
(2015) 07 GAU CK 0017
In the Gauhati High Court
Case No : Writ Appeal No. 233 of 2014

J. Geetha

APPELLANT

Vs

The State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 15-07-2015

Acts Referred:

Competition Act, 2002 — Section 12(2), 20, 3(2)
Constitution of India, 1950 — Article 14, 19(1)(g), 21
Income Tax Act, 1961 — Section 139(1), 139(4)
Police Act, 1861 — Section 15-A, 3(1), 4, 46(2), 7

Citation : (2015) 07 GAU CK 0017

Hon'ble Judges : Tinlianthang Vaiphei, J; Prasanta Kumar Saikia, J

Bench : Division Bench

Advocate : D.K. Mishra, D. Das, R.B. Phukan and M. Kumar, for the Appellant;
N. Dutta, S. Dutta, K.N. Choudhury, R.M. Deka, R. Sarma and T.N. Phukan,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. This writ appeal is directed against the judgment dated 19-6-2014 passed by the learned Single Judge in WP(C) No. 546 (AP) of 2013 dismissing the writ petition of the appellant, who challenged therein the policy decision taken by the respondent authorities over the Request for Proposal (RFP) on the ground that the same was done to accommodate a few prospective bidders on extraneous considerations and for depriving the rights of the appellant and others to participate in the tender process for marketing and promotion of conventional paper and online lottery of Arunachal Pradesh.

2. The facts, relevant for disposal of the appeal, may be noticed at the outset. The case of the appellant is that she has a vast experience in lottery business, and has been engaged in this business for the last over 10 years and that her husband is also dealing with the same business for over 25 years. She used to help her husband in managing his lottery business prior to establishing her own lottery business. In this way, she has acquired adequate experience in marketing

lotteries for many State Governments viz. Government of Arunachal Pradesh ("AP" for short), Royal Government of Bhutan ("RGB" for short), etc. either directly or through distributors/agents involved in selling and marketing conventional paper and online lotteries for a long time. She was appointed as the main stockist of conventional paper lotteries organised by the Royal Government of Bhutan from 2003 onwards, and was also appointed as sub-distributor of lottery tickets organized by the State of AP vide the agreement dated 19-6-2006. She has, therefore, the experience, expertise, capital and other infrastructures to be the distributor of AP State lotteries either in her own name or in the name of the proprietary concern of her husband, namely, M/S Sri Krishna Agency for both conventional paper and online lotteries. The Parliament of India in terms of Entry 40 of List I of the Seventh Schedule of the Constitution enacted the Lotteries (Regulation) Act, 1998 ("the Lotteries Act") to regulate the State lotteries so as to infuse confidence in the participants and the public at large, and the same came into force on 2-10-1997. Penal consequences are provided for to punish violators of the Act. The Central Government also framed a set of rules called "the Lotteries (Regulation) Rules, 2010" ("the Lotteries Rules" for short) to give effect to the Act. It would appear that the Government of AP had at one time framed a set of rules called "The Arunachal Pradesh State Lottery Rules, 2001" ("the State Rules, 2001" for short) for dealing with Conventional Paper Lottery and another set of rules called "The Arunachal Pradesh State Online Lottery Rules, 2002" ("The Online Rules" for short) for dealing with online State Lottery Schemes. However, for sometime, such lotteries were prohibited by the State Government, but State-respondent decided to re-introduce the AP State lotteries by issuing the Notification dated 26-7-2011 in conformity with the provisions of the Act.

3. It would appear that in the year 2011, the respondent No. 2 (Secretary/State Lottery) issued the notice inviting tender (NIT) dated 26-8-2011 for appointment of Distributors and Selling Agents for marketing of conventional paper and online lottery in the State of AP and accordingly issued the Request for Proposal (RPF) dated 26-8-2011. The said RPF contained certain terms and conditions, which were found to be onerous, arbitrary and unreasonable whereupon WP(C) No. 4712/2011 was filed before this Court and an interim order passed therefor for not opening the bid and for not taking further action pending disposal of the writ petition. An interim stay was accordingly granted by this Court. During the pendency of the said writ petition, the State issued the notification dated 12-11-2012 withdrawing the NIT dated 26-8-11 whereupon this Court disposed of the writ petition as not pressed. In the meantime, the State-respondent, in exercise of the powers conferred under Section 12(2) of the Act, also framed a new set of rules called the Arunachal Pradesh Lotteries (Regulation) Rules, 2013 ("the State Lotteries Rules" for short) for conducting AP State Lotteries in the State, which replaced the State Rules, 2001 and Online Lotteries Rules. According to the appellant, the pre-qualification requirements in the RPF requiring that the bidder should have a registered office and operations in India

for at least the previous five financial years is onerous, unreasonable, discriminatory, arbitrary and irrational and is incorporated to oust intending bidders like appellant and others from participating in the competitive bidding. It is also the contention of the appellant that the fixation of an annual gross turnover of not less than Rs. 50 crores per annum for the last three financial years as on 31-3-2012 and also of stipulating that the minimum experience of a bidder should not be less than 1 year during the last 3 years in the capacity of working directly with any State Governments as distributor/stockist/marketing agents, etc., are equally onerous, vague, unreasonable, arbitrary, actuated by malice and are tailor-made for the present distributors for the States of Sikkim, Nagaland, Mizoram and Goa. Such requirements were never insisted in the previous tender processes: the State of AP has in this process abused its dominant position by indulging in practice potentially denying access to prospective bidders like the appellant, besides limiting and restricting the competition to a few bidders in violation of Competition Act, 2002.

4. According to the appellant, the stockist/marketing agent, etc. work through distributors and may not have direct working relationship with State Governments, but they, nevertheless, gathered vast experience, expertise and infrastructures to be appointed as such for the AP State Lottery. It is the further case of the appellant that the appellant was the distributor of AP State Lottery, and it was the State of AP which prohibited the sale of State Lotteries with effect from 1-4-2010 vide the order dated 23-3-2010 during the subsistence of the agreement dated 19-6-2006 whereafter it has not organized any State Lottery till date: the appellant never has any due to pay as on date though it was associated with them since 2006. According to the appellant, the incorporation of Clauses 5.1 and 5.2 of the RPF that the selected distributor/selling agent should deposit a sum equivalent to 2 years bank guarantee as advance payment of sale proceeds in the form of demand draft and the further condition that a performance bank guarantee of equivalent amount of 1 year's guaranteed revenue would be furnished by the bidder in the form of a Bank Guarantee, are also unreasonable and contrary to Rule 4(2) of the Central Rules, 2010.

