

(2015) 06 SIK CK 0013
In the Sikkim High Court
Case No : Writ Petition (C) No. 45 of 2014

J. Geetha

APPELLANT

Vs

The State of Sikkim and Others

RESPONDENT

Date of Decision : 22-06-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19 (6), 19(1)(g), 301, 301
Lotteries (Regulation) Act, 1998 — Section 11, 12, 3, 4, 4 (c)

Citation : (2015) 06 SIK CK 0013

Hon'ble Judges : Sunil Kumar Sinha, C.J

Bench : Single Bench

Advocate : D. Das, Senior Advocate, Zangpo Sherpa, Sangay G. Bhutia, Rakesh Sharma and Ishan Das, for the Appellant; C.A. Bimala Mishra, Auditor, J.B. Pradhan, A.A.G, S.K. Chettri, Pollin Rai, Asstt. Govt. Advocates and Suman Sharma, Legal Retainer, (Lottery), Advoc

Final Decision : Partly Allowed

Judgement

Sunil Kumar Sinha, C.J—Petitioner, J. Geetha, is proprietor of M/s. Sri Krishna Agency. This is a proprietary concern for running the lottery business. She has filed this Petition for quashing of Rule 4(3)(a)(i) and (iii) of the Sikkim State Lottery Rules, 2003 (hereinafter referred to as "Rules, 2003"), as also the Notice Inviting Tender (NIT) dated 12th November, 2014, published in newspapers on 14th November, 2014, wherein the above clauses have been incorporated as the essential qualifications for the tenderers to participate in the tender process.

2. The Parliament enacted the Lotteries (Regulation) Act, 1998 (hereinafter referred to as "the Act, 1998"), to regulate the lotteries, which came into force on the 2nd day of October, 1997. Section 11 of the Act gave power to the Central Government to make Rules. Likewise, Section 12 gave power to the State Government to make Rules to carry out the provisions of the Act, 1998. The Central Government did not frame Rules for a very long period. However, it ultimately framed the Rules under the said provision in the year 2010, i.e. The

Lotteries (Regulation) Rules, 2010 (hereinafter referred to as "the Rules, 2010"). Much prior to this, the State of Sikkim, in exercise of powers conferred under sub-section (1) of Section 12 of the Act, 1998, had framed its Rules, namely, Sikkim State Lottery Rules, 2003, which came into force on 2nd July, 2007. Later on, by the amending Rules i.e. Sikkim State Lottery (Amendment) Rules, 2014 (hereinafter referred to as "Amendment Rules, 2014"), the above Rules of 2003 were amended by the State Government with effect from 11th day of November, 2014. According to the Amendment Rules of 2014, existing Rule 4 of the Rules of 2003 was substituted by the following new Rule 4:--

"4(1) The State Government may specify qualification, experience and other terms and conditions for appointment of distributors or Marketing agents.

(2) The State Government may appoint Marketing Agent(s)/Distributor(s) by way of inviting tender. The tender shall be in two parts i.e. (a) Technical bid and (b) Financial bid. These parts shall be furnished separately by the tenderer. The technical bid of the tenderers shall be opened first followed by the financial bid provided the tenderer is considered eligible in the technical bid. Financial bids of the unqualified parties in the technical bid shall not be opened and both the bids shall be returned to them in person.

(3) The terms and conditions to be fulfilled by the tenderers in Technical bid and Financial bid shall be as under, namely:--

(a) The Technical Bid:

(i) The tender form/documents shall be issued only to registered firms/ proprietorship concerns/companies registered/Partnership firms registered under the law for the time being in-force in Sikkim, and on production of proof thereof.

(ii) The tenderer should be bonafide Marketing Agent(s)/Distributor(s)/Bulk Agents of sound financial standing having sufficient experience of at least 5 (five) years in the lottery business. A documentary proof in this regard is to be submitted.

(iii) The tenderer shall have carried out similar jobs of paper Lotteries (i.e. sale of weekly and bumper lotteries) continuously for 2 (two) or more years in the last 5 (five) years and should have distributorship of at least one State currently.

(iv) The legal status of the tenderer, whether it is sole proprietorship, private limited company, partnership firm or otherwise should submit documentary proof along with the bid.

