

**Advanced Contract, Tendering and Public Procurement**  
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**Lecture 40**  
**Special Contracts: Sale of Goods - Part 03**

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### Goods: Gas, Electricity, water etc



- Halsbury Laws of England, 4<sup>th</sup> Ed vol. 49 and Benjamin, Sale of Goods, 5<sup>th</sup> Ed, 1997 says that they are goods
- Pollock and Mulla disagree [Rash Behari v Emperor 1936 and Associated Power Co v RT Roy AIR 1970 Cal 75]
- Art 366(12) of the Constitution: 'goods includes all material, commodities and articles'.
- Commissioner of ST v MP Electricity Board AIR 1970 SC 732: Held it as goods.



Continuing the discussion on understanding what can constitute as goods for the purpose of the application of the Sale of Goods Act of 1930. Also looking at the cooperative federalism of taxation, where central and state equally would want to have a tax contract. An issue that was quite interesting is to look at these three things. LPG, that is gas, electricity and water, can these three be considered as good?

Now, why there is the multiplicity of cases and the kind of that the courts had to look into the application of these. When talking about water, water is supplied, electricity supplied, LPG is delivered. Now, with LPG, what happens is liquefied gas. It is actually trapped into a cylinder and then delivered. Now, the cylinder is measured and that is a measurement of 14 kgs. And the LPG is delivered for which we use the content, not the container. Now, this content versus container is a very interesting philosophy that we have to look into. To use the content first there is a necessity to pack the content. Now, that is the interesting part. So, when the content, which is liquefied gas can be considered as goods, the rule is about the tangible goods.

When to consider that the LPG is a goods. So, LPG is not material in any form? So, that is the problem with LPG. Now, coming to electricity, please note electricity is supplied in terms

of the wires and cable lines. But when it is coming into your house, probably there is a meter that measures the consumption. But is it really it is a commodity? Can you say electricity is an article? Now both, liquefied gas and electricity could be felt in some form, but it is not necessarily tangible in that sense. Unlike LPG water is tangible. But the problem with water is how to measure what is being supplied and can that measurability result in it being commodity or not? The commodification of water means privatization in one sense, commodification of water means private companies want to sell it, buy it

So, there has been water being sold for profits. But water that is supplied to the house can it be considered as goods? And then can the contract be one of sale of goods? Can the Sale of Goods Act apply that is the first rule? But more importantly, will sales tax apply to such contracts. The majority opinion on this is that these three things are considered as goods for multiple reasons that the judges have laid out in different cases. First among them looking at the Electricity Act of 2003, which is the law that governs the production generation, distribution and transmission of electricity, that the Electricity Act of 2003 has established what we know as the Central Electricity Regulatory Commission or the State Electricity Regulatory Commission's. It governs the business of electricity largely right from its production to its final consumption.

Now, there is something called electricity theft under this legislation, when there is actually theft of electricity, maybe through unethical connection, maybe through tampering of the meter, but that is theft and the courts have said can only be of commodity or of goods. And secondly, to feel the electricity, means it can give shock actually, so that tangibility of electricity is also there. And hence, today, to apply this kind of analogy of saying that there can be electricity theft and there is another kind of theft found in the say the Information Technology Act of 2000 what is called as data theft. The data also must be considered as some kind of a material commodity order. So, the extension of this analogy that is there for these three traditional forms of supply or some kind of service, which is to be considered "goods" can actually be made analogous to the modern challenges that is faced in terms of the application of the Sale of Goods Act.

The courts have said something that if there can be deliverability and transferability of some forms, if there can be measurability of some forms. While measuring these three things, gas, electricity, water and how the consumption can be measured. Actually looking at the measure of consumption being transferred to the consumer. Those are probably some of the reasons

that the courts have said that because there is measurability and transferability, which is the test of deliverability to the consumer, these three things can be considered a sale of goods.

Now, what is important to understand is the primary contention in all these cases, was whether state governments, 29 states in number. They are fighting to tax these contracts that by increasing their taxation, because these are the contracts that sales tax can be imposed because that is what the Constitution says that sales tax can be imposed only on sale of goods.

The contention on the others or what is reversed is, if they are not sale of goods, they could be supply of services and supply of services comes within the domain of the central government who can actually tax it. So, that was the central theme of the government. However, to think that the definition of goods and try to understand it, not only from the perspective of the Constitution, but also from the point of application of the Sale of Goods Act 1930.