5. The writ petition was contested by the State-respondents, but, interestingly, none of the private respondents were impleaded as party-respondents therein. It was only at the appellate stage that the respondent No. 5 (Summit Online Trade Solutions) and the respondent No. 6 (Future Gaming & Hotel Services Pvt. Ltd.) were impleaded as party respondents and were allowed to file their respective affidavits-in-opposition. Coming now to counter-affidavit of the State-respondents, it is asserted therein that as per the available record, the appellant is not in the lottery business for the last several years inasmuch as there is no documentary evidence to prove it and that the appellant has no infrastructure or network of her own to sell lottery ticket throughout the country wherever lottery is being sold. The RFP dated 1-11-2013 was issued by the Government of AP for selection of distributor and/or selling agent for marketing the conventional paper and online lottery schemes with a view to earn revenue to the State exchequer

for public welfare schemes announced by the Government. The impugned pre-qualification requirements are insisted upon so as to control the sale and purchase of lotteries as well as to ensure that there is no default in payment of prizes to the winners; after all, it is the State, which is the guarantor for the payment of the prizes to the winners. The State of AP has very limited resources of its own to earn revenue and, as such, it was decided to organize, conduct and promote lotteries both conventional and online lotteries with the object of generating revenue for financing the various public welfare activities as declared by them from time to time. The lotteries are conducted in accordance with the requirements of the Lotteries Act, the Lotteries Rules: the Arunachal Pradesh State Rules, 2001 and Arunachal Pradesh State Online Lotteries Rules, 2002 ceased to have any effect after the coming into force of the Lotteries Rules on 1-4-2010 to further regulate the lotteries.

6. It is also the case of the State that the appellant has no experience of selling lottery tickets or the infrastructures to run the lotteries as per the Lotteries Rules. The impugned RFP was issued to all interested Indian firms/parties/individuals/bodies or other legal entities having registration under the relevant Act and who are interested to be selected as distributors and/or selling agents for Arunachal Pradesh State lottery tickets through paper and online system in accordance with the Lotteries Act, the Lotteries Rules and the State Lotteries Rules with some other terms and conditions specified in the RFP. The answering respondents deny that the State Lotteries Rules is not published in the official gazette as required under Rule 3(2) of the Lotteries Rules: it was duly published on 14-5-2013. The previous NIT dated 26-8-2011, which was challenged before this Court, had to be withdrawn due to revenue loss to the State Government during the pendency of the writ petition. The appellant has no worked with the Government of AP as a distributor for marketing of AP State lotteries as per the available record nor has she any experience or infrastructures for selling lottery tickets anywhere in the country wherever lotteries are allowed to be sold as she could not prove it. The cut-off date of 31-3-2012 was chosen keeping in mind Section 139(1) of the Income Tax Act where the assessee is allowed to file income tax return on 30-9-2012 and Section 139(4) of the Income Tax Act allows the assessee to furnish the return of any previous year at any time before the end of one year from the time of the relevant assessment year. Furthermore, the cut-off date for submission of financial documents has now been changed to 31-3-2013 vide the Circular dated 12-12-2013. More than 33 RFPs have been purchased by the various parties having their offices throughout the country and the Government is expecting that more prospective parties would participate in the forthcoming bid/RFP.

7. The impugned pre-qualification criteria in Clause 3.1 of RFP is as per the market conditions, and certain conditions are incorporated therein keeping in view the amount of revenues expected by the Government and also the huge turnover involved in the sale of lottery tickets. Under Clause 3(xxvi) of the State Rules, the Government is given the discretion to authorize the sole selling agent/

distributor to disburse the prize amount up to Rs. 5,000/- within 90 days from the date of draw on its behalf. Therefore, the prize winning tickets after the draw would be like a currency note, and it is the responsibility of the distributor to disburse the prize money to the winners: if there is any default in payment of the prize to the winners, the Government could always encash the Bank Guarantee for the payment. With respect to the stipulation to have the minimum experience by the bidder of not less than 1 year during the last 3 years in the capacity of working directly with any State Government as distributor, etc., such stipulation is incorporated to ensure that the bidder is able to deposit the sale proceeds and make payment of the prizes to the prize winners: such condition would prevent any violation of the Lotteries Rules and the State Lotteries Rules. Under the same rules, the Government should not charge less than Rs. 10,000/- per draw for weekly lottery and not less than Rs. 5,00,000/- for bumper lottery. Therefore, the minimum revenue to be earned by the State Government should not be less than Rs. 9 crores per annum. To earn the minimum revenue of Rs. 9 crores for deposit with the State exchequer, the prospective bidder's expected turnover should not be less than Rs. 200-300 crores per annum. In view of this, the pre-qualification condition of the annual turnover of not less than Rs. 50 crores of the bidder is valid as the Government is required to have secured guarantee so that the firm would not default in depositing the revenue to the Government and that in case of any recovery proceeding, the said firm should have the ability to satisfy its debt. The answering respondents deny that in the previous tenders floated by the State-respondent, there was no such requirement. Clause 3.1(2) of the RFP published in the year 2011 had provided that the annual gross turnover should be Rs. 300 crores and the net worth Rs. 100 crores, but these amounts have now been reduced to Rs. 50 crores and Rs. 10 crores respectively so that more competitors could participate in the ongoing NIT process. In the instant RFP, the prospective bidder must have a minimum of one year's experience in the last three years directly with the State Government as compared to the one issued on 26-8-2011 wherein the bidder was required to have 3 years' experience during the last 5 years: this was not incorporated to favour any one but to ensure the participation of more bidders.

8. It is also the case of the State that more than 33 RFP have already been purchased by various parties in the instant bid. The appellant does not have the aforesaid qualifications or experience. There is thus no arbitrariness or irrationality or malicious exercise of power by incorporating the impugned pre-qualifications. Such terms and conditions are incorporated to maximize generation of Government revenue through selling/marketing of lottery tickets by the appointed distributor/selling agent. The State Government has issued three sets of lotteries (each set comprising of 56 weekly lotteries) so that there is healthy competition among the prospective bidders and the Government would appoint the distributor/selling agent for each set of lotteries through separate agreements. This is to ensure maximum revenue to the State Government for running its various welfare schemes: it is not for granting exclusive right to any

particular bidder. It is, therefore, denied that the RFP is against public interest. The appellant has never worked with the Government of AP in the capacity as distributor for marketing of AP State Lotteries as per record. Furthermore, there have been a lot of changes in the lottery market due to technological advancement and stringent conditions incorporated in the Lotteries Rules, and the appellant has no experience or the infrastructure to sell lotteries anywhere in the country wherever lotteries are to be sold. It is pointed out by the answering respondent that Clause 3.3 of the RFP provides for seeking clarification with respect to the contents thereof: the participating bidder is free to seek clarification on any clause of the RFP. All the pre-qualification requirements are reasonable and are prescribed in consonance with the prevailing market trends: there is no mala fide intention to put hindrance to the appellant in the process of appointment of distributor or selling agent. It is, therefore, submitted that no serious infirmity could be pointed out by the appellant in the impugned judgment warranting the interference of this Court and the writ appeal is, therefore, liable to be dismissed.