(v) Any party willing to be present in the opening of the bid documents may do so with proper authorization letter duly issued by the authorized signatory of the Company/Firm/Body/Individual or other Legal entities.

(vi) The tenderer must be capable of commencing the operations with effect from the date stipulated in Notice Inviting Tender.

(vii) Any other terms and conditions as the State Government may deem fit and proper to specify.

(viii) The State Government reserves the right to reject all or any of the tenders without assigning any reasons thereof.

(b) The Financial Bid:

(i) The Firm/Company should be an Income Tax Assessee and have a valid permanent PAN/TAN number issued by the Income Tax Department, Government of India.

(ii) The Firm/Company shall furnish Income Tax clearance certificate or return acknowledgment copy from the Income Tax Department, Government of India for the last 5 (five) years.

(iii) The Firm/Company shall furnish balance sheet for the last 5 (five) years duly certified by a registered Chartered Accountant.

(iv) The Firm/Company shall furnish clearance certificate from the other Lottery Organizing States wherever they are having distributorship.

(v) The tenderer shall deposit earnest money as specified by the State Government. The earnest money so deposited shall be forfeited in case the successful tenderer fails to execute the agreement within the stipulated time.

(vi) The tenderer should be able to furnish any unconditional and irrevocable Bank Guarantee as security deposit from any Scheduled/Nationalized Bank having its Branch at Gangtok, Sikkim in favour of the "Secretary, Finance, Revenue and Expenditure Department, Government of Sikkim, Gangtok" which can be forfeited by the State Government on violation/breach of the terms of agreement."

3. The Petitioner and her husband, namely Mr. N. Jayamurugan, were also running a company in the name and style of M/s. Gaming India Distributor Limited. This was a registered company under the Companies Act and was also engaged in lottery business. Earlier, in the year 2004, M/s. Future Gaming and Hotel Services Pvt. Ltd. (R-4), was appointed as distributor of the Sikkim State Lotteries by floating an open tender in the market. An agreement was executed between the State and R-4 for a period of 5 (five) years. At the end of the period of 5 (five) years in the year 2009, fresh tender was not floated and its agreement was renewed/extended mutually for a further period of 5 (five) years, i.e. upto 17.10.2014. Again the tender for appointment of distributor was not floated and the agreement, executed in favour of the R-4 was further extended by the State for the period commencing from 18.10.2014 till 17.10.2019 @ Rs. 10.50 crores per annum. The above action of the State was challenged by M/s. Gaming India Distributor Ltd., on the grounds of arbitrariness, discrimination and violation of Article 14 of the Constitution, by filing W.P. (C) No. 35 of 2014. The said writ petition came up for hearing before this Court on 24.09.2014 and was

disposed of by an agreed order in the following manner:--

"3. Learned counsel for parties argued the case at length, but during the course of arguments, they agreed, on instruction, to dispose off the writ petition, as under:--

"i) Respondents No. 1 and 2 will float the tender for appointment of distributor for selling and marketing of lottery tickets of Sikkim State Lotteries. The tender notice will be published in daily two national news papers and two local news papers, on or before 15.11.2014 giving time of at least one month for collecting and depositing the tender notice, etc.

ii) All the tender notices received by respondents No. 1 and 2 will be opened and finalized on or before 07.01.2015. Thereafter, the agreement with the concerned party/distributor, to be appointed, will be executed on or before 30.01.2015.

iii) The agreement dated 06.08.2013, whereby contesting respondent No. 3 has been authorized/appointed as distributor for selling and marketing of lottery tickets of Sikkim State Lotteries is confined to the period from 18.10.2014 to 31.01.2015 and it stands cancelled for the period after 31.01.2015, meaning thereby respondent No. 3 will carry its business/work of distribution of selling and marketing of lottery tickets of Sikkim State Lotteries under the agreement dated 06.08.2013, till 31.01.2015, so there may not be any loss of revenue to State of Sikkim.

iv) In case any other agreement of similar nature for appointment of distributor for selling and marketing of lottery tickets of Sikkim State Lotteries has been renewed/extended/executed by respondents No. 1 and 2 with any other party/distributor, without floating the tender in open market, then respondents No. 1 and 2 will take necessary steps for cancellation of their agreement in accordance with law and to float the tender for those draws/lotteries also and complete all formalities/action before 31.01.2015.