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### Lottery Ticket: goods or actionable claims

- H Anraj v Govt of T N AIR 1986 Sc 63 [Vikas Sales Corp v CCT 1996 SC]
- Sunrise Associates v Govt. of NCT, Delhi 2006 SC [5 judge bench]
- J Ruma Pal: we find three ingredients in the sale of lottery tickets, namely, (i) prize, (ii) chance, and (iii) consideration. So, when one purchases a lottery ticket, he purchases for a prize, which is by chance and the consideration is the price of the ticket".
- The further distinction sought to be drawn in H.Anraj between the chance to win and the right to participate in the draw was in our opinion unwarranted. A lottery having been held to be in essence a chance for a prize, the sale of a lottery ticket can only be a sale of that chance. There is no other element.
- Sale of lottery is an actionable claim. In our opinion a sale of a lottery ticket also amounts to the transfer of an actionable claim. A lottery ticket has no value in itself. It is a mere piece of paper. Its value lies in the fact that it represents a chance or a right to a conditional benefit of winning a prize of a greater value than the consideration paid for the transfer of that chance. It is nothing more than a token or evidence of this right.



Now, moving on to another interesting aspect of lottery tickets. Now, there are three cases that unfortunately come into contention. The Anraj case, the Vikas sale corporation case, but most importantly the judgment that is now prevalent is the sunrise associates versus Government of Delhi case. Notice that the importance that these cases have in terms of why should we decide one thing against the other?

Now, the lottery tickets the immediate reason how to understand is to look if it is tangible in one sense. Now, is paper commodity, is paper goods, is it a paper article? The answer is yes, it is. Now, if something is printed on the paper, suppose it is photocopy. Can it be considered that to be goods? Paper is goods but whether the photocopier, who is photocopying and printing it or say printer was printed on piece of paper, can be it be considered as goods.

Now, for example, a book, book is nothing but paper. But it is printed paper. Now, can books be considered as good? The answer is yes, of course, it can be. Similarly notice that there were times when these photographs. This is a very interesting case for the rainbow-colored lapse case, wherein the issue was whether these color labs that are printing photographs, can they be considered to be under the contract of sale of goods. Now, printing was considered to be service. Just putting your labor in scale, putting the colors and actually printing it on paper. Paper is goods but what is being printed is not was the contention in the rainbow color case.

Now, to looking at all of these contentions there is this case called a Sunrise Associates case where the question was about lottery tickets. The lottery tickets, is just a printed piece of

paper. Buying a lottery ticket, why do you buy because there is a special number and this is the not the online lottery but the physical lotteries. And interestingly in India, notice that lotteries is kind of a regulated activity. The Constitution permits the State Governments to allow lotteries but only if the State Government wishes to be involved in it because it kind of naturally encourages gambling. And lotteries are floated by the state government for developmental purposes. Karnataka government has banned lotteries like many states but there are states like it is seeking and others who permit lotteries. There are states like Goa who also permit gambling in some form, especially in the form of casinos.

So, State Governments are permitted to regulate that it is a lottery so lottery business can still exist in that sense. And the question is whether lotteries that are printed just on a piece of paper can be considered as contract of sale of goods. So, this question was raised before the judges and the judges said, look, lottery contains three things. And that is where the importance comes over here about trying to understand the business and contract and then later on decide whether the Sale of Goods Act applies or not.

So, understanding the business of lotteries, notice that there is a price that is to be won in the lottery. And the price is a chance; it is not to confirm that they will definitely get it. It is a chance. And it is like, you may or may not. They actually pay consideration for the sales to take part in the scheme of the lottery. So, Justice Ruma Pal, said that “while you want to look at lotteries, in a sense that look what is to get in a lottery?” Can you transfer a lottery ticket? Maybe yes. But again, there are would be conditions of non-transferability over here.

But when you transfer, it is nothing but a chance to participate in the lottery that have to be transferred. It is not a commodity or article in itself that it can be traded, it has no value in itself. The only value that lottery ticket is the winning of lottery ticket in which the number has been announced and the number on the lottery ticket.

So, except that, the rest of this thing is just a chance and nothing more than that. So, the question was, if you are trying to look at lottery tickets or can it be considered to be an actual number claim instead of goods. To start distinguishing contract and say, if they do not fit within goods, they have to fit probably with an actionable claims or within services. So, the option of actionable claim is already there in law. And hence, going to evaluate with a lottery tickets would come within that are not.