9. The respondent No. 6 in its affidavit-in-opposition asserts that the following statements of the appellant are not substantiated by any evidence and, therefore, denies that---

- "1) she has been conducting a lottery business for more than 10 years;
- 2) her husband is also engaged in the same business for the last more than 25 years;
- 3) she was managing the affairs of her husband's business immediately after she got married to him and has thereby practically completed 20 years of vast experience in lottery business;
- 4) she has ample experience of marketing lotteries of various State Governments;
- 5) she directly or through distributors/agents has been involved in selling and marketing conventional paper and/or online lotteries of different State Governments for a long time;
- 6) she has a large dealer network in the lottery trade all over India and"
- 7) she has vast experience, experience and infrastructures."

The findings of the learned Single Judge with respect to the eligibility/experience of the appellant do not call for any interference. The appellant submitted the tender in her individual capacity as the proprietor of M/S Shri Krishna Agency, and her husband's experience has no bearing on her eligibility. It is well-settled that in an invitation to tender, a tendering authority is well within his right to prescribe the terms of eligibility of a bidder to suit its requirements, and the eligibility conditions stipulated for taking part in a tender is not open to judicial scrutiny. The Gaming India Distributors Pvt. Ltd., wherein the appellant and her husband are Directors, had participated in a tender initiated by the Government

of Nagaland on 10-12-2011. The eligibility criteria prescribed therein were (i) having a turnover of Rs. 5,000/- crores and (ii) good knowledge and experience in lottery business for marketing and sale of Nagaland State Lottery Tickets. The Gaming India Distributors Pvt. Ltd. had participated in the tender process without any demur and bagged the tender, but this Court in its judgment dated 21-12-2012 of WP(C) No. 130(K)/12 quashed the selection of the said company on the ground that it did not possess the requisite turnover. This decision was based on the decision dated 13-4-2010 passed by the Bombay High Court in WP(C) No. 265 of 2010 wherein the condition of having a minimum turnover of Rs. 4,000/- crores per annum in case of Goa lottery was challenged. The writ petition itself is subsequently learned to have been abandoned. The NIT floated by the Government of Goa in 2010 requiring the eligibility criteria of having a minimum turnover of Rs. 4,000/- crores per annum in the last 3 financial years and a minimum experience of 3 years during the last five years in the capacity of working directly with at least two State Government and also of requiring the intending tenderer to have a minimum net worth of not less than Rs. 40 crores as on 31-3-2009, challenged before the High Court of Bombay at Goa in WP(C) No. 265/10 was dismissed. It is, therefore, contended that when the challenge to more stringent terms of eligibility criteria was not accepted by other High Courts, the learned Single Judge did not commit any illegality in not interfering with the writ petition: there is no violation of the Lotteries (Regulation) Act, 1998 in stipulating the aforesaid eligibility criteria. If there is violation of the provisions of the Competition Act, 2002 in laying down such eligibility criteria, the remedy lies in approaching the appropriate statutory forum, which is adequate and equally efficacious.

10. It is the further case of the answering respondent that the State of AP, which is floating the NIT, is the best authority to prescribe the terms and conditions of the NIT for safeguarding its interest. Since the proposed appointment would be for a period of three years, based on the statutorily fixed minimum bid value, a selected bidder will have to generate minimum revenue of Rs. 9 crores per year or Rs. 27 crores in three years. This is because as per Lottery Rules, the minimum bid value cannot be less than Rs. 10000 per draw and as mandated by Rule 3(xv), the permissible limit of draws in a day is 24. Therefore, the minimum guaranteed revenue becomes Rs. $10,000 \times 24 = \text{Rs. } 240,000/-$ per day and this becomes Rs. $8,68,80,000/-$ i.e. $\text{Rs. } 10,000 \times 24 \times 362$. While the revenue against six Bumper Draws (vide Rule 2(h), 2(j) & Rule 10) i.e. $\text{Rs. } 500,000 \times 6 = \text{Rs. } 30,00,000/-$ is added to the aforesaid amount, the total minimum guaranteed revenue per year comes to Rs. $8,98,80,000/-$ (say Rs. 9 crores). This is what a bidder has to assure to pay to the Government for conducting Lottery Draws in a year. Depending upon the bid value, it can go anywhere. For example, if the bidder bids for Rs. 30,000/- per draw, the minimum revenue would be Rs. 27 crores per year and Rs. 81 crores in three years. Viewed from this perspective, the stipulation of a turnover of Rs. 50 crores cannot be termed as unreasonable or arbitrary. As for stipulating the possession of minimum experience of at least

one year in the last three years, it is contended by the answering respondent that this has been devised to check the entry of unscrupulous entities in the field: if all and sundry are allowed to bid in the tender process, it may help promoting benami business in favour of unscrupulous entity including a blacklisted bidder through proxy. Refuting the contention of the appellant that only the States of Sikkim, Nagaland, Mizoram and Goa are the major States who have been organising and conducting lottery through distributors, the answering respondent points out that the States of Kerala, Maharashtra, Punjab and West Bengal also conducts lottery through distributors and the State of Punjab is one State which unlike other States has no restriction on the eligibility criteria for an entity desirous of being appointed as distributor or selling agent. The appellant has never attempted to become a distributor in Punjab and/or in any of the aforesaid States so as to gain experience of working directly with the Government. As for the challenge to the incorporation of Clauses 5.1 and 5.2 of the RFP, it is contended by the answering respondent that the terms of invitation to tender are within the realm of contract, and is not open to judicial scrutiny. However, it is pointed out by the answering respondent that as per Clause 3.7 of the RFP, the Advance Sale Proceeds are adjustable against the Bid Security and that Performance Bank Guarantee is in the form of collateral security: there can be no complaint if the State wants to secure its interest by every possible means, for which the appellant cannot possibly have any legitimate grievance to complain. The finding of the learned Single Judge that the appellant submitted Nil returns in the financial years 2012-13 is not challenged by the appellant. The net effect is that the appellant stands disqualified independently of the conditions concerning the turnover or experience. The appeal has no merit and is, therefore, liable to be dismissed. The affidavit-in-opposition filed by the respondent No. 6 is in pari materia with the stance taken by the respondent No. 5 in its counter-affidavit and, the same, for the sake of brevity, need not be referred to.

11. The first contention of Mr. D.K. Mishra, the learned senior counsel for the appellant is that though Rule 3(2) of the Lotteries Rules mandates that if the State Government decides to organize a lottery, it has to issue a notification in its Official Gazette outlining the purpose, scope, limitation and methods thereof, no such gazette notification was issued by the it before reorganizing the lotteries: this alone is sufficient to annul the ongoing lotteries conducted by it. He relies on the following decisions to buttress his contentions:-- (i) I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, (1996) 7 AD 398 : (1996) 8 JT 67 : (1996) 6 SCALE 551 : (1996) 6 SCC 634 : (1996) 5 SCR 643 Supp : (1998) 110 STC 590 ; (ii) Rajendra Agricultural University Vs. Ashok Kumar Prasad and Others, AIR 2010 SC 259 : (2009) 14 JT 516 : (2009) 14 SCALE 237 : (2010) 1 SCC 730 : (2009) 15 SCR 1168 ; (iii) M/S M. Cement Industries v. APDCL. It is next contended by the learned senior counsel that the notification outlining the purpose, scope, limitation and method of the lotteries to be issued/contemplated under Section 3(2) of the Act cannot by any stretch of