4. Ordered accordingly.

5. Parties are directed to bear their own costs."

4. Clause iv of the above agreed order, which was also effecting the other distributor, M/s. Summit Online Trade Solutions Private Limited, dealing in online lotteries, however, was held as redundant and inoperative in a review petition filed by it.

5. The State-respondents then firstly amended their Rules of 2003 by bringing the Amendment Rules of 2014 with effect from 11.11.2014 in the above manner and, thereafter, floated the impugned NIT for appointment of the distributor as per directions issued by this Court in W.P. (C) No. 35 of 2014. The Petitioner purchased the tender documents. However, when she found that she would not be eligible for appointment as per condition Nos. 2(i)(a) and (c) of the tender documents, which were similar to clauses (i) and (iii) of sub-rule (3)(a) of Rule 4

of the Rules of 2003, as amended by Rules, 2014, she filed this writ petition challenging the vires of the above provisions of the rules as also the above conditions of the NIT.

6. In response to the impugned NIT, following 6 (six) concerns had purchased the tender documents:--

- "1. M/s. Krishna Agency (Petitioner),
2. M/s. Divya Jyoti Distributors,
3. M/s. Pooja Fortune Pvt. Ltd.,
4. M/s. Teesta Distributors,
5. M/s. Future Gaming and Hotel Services Pvt. Ltd. (R-4)
6. M/s. Big Star G Services Pvt. Ltd."

7. Out of the above 6 (six) concerns, the Petitioner did not offer the bids. Only 5 concerns offered their bids. On scrutiny, the technical bids of M/s. Divya Jyoti Distributors and M/s. Pooja Fortune Pvt. Ltd. were rejected. Thus, M/s. Teesta Distributor Pvt. Ltd.; M/s. Big Star G Services Pvt. Ltd.; and M/s. Future Gaming and Hotel Services Pvt. Ltd. (R-4) were found to be eligible for opening of their price bids. M/s. Teesta Distributor Pvt. Ltd. had quoted the price @ Rs. 10,13,63,000/- per year; M/s. Big Star G Services Pvt. Ltd. had quoted the price @ Rs. 7,24,00,000/- per year and M/s. Future Gaming and Hotel Services Pvt. Ltd. (R-4) had quoted the price @ Rs. 15,00,12,800/- per year. Therefore, the R-4, who had quoted the highest price, was appointed as distributor against the impugned NIT and an agreement was executed on 24.01.2015 for a period of 5 (five) years.

8. By that time, CMA No. 371 of 2014 filed in the instant writ petition, had came up for hearing and an interim order was passed on 03.12.2014 that "the tender process may go on and the final decision may also take place, however, the decision finally taken by the authorities and agreement entered into with the winning party all shall be subject to the final outcome of the writ petition". It was also directed that "this shall be informed to the contesting parties". In pursuance of the above order, which, later on was made absolute on 09.02.2015, it was specifically stipulated in clause 19.4 of the agreement with R-4 that the said agreement was subject to the final outcome of the writ petition.

9. Mr. D. Das, learned Senior Counsel appearing on behalf of the Petitioner, has firstly contended that Rule 4(3)(a)(i) is restrictive and it takes away the right of equal treatment to be given to all who are interested in lottery business. According to him, the Firms/Partnership concerns/Companies registered/ Partnership firms which are registered in the State of Sikkim under law for the time being in-force were only entitled for issuance of tender forms/tender documents. The said argument was vehemently opposed by the counsel for the Respondents. Learned Additional Advocate General, appearing on behalf of the