Now, the term actionable claims, is just a piece of paper in which the claim has been settled, and has been proclaimed, the claim exists in the eyes of law. So, the piece of paper is of no value except for the claim. So, it is not a commodity or an article or material, which is there off the shelf for everyone to exercise or transfer or get. So, that is what an actionable claim actually means. This is defined under the Transfer Property Act 1882 and hence have to understand what this would mean. The lottery tickets interestingly, the court say cannot be considered as goods because it is just a chance for winning the prize for our consideration.

So, the piece of chance for winning a prize cannot be commodity, cannot be an article, it can maximum be an actionable claim only for the winning lottery. And the lottery ticket itself does not have a value of its own. It is merely a piece of paper and nothing more than that. It could be the evidence of the right to win the lottery. But apart from that, it has nothing else and hence, lottery ticket can be best considered as actionable claim, not sale of goods is what the Supreme Court judges had to say.

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## So what are actionable claims ?



- An actionable claim would include a right to recover insurance money or a partner's right to sue for an account of a dissolved partnership or the right to claim the benefit of a contract not coupled with any liability (see *Union of India v Sarada Mills* (1972) 2 SCC 877, 880). A claim for arrears of rent has also been held to be an actionable claim (*State of Bihar v Kameshwar Singh* 1952 SCR 889, 910). A right to the credit in a provident fund account has also been held to an actionable claim (*Official Trustee, Bengal v. L. Chippendale*, AIR 1944 (Cal.) 335; *Bhupati Mohan Das v. Phanindra Chandra Chakravarty & Anr.* AIR 1935 (Cal.) 756).
- Sec 3 of TP Act defines actionable claims: incorporeal right-claim to any debt]



To understand what actually claims are, it is very important for us to understand the same because we have to know what kind of contract are entering in to and we have to treat them similarly. Suppose there is an insurance policy, it can be considered as an actual claim, because based on that claim of insurance to be made So, actionable means it is a confirmed kind of right, that is determined on a piece of paper.

To make a claim from that kind of piece of paper it means the exercising for right. Interestingly, a judgment or a decree that is made by a court. Now, judgments and decrees are put on paper and that is a judgment of paper on which has claims of rights that also can be considered as an actionable claim. Our pass books with the bank it is actionable claim because that is exactly known with the pass book, account balance and to withdraw the amount.

The Provident Fund, a passbook can also be an actionable claim. So, all of these are considered as actionable payment and that an actionable claims cannot or should not be considered as goods. These actionable claims do not bring commercial material angle to the sale. And that is where some of these elements in or the society are not amounting to sale of goods.

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## Goods



- Telecommunication [mobile or fixed]: BSNL v Union of India 2006 SC 1 [3 Judge bench: J Ruma Pal, Dalveer Bhandari and AR Lakshmanan]
- Issues: What are goods in telecommunication for the purpose of sale of goods? Whether electromagnetic waves can be considered as goods? Whether SIM cards can be considered as goods
- Held: electromagnetic waves were neither abstracted, nor were they consumed in the sense that they were not extinguished by their user. They were not delivered, stored or possessed. Nor were they marketable. They were merely the medium of communication.



Moving forward very interesting aspect that did come about is the BSNL case, which is kind of one of the favorite cases that which is discussed in law classes about telecommunications. Now, telecommunication business has flourished in and obviously, there are numerous transactions and contracts that have been made. And once a sector starts, making a lot of noise, a lot of money, lot of contract obviously, the state government or any other government wants to tax the same.

Interestingly, India had landline connection, even now, but mobile has actually taken over the telecommunication business. Now, when there was landline connection, you would notice that we had a kind of something like this. So, there was an instrument through which we

would receive the calls and make calls. Today there is what is known as a mobile phone, which is also an instrument that receives these calls. But landline is kind of fixed because there is a wire because telecommunication on the phone is through electromagnetic waves, the towers actually disseminate those kinds of signals.

So, there is some kind of distinction in the kind of businesses. Secondly, once there is a wire to this phone, which is the instrument for a landline connection, the wire connects you to different people across networks. But here, unfortunately, there is a SIM card, which is considered as the activation device to actually receive the electromagnetic waves from the mobile service companies.

So, the question before the court was, can the business of telecommunication be considered as sale of goods? And most importantly, can the electromagnetic waves that are transferred in terms of talk time for 2 GB data, can they also be considered as goods. And finally, can SIM cards also be considered as goods. So, all of these issues was brought before the court. Because, of course, if they are good, they become sale, if they are sale they become applicable to sale tax. The goods considering the whole aspect of the business, the contract and the intention of partners, these three are very relevant and important.

And then looking at the need of the state governments, think all of these three very important considerations for the court to actually evaluate whether such contract should be taxed, under Sale of Goods Act, or not. So, the court held that look electromagnetic waves were neither abstracted nor were they consumed in the sense that they were extinguished by the user.