imagination be tantamount to making of the State Rule: having taken a decision to organize lotteries, the State-respondents was under obligation to issue such notification in the official gazette on the pain of invalidating the organization of the lotteries if it omits to do so. To fortify his submissions, the learned senior counsel places reliance on Subhash Ramkumar Bind @ Vakil and Another Vs. State of Maharashtra, AIR 2003 SC 269 : (2003) CriLJ 443 : (2002) 9 JT 445 : (2003) 1 SCC 506 : (2003) 1 UJ 576 and "Maxwell on Interpretation of Statutes" by P. St. J. Langan, 12th Edn. on "Omission not to be inferred" as well as the decision rendered in Thompson v. Gold & Co., (1910 A.C. 409). According to the learned senior counsel, since the State has decided to organize lottery for public welfare schemes like health, education, infrastructure development and anti-poverty programme, etc., such purposes should have been spelt out by issuing the said notification under Rule 3(2) of the State Rules: such notification must precede the issuance of the NIT. It is also submitted by the learned senior counsel that the conditions in Clause 3.1 of the NIT requiring a bidder to be operational during the last five years and of requiring him to be profitable for the last three years with profits record and also of requiring the bidder to have a minimum net worth of not less than Rs. 10 crores as on 31-3-2012 and of having a minimum experience of not less than one year during the last three years in the capacity of directly working with the State Government as a stockist/distributor, marketing agent resulted in making the bidders who are running lottery business only in the State of Goa, Sikkim, Mizoram and Nagaland as lottery in other States have stopped after the coming into force of the Lotteries Act. According to the learned senior counsel, it is obvious that no one, except Martin Group, would be eligible to run paper lottery and that no one, except Sugala Group, would be able to run online lottery as the two have divided the space between them: those who are out of lottery business including the appellant since November, 2010 would not be eligible to participate in the tender process though they may have income from other business as can be seen from the Income Tax return filed with her tender, which is on the Government record. He, therefore, submits that such pre-qualification conditions are onerous, arbitrary and are liable to be interfered with by this Court.

12. The learned senior counsel ridicules the stances taken by the State-respondent that prior to 2010, lotteries were not regulated by contending that there were already State Rules, 2001 and State Rules 2002, which were framed under the provisions of the Lotteries Act and that the experiences of the appellant relate to 2003 to 2007, when these two rules were in force and, as such, there was not even a day when the lotteries were unregulated in AP since 1998. He also contends that the classification made between those who have experience prior to 2010 and those who have experience after 2010 is not based on intelligible differentia and that there is no nexus between the classification and the object sought to be achieved by such classification inasmuch as both the period prior to 2010 and after 2010 are regulated by the Lotteries Act and State Rules 2001 and State Rules 2002. Thus, maintains the learned senior counsel,

the stance taken by the respondent authorities is an after-thought and to give undue favour to the Martin Group and Sugul Group. He places strong reliance on (a) Centre for Public Interest Litigation Vs. Union of India (UOI), AIR 2014 SC 2140 : (2014) AIRSCW 2930 : (2014) 7 JT 474 : (2014) 2 RCR(Criminal) 822 : (2014) 6 SCALE 146 : (2014) 8 SCC 682 : (2014) 4 SCJ 468 ; (b) Abdul Rahman Bhadar Wahi Vs. State of Jammu and Kashmir, AIR 1971 SC 266 : AIR 1970 SC 266 : (1971) CriLJ 284 : (1970) 3 SCC 489 : (1971) SCC(Cri) 95 : (1971) 3 UJ 56 and (c) Bengal Tools v. State of Assam, WP(C No. 5455/2013 of this Court, in support of his contentions. The learned senior counsel also argues that the appellant is a proprietary concern and certainly has no registered office, but then it is a natural person, has a right to have office of her own and has no obligation in law to register her office as held in Ashok Transport Agency Vs. Awadhesh Kumar and Another, AIR 1999 SC 1484 : (1998) 7 JT 103 : (1998) 120 PLR 810 : (1998) 5 SCALE 730 : (1998) 5 SCC 567 : (1998) AIRSCW 4042 and Bhagawati Vanaspati Traders v. Supt. Of Post Offices, (2015) CC 617 . It is also the submission of the learned senior counsel for the appellant that as a natural person having a PAN card as well as an Income Tax payee (she annexed her IT returns), the appellant is undoubtedly eligible for participating in the NIT. It is also contended by the learned senior counsel that there is no outstanding dues from the Arunachal Pradesh Relief and Welfare (Charitable) Society (APRWC), through which the appellant is alleged to have been conducting lottery, and is, therefore, not a defaulter. Moreover, submits the learned senior counsel, the terms and conditions of the NIT have ensured adequate securities for the State Government as it is realizing all revenue in advance from the earnest money deposit, advance payment of sale proceeds, performance bank guarantee as well as prize pool money deposit and forfeiture clause in the event of non-compliance thereof by the successful bidder. He also maintains that the question of estoppel cannot arise in the case of the appellant inasmuch as she challenged the terms and conditions of the NIT before submitting her tender: it was in terms of the interim order of this Court that she submitted her tender. He refers to the decision of the Apex Court in Nagubai Ammal and Others Vs. B. Shama Rao and Others, AIR 1956 SC 593 : (1956) 1 SCR 451 and The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, (2013) 3 AD 73 : AIR 2013 SC 1241 : (2013) 3 JT 417 : (2013) 3 JT 409 : (2013) 2 SCALE 452 : (2013) 5 SCC 470 : (2013) AIRSCW 1244 . It is the further contention of the senior counsel that the favouritism shown to the Martin Group is evident from the facts that despite the pendency of criminal cases against Mr. S. Martin, the tender of his company has been accepted in violation of Clause 3.1.4. of the NIT on the ground that it has submitted No Dues Certificate. Finally, he submits that the learned Single Judge is completely wrong in holding that Article 14 of the Constitution would not apply since Article 19(1)(g) does not apply in a lottery business: a writ court has rather the duty to interfere with the terms and conditions of NIT if they are found to be arbitrary, unreasonable and the classification has no nexus with the object sought to be achieved. He, therefore,

strenuously urges this Court to set aside the impugned judgment and pass appropriate orders/direction as warranted by the facts and circumstances of the case.