State-respondents, has categorically submitted that the registration under the law for the time being in-force in Sikkim was required only in relation to Partnership firms and not for any other entity described in the said Rule. The above contention of the State Counsel completely dilutes the argument advanced by Mr. Das. Moreover, if we look into the contents of Rule 4(3)(a)(i), quoted in paragraph 2 (supra), it would be clear that the said Rule is in two compartments. The first compartment says that the tender forms/documents would be issued only to Registered firms, Partnership concerns and Companies Registered, and the second compartment says that it would also be issued to the Partnership firms registered under the law for the time being in-force in Sikkim. That is to say that if any tenderer is a Partnership firm, then only its registration was required in the State of Sikkim and if the tenderer is any other entity classified in the first compartment, it was not required by this Rule that it should be registered in the State of Sikkim. Thus, according to Rule 4(3)(a)(i) any Registered firm or Partnership concern or Company even not registered in State of Sikkim, was eligible for issuance of tender documents. Therefore, the said Rule cannot said to be restrictive. Admittedly, the Petitioner's concern was a proprietorship concern. It had purchased the tender form, which was duly issued to its representative. Had there been any restriction of this nature intended by the State in their Rule, the tender form would not have been issued to the Petitioner because there was a pre-requirement of production of proof of registration and the Petitioner's concern was not registered in the State of Sikkim. Therefore, the first argument of Mr. Das cannot be accepted.

10. Mr. Das then contended that Rule 4(3)(a)(iii) is violative of fundamental rights under Articles 14 and 19(1)(g) of the Constitution because it gives rise to a monopoly in lottery business to the 4th Respondent and keeps away the other entities and new entrants by discriminatory treatment. He relied on the decision of *Rashbihari Panda etc. Vs. State of Orissa*, AIR 1969 SC 1081 : (1969) 35 CLT 479 : (1969) 1 SCC 414 : (1969) 3 SCR 374 .

11. On the other hand, Mr. J.B. Pradhan, learned Additional Advocate General and Mr. Madhavrao, learned counsel appearing on behalf of the 4th Respondent, opposed these arguments and submitted that action of the State, bringing such a legislation, was with an intention to have a best person as their distributor. The lottery business is not a common business and is restricted to few States. An experienced distributor with distributorship of at least one State currently would have managed the lottery affairs in a competent manner, therefore, such legislation was brought and it was also made a condition in the tender documents.

12. *Rashbihari* (supra) was a case relating to purchase of Kendu leaves. The Government of Orissa invited tenders from persons desirous of purchasing Kendu leaves purchased or collected by the Government or their officers or agents under the provisions of the Orissa Kendu Leaves (Control of Trade) Act, 1961, in the units as constituted under Section 5 of the Act. In the last paragraph of the

NIT it was stated that if the person appointed as purchaser during the currency of his agreement in respect of any unit duly observes and performs all the terms and conditions to the satisfaction of the Government and if the Government are satisfied that the purchaser has been prompt in taking delivery of leaves and making payments, the Government may grant to the purchaser a renewal of his appointment for one year on such terms and conditions as may be mutually agreed upon. It was held by the Supreme Court that the validity of the schemes adopted by the Government for sale of Kendu leaves must be adjudged in the light of Article 19(1)(g) and Article 14. Instead of inviting tenders the Government offered to certain old contractors the option to purchase Kendu leaves for the year 1968 on terms mentioned in the scheme. The reason suggested by the Government that these offers were made because the purchasers had carried out their obligations in the previous year to the satisfaction of the Government was not of any significance, because the classification based on the above circumstance was not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved. It was held that the action of the Government was liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme was not integrally and essentially connected with the creation of the monopoly.

13. The reason for taking such a view appears to be that no attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in Kendu leaves and that it was not considered whether the restrictions imposed upon the persons excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19 (6).

14. The case in hand is one of lottery businesses of the State. In *B.R. Enterprises Vs. State of U.P. and Others*, (1999) 3 SCALE 171 : (1999) 9 SCC 700 : (2000) 120 STC 302 , it was held by the Supreme Court that the lottery business is a gambling and would never fall within the meaning of word "trade" under Article 301 of the Constitution. Thus, the lotteries cannot be construed to be a "trade and commerce" within the meaning of Articles 301 to 303 of the Constitution. Transaction of sale of lottery tickets, which is gambling in nature, cannot get protection under Article 19(1)(g). It was held that the right of sale of lottery tickets, whether by the State or others, could neither be a fundamental right nor a right under Article 301. No one could seek it as a free "trade" like other "trades", even though it may have the authority of law. On this account the judgment cited by Mr. Das is distinguishable, which is basically based on the principles of free trade in which no one can be prohibited by imposing an unreasonable restriction.