So, it is not something that is delivered. It is not stored or processed. It is only something that there is a supply. And hence, the SIM card is merely an activation device. The SIM card does not have a sale of its own. It is not merchantable of its own, though it could be tangible. It is just an activation device. So, what does the SIM card do? In many cases, you will notice that the hardware is just trying to support the software. Hardware is just a small component. Software is basically the service that is supplied to activate within the hardware device. So, the SIM card has no separate value in terms of sale ability, unless it is given as invalid SIM card by the service companies that are actually given by the mobile telecommunication services.



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## BSNL judgment: 2006: J Ruma Pal



– The test for deciding whether a contract falls into one category or the other is to as what is 'the substance of the contract'. We will for want of a better phrase, call this the dominant nature test."

– Held:

- Electromagnetic waves are not 'goods' within Art 366 [12]
- Equipment like handset: goods
- SIM cards: activation device-can be assessed separately  
[Commissioner of Central Excise v Acer India 2004 SCC 173:  
Acer computers sold had windows software [preloaded]: Held:  
not divisible. Without software the computer cannot function,  
hence it is not applicable to sale tax]



The courts in the BSNL judgment very clearly said that the dominant nature of this contract, does it to do service or does it for sale of goods. The dominant nature contract is very, very important. And they concluded that electromagnetic waves are not good within the definition of the Constitution of India.

The equipments are definitely the handset that is considered as goods and finally coming to the activation device. They said that the activation device can be accessed separately if required, but the question is whether it is divided between the electromagnetic waves that the service and the activation device.

So, hence the court said that the SIM cards cannot be taxed; cannot consider them to be sale of goods. It is only an activation device. So, you cannot really divide SIM card visa vis the electromagnetic waves. They are combined together and unless there is a divisibility test, it cannot be separated and cannot tax them differently. All have to now understood the nature of the judgment in the BSNL case? Considering now how is this relevant to common contracts? The discussion so far, it is important not only to understand what nature of contract which is integrating, but also have to draft the purchase order agreements. There is a necessity to understand whether it is good, whether it is a sale, but it is more important that every contract that is made must have proper applicable taxes. Therefore, it is important to know, the nature of the contract to actually impose the proper taxation. Now, when there is no proper taxation, then the contract would not actually, be a valid enforceable one because enforceable contract

is a contract which is appropriately taxed. There is no tax avoidance by in circumstances and the tax has been made as per the law of the land.

Now, at this point of time, while speaking of government contract, while we are speaking about sale of goods, it is very pertinent to know a very interesting case of Kone elevators. Now, Kone elevators actually did take part with government tendering contract. Now, the question was whether was elevator was goods or service.

Now, everything in the elevator is tangible. It is material. However, elevators are not something that are available off the shelf, if they are not something that can just go and buy. They have to be customized, they have to be made to order, they have measured capacity, then it has to be brought about and commissioned or installed in a particular place. So, Kone Elevators considered that this as a contract. So, they took part in the tender and they quoted a price with all applicable taxes.

Most tenders should evaluate the bid amount or the price bid or the financial bid, with all applicable taxes. It is the landing cost, based on which to L1 is evaluated. This includes the cost of transport, cost of packaging and the taxation. It could be customs duty; it could be import duty or any other duty for that matter. What happened in this case was cone elevators, is it a service? At that point of time, the service tax was quite high. And it was in the range of 11 to 14 percent, when they quoted with service tax their base price per service tax, they became L2.

Now, L1, when he quoted, he quoted tax. Now, sales tax was in the range of less than 5 percent in any of the states and sales tax made the contract cheaper. Because 14 percent is higher tax and 5 percent is lower tax. So, they said that it is sale of goods. And the applicable tax to our contract is just 5 percent. And they became L1, Kone challenged it in the court of law and they said that there is a deliberate tax avoidance and evasion by creating this contract of a sale of goods. Because this is not a sale of goods contract rather than it is a supplier service contract for which service tax should be applied.

So, this kind of mischief by judging contracts as being service as an inputs will result in iniquity, will result in wrong choices of L1 and this would actually give a public policy dimension to challenge government contracts as well. So, these are possible reasons to understand, which are the contracts that are goods contract and which are the contract that are service contracts so that appropriate taxation will result in appropriate evaluation of the

bidders and thereby going to award the contracts as well. So, just to give a sense of why these cases are very relevant, important and how contracts and taxation are very interestingly brought together in the discussion here.