13. Refuting the contentions of the learned senior counsel for the appellant, Mr. N. Dutta, the learned senior counsel appearing for the State of AP, submits that it is too early to complain violation of Rule 3(2) of the State Rules at this stage inasmuch as the requirement of publication of notification under Rule 3(2) and Rule 3(3) can be observed simultaneously or one after another but at any rate before a lottery is organized. According to the learned senior counsel, the State has taken a conscious decision to re-introduce lottery and has published the State rules delineating the purpose, scope, method and limitation of the State lottery: the decision to re-introduce lottery and the decision to organize lottery is not synonymous. He point out that the criteria for eligibility laid down in Clauses 3.1.1., 3.1.2. and 3.1.8. are applicable to all bidders irrespective of whether the lottery is paper lottery or online lottery and submits that the appellant has confined her challenge to the appointment of distributor, etc. for paper lottery only in a selective manner by abandoning her challenge to the distributorship, etc. of the online lottery: if the pre-qualification requirements can hold good for the bidders of online lottery, there is no reason why the same requirements can be bad for paper lottery. He further points out that the State has already appointed a bidder for online lottery on the assured revenue of Rs. 8,31,08,000/- per annum and submits that the appellant, by obtaining a stay order has caused the State to suffer financial loss to the order of Rs. 8,31,08,000/- per annum: such conduct is unreasonable and unpardonable. It is also contended by the learned senior counsel that the State had to suffer huge losses in the past unregulated period i.e. before 2010 due to the fraudulent and defaulting activities of the distributors appointed then including the Arunachal Pradesh Relief and Welfare (Charitable) Society (APRWS) whereunder the appellant was the sub-distributor. He maintains that the impugned clauses provide a yardstick to separate the grain from the chaff and have nexus to the ultimate selection of a bidder and cannot, therefore, be termed arbitrary: paragraphs 5, 6, 9 and 10 at pg. 1 and 2 of the Note Sheet in File No. LOT-163/2013 indicate the rationale behind incorporation of such criteria. He reminds this Court of its limited jurisdiction while exercising the power of judicial review, which is confined only to the legality of the decision-making process and not the merit of the decision: this court is not an appellate court. In support of his contentions, the learned senior counsel takes me to the following decisions: *Tata Cellular Vs. Union of India*, AIR 1996 SC 11 : AIR 1994 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp ; *Association of Registration Plates Vs. Union of India (UOI) and Others*, AIR 2005 SC 469 : (2005) 1 CTC 111 : (2005) 1 CTLJ 14 : (2004) 10 JT 147 : (2004) 10 SCALE 60 : (2005) 1 SCC 679 : (2004) AIRSCW 7074 : (2005) 1 Supreme 700 ; *Siemens v. Aktiengesellschaft*, (2014) 11 SCC 288 and *M/S Bengal Tools Ltd. v. State of Assam and ors.*, WP(C) No. 5455/14 delivered on 23-4-2015. As for the ineligibility of proprietary concern for the bid,

the learned senior counsel contends that Clause 3.1.9 of the RFP stipulates the obligation of the bidder to establish his status as a bidder through documentary evidence: even a proprietary firm is liable for registration at least under the Shops and Establishment Act apart from its registration under the local Municipality Act to which it is amendable for obtaining trading licence.

14. The appellant, according to the learned senior counsel, does not challenge the validity of the stipulations contained in Clause 3.1.9 of the NIT and such contentions have, therefore, become superfluous. It is pointed out by the learned senior counsel that the firm of the appellant is still unable to prove the status of M/S Krishna Agency by documentary evidence. Even though lottery business is not a trade for the purpose of protection under Article 19(1)(g) of the Constitution, lottery as a business nevertheless requires registration under the Shops and Establishments Act and local Municipality law. He also maintains that PAN Card or the certificate issued by the HDFC Bank do not show the address of the appellant and, the existence thereof, ipso facto, do not, without anything more, prove the address of her business, more so, when there are three distinct addresses of her. He also contends that all these conditions have been laid down in exercise of the power conferred under Rule 4 of the State Rules, and as long as the source of power is not challenged and remains valid, such conditions cannot be said to be unauthorised or without jurisdiction. It is also the contention of the learned senior counsel that there is no arbitrariness or unreasonableness in prescribing a condition by the State of a prospective bidder to have at least one year's experience in lottery business during the last three years directly with the Government and of having a turnover of Rs. 50 crores inasmuch as choosing a definite yardstick to determine eligibility conditions will always be unfavourable to some: there can no full proof system to satisfy all and until and unless the criteria so laid down are demonstrated to be arbitrary, which is not the case here, such a decision cannot be interfered with by this Court. In fact, submits the learned senior counsel, the firm of the appellant, namely, M/S Krishna Agency, which is the bidder in the instant case, has submitted a NIL returns of turnover for the years 2012 and 2013, and has, therefore, no much prospect of emerging as a bidder within the zone of consideration. Referring to Annexure-B to the Misc. Case No. 35(AP) of 2013 filed by the appellant to show that Clause 3.1.8. is aimed at selecting only those bidders who are working with the Governments of Goa, Sikkim, Mizoram and Nagaland, the learned senior counsel maintains that the chart appended thereto was filed on the last day of the hearing before the learned Single Judge, was never made a part of the record and was not even pressed. Even then, submits the learned senior counsel, the said chart will rather prove that Clause 3.1.8. would permit not only the Martin Group to qualify but would rather reveal that at least three groups are running lotteries in the aforesaid States: the appellant conveniently suppressed the fact that the Bodoland Lottery (both online and paper) is being run by another group. The intention of the State in inserting impugned clauses is to enter into contract with tried and tested entity, which have working experience after the coming into

force of the Lotteries Rules, which have been in existence for about four years by now: the appellant did not have such working experience. He also contends that the Circular dated 12-12-2012 clarifying that no due certificate issued by the State Government with which it was working as Distributor, etc. during the last 5 years, if accompanied with the bid document, would be sufficient, is not made to show undue favour to the private respondents, but to clarify that such no due certificate would prove the absence of civil/criminal case pertaining to lottery marketing. These are the principal contentions of the learned senior counsel for the State of AP in defending the impugned judgment.

15. While adopting the line of arguments advanced by the learned senior counsel for the State, Mr. K.N. Choudhury, the learned senior counsel for the respondent No. 6, maintains that the purpose of organizing lotteries in Arunachal Pradesh is a fact known to all in that the scope, limitation and methods of conducting the lotteries are adequately and explicitly provided for in sub-rule (iv) to sub-rule (xxxxiii) of the State Rules: this amounts to substantial compliance with the State Rules. He explains that the scheme of (2) of Rule 3 of the Lotteries Act will clearly demonstrate that sub-rule (2) and sub-rule (3) of Rule 3 are to be harmoniously construed and, so construed, it becomes obvious that the organizing State has the option of publishing such notification under Rule 3(2) even after selecting and appointing a distributor and just on the eve of the commencement of the actual lottery draws. Taking exception to the attempt being made by the learned senior counsel for the appellant to refer to the documents annexed to the application filed in Misc. Case No. 35(AP)/14 before the learned Single Judge, the learned senior counsel submits that the Misc. Case was never allowed by the learned Single Judge nor was it taken into account by the learned Single Judge till the delivery of the impugned judgment and such documents cannot, therefore, be relied on by the appellant at the appellate stage: an appeal being a continuation of the original proceeding, materials not produced in the original proceeding cannot be taken into consideration at the appellate stage. The Misc. application was surreptitiously put on record by the appellant, which is not permissible. The learned senior counsel also submits that the Misc. Case No. 1912 of 2014 for impleading the private respondents was filed on the same date on which the memo of the writ appeal was presented, but when the appeal came up for admission on 23-6-2014, the said Misc. Case was deliberately not brought to the notice of this Court and it was only after the interim order was obtained that the said Misc. Case was moved on 5-8-2014: this amounts to suppression of vital facts for obtaining an interim order. According to the learned senior counsel, this alone calls for dismissal of the writ appeal: he who comes to this Court must come with a clean hand. These are the additional submissions made by the learned senior counsel for the respondent No. 6 in resisting the writ appeal. Mr. S. Chakraborty, the learned counsel for the respondent No. 5 also adopts the submissions of the learned State counsel and it is, therefore, not necessary to refer to his submissions separately for the sake of brevity. His case is that the writ petition was rightly dismissed by the learned

Single, for which the interference of this Court is not called for.