15. In the instant case, the Act of 1998 itself provides, vide Section 4, certain conditions subject to which the lotteries may be organized. Section 4 (c) provides that the State Government shall sell the tickets either itself or through

distributors or selling agents. Section 7 of the Act provides for penalty and sub-section (3) of Section 7 clearly provides that if any person acts as an agent or promoter or trader in any lottery organized, conducted or promoted in contravention of the provisions of this Act or sells, distributes or purchases the ticket of such lottery, he shall be punishable with rigorous imprisonment for a term which may extend to two years or with fine or with both. Not only this, the offences under the Act of 1998 have been declared as cognizable and non-bailable. Contents of the above clauses of Sections 4 and 7 would make it clear that if the State Government takes a decision to sell the tickets through distributors or selling agents, it can do so, but, a heavy burden lies upon the Government to arrange the distributorship in such a manner in which there is no possibility of any contravention of the Act so as to make the distributors/selling agents or even officials of the Government liable for punishment under the said Act.

16. It is in these backgrounds, the Government of Sikkim had framed the Rules of 2003, which ultimately came into force in 2007. In the Rules of 2003, Rule 4, as it stood before amendment, provided that the Government may, by floating open tenders or such other manners as deemed appropriate, appoint a person/persons or firm/firms having experience in running lotteries as Distributor for a period as determined by the Government in accordance with the terms and conditions provided thereafter. Thus in the said Rule the criteria of having experience in running lotteries was the main criteria. The distributors earlier were appointed on the said criteria and their agreements were also extended from time to time. Thereafter, the Rules of 2010 (Central Rules) came into force and certain other conditions, which I shall discuss later on, were imposed on the State Government, who may be organizing a paper lottery or online lottery. Here also the distributor or selling agent has been defined vide Rule 2 (c), which means an individual or a firm or a body corporate or other legal entity under law so appointed by the Organising State through an agreement to market and sell lotteries on behalf of the Organising State. Rule 4 further provided that the Organizing State may specify qualifications, experience and other terms and conditions for the appointment of distributors or selling agents and the distributors or the selling agents shall furnish a security deposit or a bank guarantee, as may be specified by the Organising State. These Rules also imposed a condition that the distributors or selling agents shall maintain a record of the tickets obtained from the Organising State, tickets sold and those which remain unsold up to the date and time of draw along with other details, as may be specified by the Organising State. Certain obligations on the part of the Organising State have also been imposed, like payment of commission due to the distributors or selling agents and the prize amounts, etc. disbursed by the distributors or selling agents to the winners, out of the money so deposited in the Public Ledger Account or in the Consolidated Fund, etc.

17. Thus, the rights and liabilities of the Organising State as well as the distributors or selling agents have been well defined under the Rules, 2010

(Central Rules) and in the above background the State has to appoint the distributor to carry on its business in an organized, smooth and responsible manner and the Organizing State has been given full liberty to specify the terms and conditions including qualifications and experience for such appointment.

18. The stringent measures and the conditions imposed under the State lotteries are only to inculcate faith in the participant of such lottery, that it is being conducted fairly with no possibility of fraud, misappropriation or deceit and assure the hopeful recipients of high prizes that all is fair and safe. The said assurance is from stage one to the last with full transparency. No doubt, holding of the State lotteries for public revenue has been authorized, legalized and once this has been done it is expected from the State to take such measures to see that people at large, faithfully and hopefully participate in larger number for the greater yield of its revenue with no fear in their mind. (See: B.R. Enterprises *supra*).

19. In light of the above legal scenario, if the Organising State, like Sikkim here, imposes a condition that distributor to be appointed should be having the distributorship of at least one State currently, it has certainly a nexus with the object to be achieved i.e. to generate more and more revenue, which ultimately goes to the funds of the State by virtue of Section 4 (d) of the Act. How to generate more money by an element of sale in lottery business at a particular point of time can be well understood by a person who is currently engaged in the said business. That apart, the person currently engaged would have full infrastructure, ongoing regulatory system and existing connecting links and it would be easier for him to bring acceleration in generating more revenue. If for all these purposes, a provision like having current distributorship of one State has been brought in the legislation, the same cannot be held to be unreasonable or having no nexus with the object to be achieved.