16. Having given our anxious consideration to the submission advanced by the learned senior counsel appearing for the rival parties and having perused the materials on record including the impugned judgment, the first point for consideration is whether there is violation of Rule 3(2) of the Lotteries Rule and, if so, what is the effect of such violation? Before proceeding further, it may be apposite to refer to Rule 3 of the Lotteries Rules, relevant portion whereof is reproduced below:

"3. Organization of Lottery:

1) State Government may organize a paper lottery or online lottery or both subject to the conditions specified in the Act and these rules.

2) The State Government may organize a lottery or lotteries, if it so desires, by issuing a notification in the Official Gazette, outlining the purpose, scope, limitation and methods thereof.

3) * * *

From the provisions extracted above, it is seen that discretion is given to any State Government to organize a lottery if it desires to do by issuing a notification in the official gazette by outlining the purpose, scope, limitation and methods for organizing the lottery. As already noticed, in exercise of the powers conferred under Section 12(2) of the Act, the State of AP in the year 2013 framed the State Rules for conducting the Arunachal Pradesh State lotteries. On careful reading of the State Lotteries Rules, there can be no dispute that the purpose of the lotteries is not mentioned by State while issuing a notification in the official gazette. However, in so far as the scope of the lottery, its limitation or its method is concerned, in our opinion, they are discernible from the various provisions or can be necessarily implied from sub-rule (iv) to sub-rule (xxxxiii) of Rule 3 of the State Rules. It is true that when a statute requires that a particular thing should be done in a particular manner, it must be done in that way and in no other way. But then, on the facts found in this case, one cannot take a hyper-technical view of the matter. The question is whether the omission to notify the purpose of the lottery separately in the official gazette has caused substantial prejudice to the public, in general, and the appellant, in particular. In our opinion, the answer must be in the negative. The appellant herself wanted to participate in the bid and made an attempt to do so despite such omission thereby demonstrating that she was aware of the re-introduction of the State lotteries, paper lottery or otherwise. Moreover, no plea of prejudice by reason of such omission ever is made by the appellant. This omission cannot be compared with the some notification in the Land Acquisition Act, etc. where a provision is made for calling objection from persons likely to be affected by the proposed land acquisition: such provision is indeed held to be mandatory. In any case, the manner in which the language of Rule 3(2) of the Lotteries Rules is couched cannot possibly lead to the inference that notification in the official gazette of the purpose of the

lottery is mandatory: no individual right or public right is likely to be affected by such omission. The question as to whether non-publication in the official gazette of the rules in terms of Section 46(2) of the Police Act, 1861 is mandatory or not came up for consideration before the Apex Court in Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others, AIR 2002 SC 2322 : (2002) 1 JT 159 Supp : (2002) LabIC 2168 : (2002) 4 SCALE 528 : (2002) 6 SCC 127 : (2002) 3 SCR 948 : (2002) 2 SCT 1093 : (2002) 3 SLJ 88 : (2002) AIRSCW 2457 : (2002) 4 Supreme 218 . To appreciate the controversy, we may reproduce below the provisions of Section 46(2):

"46. Scope of Act-(1) * * *

(2) When the whole or any part of this Act shall have been so extended, the State Government may, from time to time, by notification in the Official Gazette, makes rules consistent with the Act-

a) to regulate the procedure to be followed by Magistrates and police officers in the discharge of any duty imposed upon them by or under the Act;

b) to prescribe the time, manner and conditions within and under which claims for compensation under Section 15-A are to be made, the particulars to be stated in such claims, the manner in which the same are to be verified, and the proceedings (including local enquiries, if necessary) which are to be taken consequent thereto; and

c) generally, for giving effect to the provisions of this Act."

(Italics mine)

17. It may be noted that an administrative order was, nevertheless, issued even though not specifically issued under S. 46(2), but was otherwise referable to various powers available under the Act. Holding that the non-publication did not render the order ineffective, the Apex Court observed:

"39. Two other short issues remain for consideration: one pertaining to the clubbing and the other is in regard to non-publication in the Official Gazette. Gazette publication is required in terms of Section 46(2) and as such until the Rule specifically required to be framed under Section 46(2), the mandatory nature of the same cannot be stated to be a requirement. In any event, it is hyper-technical in nature since the parties who were well aware of the 1965 Order, participated at the interview and knew the contents. As such no further detail need be had on this score and we record our concurrence with the submissions advanced by Dr Dhavan."

(Underlined for emphasis)

In our judgment, the aforesaid observations of the Apex Court have clinched the issue in favour of the respondents, namely, the omission on the part of the State-respondents not to strictly comply with the provisions of Rule 3(2) of the Lottery Rules cannot and does not have the effect of vitiating the tendering process. We

have perused the various decisions to the contrary cited by the learned senior counsel for the appellant, but, we are afraid, the instant case is not one where non-publication of the purpose of the lottery in the official gazette per se could cause prejudice to the appellant or, for that matter, to the general public, which alone can warrant the interference of this Court. For example, Section 3(1) empowers every local authority to prepare and publish in the prescribed manner a development plan and to submit it to the State Government for sanction otherwise government too is empowered to do so. Under sub-section (1) of Section 4, the local authority is authorised to make a declaration of its intention to prepare a development plan and to despatch a copy thereof to the State Government for publication in the official gazette. The State Government after inviting suggestions from the public within a period of two months is to publish in the official gazette the fact of making such declaration or intention as aforesaid. Section 7 prescribes the particulars of the Master Plan. In *Jaswant Singh Mathurasingh and another Vs. Ahmedabad Municipal Corporation and others*, AIR 1991 SC 2130 : (1991) 4 JT 46 : (1991) 2 SCALE 749 : (1992) 1 SCC 5 Supp : (1991) 1 SCR 226 Supp : (1992) 1 UJ 14 , the Apex Court held that the requirement of notice to a person interested before a town planning scheme was finalised, was mandatory for the provision for notice ensures fair procedure under Articles 14 and 21 of the Constitution before a person is made to lose property as a result of the scheme. In the instant case, the appellant is not likely to lose any property merely by non-publication in the official gazette of the purpose of the lottery nor is this her pleaded case. In other words, no constitutional or legal right of the appellant is infringed by the omission to publish the purpose of the State lottery in the official gazette. That is why, it is said that a judgment of a court of law cannot be read like Euclid's theorem. Therefore, the first contention of the appellant fails.