20. Let us remind ourselves that there is always presumption in favour of constitutionality of an Act or a Rule. The legislature appreciates the needs of the people and directs the laws to the problems made manifest by experience and discrimination is based on adequate grounds. The Court does not supplant the feel and experiment of the expert by its own views. Court in deference to legislative judgment, imposes self-restraint to adjudge on crudities and experiment but concern on core constitutionality. (See: *Dalmia Cement (Bharat) Ltd. and Another Vs. Union of India (UOI) and Others*, (1996) 4 AD 221 : (1996) 4 JT 555 : (1996) 4 SCALE 14 : (1996) 10 SCC 104 : (1996) 1 SCR 825 Supp).

21. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. No enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act. An enactment cannot be struck down on the ground that court thinks it unjustified. Parliament

and the legislatures, composed as they are of the representatives of the people, are supposed to know and be aware of the needs of the people and what is good and bad for them. The Court cannot sit in judgment over their wisdom. In this connection, it should be remembered that even in the case of administrative action, the scope of judicial review is limited to three grounds, viz., (i) unreasonableness, which can more appropriately be called irrationality, (ii) illegality and (iii) procedural impropriety. (See: *State of Andhra Pradesh and others, etc. Vs. McDowell and Co. and others, etc.*, (1996) 3 AD 428 : AIR 1996 SC 1627 : (1996) 3 JT 679 : (1995) 4 SCALE 762 : (1996) 3 SCC 709 : (1996) 3 SCR 721).

22. In the instant case, as I have already stated, the legislative competence for making rules by the State Government is there in Section 12 of the Act, 1998 and the source for specifying qualifications, experience and other terms and conditions for the appointment of distributors is there in Rule 4 of the Rules, 2010 (Central Rules). Rule 4(3)(a)(iii) of the Rules, 2003 does not violate any of the fundamental rights or any other constitutional provision. It has nexus with the object to be achieved, and thus, it is neither arbitrary nor unreasonable.

23. Mr. Das, then contended that the provision of having distributorship of at least one State currently is tailor-made to suit the convenience of the 4th Respondent with a view to eliminate all others from participating in the bid process. He relied on the decision of *Meerut Development Authority Vs. Association of Management Studies and Another*, AIR 2009 SC 2894 : (2009) 6 JT 169 : (2009) 6 SCALE 49 : (2009) 6 SCC 171 : (2009) 6 SCR 663 : (2009) 5 UJ 2391 : (2009) AIRSCW 4623 : (2009) 3 Supreme 429 .

24. In *Meerut Development Authority*, certain principles relating to tender have been laid down by considering many earlier decisions. It was held that a tender is an offer. It is something which invites and is communicated to notify acceptance. It must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations. It is so well settled in law and needs no restatement, that

disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism. *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 ; *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, AIR 2000 SC 801 : (2000) 1 CTC 594 : (2000) 1 JT 481 : (2000) 1 SCALE 346 : (1999) 4 SCALE 477(1) : (2000) 2 SCC 617 : (2000) 1 SCR 505 : (2000) AIRSCW 351 : (2000) 1 Supreme 351 ; *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, AIR 2004 SC 1962 : (2004) 2 BC 386 : (2004) 2 CTC 221 : (2004) 1 CTLJ 339 : (2004) 1 JT 502 Supp : (2004) 3 SCALE 111 : (2004) 4 SCC 19 : (2004) 2 SCR 1010 : (2004) AIRSCW 1505 : (2004) 2 Supreme 646 ; *Association of Registration Plates Vs. Union of India (UOI) and Others*, (2005) 1 ACC 83 : (2004) 5 SCALE 822 : (2004) 5 SCC 364 : (2004) 2 SCR 783 Supp ; *Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others*, AIR 2005 SC 2653 : (2005) 1 CTLJ 259 : (2005) 5 JT 121 : (2005) 4 SCC 435 : (2005) 3 SCR 1108 ; *Puravankara Projects Ltd. Vs. Hotel Venus International and Others*, (2007) 2 BC 245 : (2007) 1 CTLJ 105 : (2007) 2 SCALE 471 : (2007) 10 SCC 33 : (2007) 2 SCR 215 , followed).