18. Coming now to the second contention of the learned senior counsel for the appellant, the law is now well-settled without reference to cases that the terms of the invitation to tender cannot be subject to judicial scrutiny unless the terms are manifestly demonstrated to be arbitrary or suffers from *Wednesbury* unreasonableness or illegality as well as procedural impropriety. Court would not normally go into the various factors involving commercial/technical prudence. The parameters for the intervention of a writ court in exercise of its power of judicial review was laid down by the Apex Court in *Netaji Bag and Others Vs. The State of West Bengal and Others*, AIR 2000 SC 3313 : (2000) 1 JT 181 Supp : (2000) 6 SCALE 504 : (2000) 8 SCC 262 : (2000) 3 SCR 424 Supp : (2001) 1 UJ 391 : (2000) AIRSCW 3590 : (2000) 6 Supreme 425 . This is what it said:

"19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet wherever challenge is thrown to any of such action, initial burden of showing the *prima facie* existence of violation of the mandate of the Constitution lies upon the person approaching the court. We have found in this case, that the appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the

High Court nor this Court would have ventured to make a roving inquiry particularly in a writ petition filed at the instance of the erstwhile owners of the land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold. It may be noticed that in the year 1961 the erstwhile owners were paid about Rs. 5.5 lakhs and the State Government assessed the market value of the property which was paid by Respondent 5 at Rs. 71,59,820. The appellants have themselves stated that the value of the land roundabout the time, when it was leased to Respondent 5 was about Rs. 11 crores. There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor can the courts substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process.

(Underlined for emphasis)

"20. The Government is entitled to make pragmatic adjustments and policy decision which may be necessary or called for under the prevalent peculiar circumstances. The court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or wiser or more scientific or logical. One of the methods of securing the public interest when it is considered necessary to dispose of the property is to sell the property by public auction or by inviting tenders. But such a rule is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule. As and when a departure is made from the general rule, it must be shown that such an action was rational and not suggestive of discrimination. In that case on facts the Court found that on the commercial and financial aspect, the lease granted in favour of a group of hoteliers, not arbitrary as the method of "net sales" was held to be fairly well-known method adopted in similar situations."

19. The following trend setting observations of the Apex Court in *Tata Cellular Vs. Union of India*, AIR 1996 SC 11 : AIR 1994 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp may also be noticed:

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are

inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such unfairness is set right by judicial review."

20. In so far as the working experience of the appellant is concerned, the case of the State-respondents is that she never has any working experience with them as distributor for marketing of their lotteries nor does she have any infrastructure anywhere in the country. Her claim of having adequate experience of conducting lottery business is seriously challenged by the respondents, who are asserting that there is not an iota of evidence to support her claim. On careful perusal of the materials on record, we are of the view that the contentions of the respondents appears to have force. All that she said is that she was managing the lottery business of her husband immediately after her marriage to him. To say that she has been conducting lottery business by herself is one thing, but to say that she has been assisting her husband in running his lottery business is an entirely different proposition. This is not a case of running a lottery by proxy: this is a competitive bidding for a huge sum of money. Under the circumstances, the approach of the respondent authorities in holding the appellant is ineligible for the bid cannot be said to be arbitrary. After all, if a fact asserted by a party is denied by the other party, the burden of proof is upon that party who would fail if no evidence at all were given on either side. No proof is furnished by her. The respondent authority has no duty to prove the negative.

21. It is to be noted that the criteria laid down in Clauses 3.1.1., 3.1.2. and 3.1.3. are applicable to all the bidders irrespective of whether the lottery is online or paper. If they are held to be invalid, then both the writ appeals shall have to be allowed vice versa. Clause 3.1.1 stipulates that the bidder should be a profitable vendor for the last three years with profit records and must also have an annual gross turnover of not less than Rs. 50 crores per annum for the last three financial years as on 31-3-2012. Again the next Clause also requires that the minimum worth of the bidder should not be less than Rs. 10 crores as on 31-3-2012, and a certificate to that effect from Auditor/Chartered Accountant should be submitted at the time of submission of proposal. The further requirement is that the minimum experience of the bidder should not be less

than one year during the last 3 years in the capacity of working directly with any State Government as distributor, stockist and marketing agent. The next question to be determined is whether these conditions are arbitrary, discriminatory and are tailor-made for those who are running the lottery business in the State of Goa, Sikkim, Mizoram and Nagaland. In our opinion, since lottery is a game of chance and is subject to favourable market condition, such criteria appeared to have been prescribed after due application of mind. As for the stipulation requiring the bidder to have a net worth of not less than 10 crores as on 31-3-2012 with a gross turnover of not less than Rs. 50 crores per annum for the last three years as on 31-3-2012, the stance taken by the State is that as per the State Lotteries Rules, the organizing State should not charge less than Rs. 10,000/- per draw for weekly lottery and not less than Rs. 5,00,000/- for bumper lottery. That being the position, the total revenues to be earned by the State should not be less than Rs. 9 crores per annum. Thus, to earn the minimum revenue of Rs. 9 crores per annum for depositing it with the State exchequer, the turnover of prospective bidder should be not less Rs. 200-300 crores per annum. In this view of the matter, according to the State, the pre-qualification condition of annual turnover of not less than Rs. 50 crores of the bidder is valid. In our judgment, the view taken by the State in this behalf is indeed a possible view and not an irrational view. Coming now to the challenge to the condition that the bidder must have a minimum of one year experience in the last three years directly with the State Government, it is not comprehensible from the pleadings of the appellant as to how such condition can be said to be onerous or unreasonable. In the absence of specific averment as to how such condition will fall foul of Article 14 of the Constitution, it is not possible to examine this contention. Choice of some criteria is the function of the State conducting the lottery. Prescribing of any criteria is not likely to be favourable to all and sundry intending to participate in the bidding process, but that by itself cannot be a ground for holding such criteria to be bad in law. Moreover, if the State thinks that it is safer to choose some entity who already has the minimum working experience of at least one year during the previous three years in lottery business directly with State Government, such choice cannot be said to be unreasonable or arbitrary. At this stage, it may be relevant to refer to the uncontroverted averments of the respondent No. 6 in paragraph 4(iii) of its affidavit dated 22-8-2014 wherein it points out that the company of the appellant and her husband, namely, Gaming India Distributors Pvt. Ltd. has in the year 2011 participated in a tender process initiated by the State of Nagaland with the tender condition prescribing a turnover of Rs. 5,000/- crores without raising any objection. Though the company was selected by the Government of Nagaland, the selection was quashed by this Court on the ground that the Company did not have any turnover at all. These facts are not denied by the appellant.

22. It is also pointed out by the respondent No. 6 that the Government of Goa had issued the NIT for the year 2010 wherein a minimum turnover of Rs. 4,000/- crores per annum in the last 3 financial year in the previous three financial years

was prescribed and a minimum experience of 3 years during the previous five years in the capacity of working directly with at least two State Governments was also included. Similarly, there was a further condition that the minimum net worth of the bidder should not be less than Rs. 40 crores as on 31-3-2009. Challenge made to these terms and conditions of the NIT before the Bombay High Court, Goa Bench was dismissed by upholding the said tender conditions. These facts are also not denied by the appellant. In our judgment, these factors are relevant for holding that the impugned pre-qualifications criteria cannot be said to be irrational or arbitrary. Merely because the appellant is not in a position to satisfy the terms and conditions laid down for taking part in the tender, such conditions, without anything more, cannot be said to be discriminatory or arbitrary. Certain precondition or qualification for tender shall inevitably have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. The following observations of the Apex Court in *Association of Registration Plates Vs. Union of India (UOI) and Others*, AIR 2005 SC 469 : (2005) 1 CTC 111 : (2005) 1 CTLJ 14 : (2004) 10 JT 147 : (2004) 10 SCALE 60 : (2005) 1 SCC 679 : (2004) AIRSCW 7074 : (2005) 1 Supreme 700 , the decision cited by the learned senior counsel for the respondent No. 6 answers the contentions of the appellant:

"44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

23. As observed by the Apex Court in *Tata Cellular case* (supra), there are inherent limitations in the exercise of the power of judicial review. Government is, after all, the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. There can be no violation of Article 14 of the Constitution if the government tries to get the best person or the best quotation. The right to choose cannot be said to be arbitrary. The difficulty faced by the Courts in matters relating commercial or technical dispute is succinctly explained by the Apex Court in *Center For Public Interest Litigation and Another Vs. Union of India and Others*, (2000) 2 JT 277 Supp : (2000) 7 SCALE 1 : (2000) 8 SCC 606 of the judgment. This is what it said:

"19. As observed earlier, we will also have to bear in mind the fact that the contract in question involves the payment of consideration under different heads in one basket. The contents of this basket cannot be assessed individually nor

can the Court say that the receipt from a particular item in the basket is arbitrarily low, because the take of GOI in the contract is as a whole from the total receipt from the basket. At this juncture, we would like to notice the observations of this Court found in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, AIR 1980 SC 1992 : (1980) 4 SCC 1 : (1980) 3 SCR 1338 wherein this Court had held: (SCC p. 13, para 14)

"We have referred to these considerations only illustratively, for there may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the court would have to decide whether the action of the Government is reasonable and in public interest."

"20. It is clear from the above observations of this Court that it will be very difficult for the courts to visualise the various factors like commercial/technical aspects of the contract, prevailing market conditions, both national and international and immediate needs of the country etc. which will have to be taken note of while accepting the bid offer. In such a case, unless the court is satisfied that the allegations levelled are unassailable and there could be no doubt as to the unreasonableness, mala fide, collateral considerations alleged, it will not be possible for the courts to come to the conclusion that such a contract can be prima facie or otherwise held to be vitiated so as to call for an independent investigation, as prayed for by the appellants. Therefore, the above contention of the appellants also fails."

24. In so far as the allegation about the involvement of the private respondents in criminal cases is concerned, this was never the pleaded case of the appellant in the original proceeding. Misc. Case No. 35(AP) of 2014 filed by the appellant will reveal that the application for allowing her to bring on record additional documents including Annexure-E (which allegedly indicates the involvement of one Mr. Martin and Nagarajan in some of the said 14 criminal cases) was filed on 20-3-2014 before the learned Single Judge. No particular averments were made by the appellant about the relevancy of those documents or the reason for the filing thereof. Be that as it may, the application was apparently not entertained as evident from the order dated 19-6-2014 which merely stated that in view of the judgment and order passed in WP(C) No. 546(AP) 2013, the misc. case accordingly stood closed. The writ petition was dismissed on 19-6-2014. Obviously, the documents annexed to the said application having not been allowed were obviously never taken into consideration by the learned Single Judge and cannot, therefore, be referred to by us at this appellate stage as these documents, for all their worth, do not form a part of the case record unless leave was sought for and was granted by this Court to admit those documents.

25. This then takes us to the question as to whether the classification made between those running lottery prior to 2010 and those who have experience after

2010 is based on intelligible differentia and whether such differentia has rational nexus to the object sought to be achieved by such classification. According to the learned senior counsel for the appellant, there is no such thing as unregulated period as claimed by the State inasmuch as the period prior to 2010 was all along regulated by the Lotteries Act as well as the State Rules of 2001 and 2002: the stance taken by the State seems to be an afterthought and cannot be sustained. As already noticed, the State in their affidavit has stoutly denied that the appellant had ever worked with them as distributor for marketing the State lotteries or that she has any experience of marketing lottery or has the infrastructure to sell lottery tickets anywhere in the country. The stance taken by the State in making such a classification as revealed from the tender file is that the State lotteries conducted prior to 2010 suffers from the following defects: (a) unrealistic draws per day; (b) lack of transparency in draw; (c) miniscule yield of revenue from online lotteries; (d) lack of transparency in the number of tickets sold; (e) default in revenue payment by the distributors; (f) due to dismantling of the Secretariat Building, no suitable alternative building for draws was available. These factors apparently prompted them to prohibit the sale of lotteries in the State for sometime. The department while pursuing collection of outstanding dues observed that out of 9 distributors, five distributors breached not only the terms and conditions of the agreement but also defaulted in depositing the Government revenue to the tune of Rs. 4,71,20,381/-. These defaulting distributors did not respond to the notices sent to them for clearing the outstanding Government dues whereupon money suits had to be instituted against these defaulting distributors for recovery of such dues. Some of the distributors have even forged/supplied fake bank guarantees, for which criminal cases had to be filed by the State. It is against the backdrop of such experience that the State decided to restart the lotteries by streamlining the entire process and selection of distributors through a transparent bidding process in conformity with the State Lotteries Rules. The noting also opined that because of such historical reasons, it was necessary for the State to protect the interest of the State by devising ways and means to maximize revenue and also award distributorship of firms that are not only technically sound but also financially sound. In other words, the classification appears to have been made with the intention of dealing only with the entity/entities which have been working under the framework of the State Lotteries Rules and to avoid fly-by-night operators. Thus, in our considered view, the classification made between the operators of lotteries prior to 2010 and those who operated after 2010 cannot be said to be based on irrelevant considerations and cannot also be said to have no rational nexus with the object sought to be achieved, namely, to protect itself from the past technically as well as financially unreliable operators and to ensure so that there is no loss of revenue by the State in future. On considering the matter from all angles, the view taken by the State is a rational view, which view cannot be substituted by us simply on the ground that the other view could have been a better view. Lastly, it has been argued that limiting and restricting the competition to a few bidders is violative of Competition Act, 2002. In our view, if

there is contravention of the provisions of the Competition Act, 2002, the appellant can always take resort to the statutory alternative remedy provided for under Section 20 of the Act to ventilate her grievance and should not have approached the writ court.

26. The result of the foregoing discussion is that this writ appeal has no merit and is, therefore, dismissed. However, considering the facts and circumstances of the case, the parties are directed to bear their respective costs. The interim order stands vacated.