25. Let us examine as to whether on account of the above clause of holding distributorship of at least one State, only the 4th Respondent would be able to submit the bids? Mr. Das has furnished a list of distributors in different States, according to which the situation would not be like that. For ready reference the above list is quoted hereunder:--

"LIST OF DISTRIBUTORS IN DIFFERENT STATES RUNNING CURRENTLY"

26. A perusal of the aforementioned list would show that Summit Online Trade Solutions Pvt. Ltd. is running a paper lottery in Goa. Likewise, Bigstar G Services (P) Ltd. and Teesta Distributors are also running paper lotteries in Bodoland and Mizoram. Out of them, Summit Online had not participated in the tender process and the tenders of Bigstar G Services and Teesta Distributors were rejected on low price basis. About Teesta Distributors, Mr. Das has argued that it was a concern related to the 4th Respondent, but about the 2 others i.e. Bigstar G Services and Summit Online Trade Solutions, who could not have been disqualified on above particular condition and could have come in competition with the 4th Respondent, nothing has been brought on record. Thus, the scenario is not that as alleged by the counsel for the Petitioner. It is not that, on the criteria of having distributorship of at least one State, none else than the 4th Respondent would have come in competition. Therefore, the contention relating

to the above condition being tailor-made to eliminate all others except the 4th Respondent cannot be accepted.

27. Mr. Das then contended that the above condition of currently having the distributorship of at least one State was not there in previous NITs issued by the State of Sikkim, therefore, this harsh and stringent condition is unreasonable. The details of the NITs, since 1999, have been brought on record. The State of Sikkim had issued NITs for paper lotteries on 01.07.1999, 25.10.2000, 30.07.2004 and then on 12.11.2014 (the impugned NIT). The documents filed along with the additional counter affidavit on behalf of Respondents 1 and 2 would show that in 1999 there was no such condition. But in 2000, there was a condition in the NIT that the tenderer shall have carried out similar job (i.e. sale of weekly and bumper lotteries) for tenure of two or more years in the last six years and should have distributorship of at least two States currently. I have been told by the counsel for the State that the words "two States" used in NIT dated 25.10.2000 were made "one State" vide a corrigendum. Thus, the above condition is not a new condition, but the State was imposing such condition earlier also, which the State has now incorporated in their Rules of 2003 by the amendment Rules of 2014. Moreover, all these activities are in the realm of contract and such terms of tender are not open to judicial scrutiny unless they are tailor-made (vide Meerut Development Authority). I have already held that the above term is not tailor-made and, thus, I do not find present to be a case for interference on the ground of past practice, which also has not been made out by the Petitioner.

28. For all these reasons, the validity of clauses (i) and (iii) of sub-rule 3(a) of Rule 4 of the Rules, 2003, as amended by Rules, 2014 are upheld and the petition challenging vires of the above clauses as also condition Nos. 2(i)(a) and (c) of the NIT is accordingly liable to be dismissed.

29. Mr. Das next contended that there is non-compliance of Rule 3(2) of the Rules, 2010. According to him, the said sub-rule is mandatory and the State Government was required to issue a notification before organizing the lottery. In the instance case, no notification under sub-rule (2) of Rule 3 has been issued by the State Government. He relied on the decision of 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 .

30. Mr. Pradhan and Mr. Madhavrao have opposed these arguments. According to them, the said Rule is not mandatory. They submitted that even if a notification was required under Rule 3(2) of the Rules, 2010, which came into existence on 1st April, 2010, before that the State Government had already notified their Rules, i.e. Rules, 2003, on 02nd July, 2007 and the requirements, which would have been contained in the notification to be issued under Rule 3(2) of the Rules, 2010, were already met out.

31. In ITC Bhadrachalam, one of the issues was whether the publication of the exemption notification in the Andhra Pradesh Gazette, as required by Section 11(1) of the Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963, was mandatory or directory. The said provision required that an order made thereunder should be (i) published in the Andhra Pradesh Gazette and (ii) must set out the grounds for granting the exemption. The exemption may be on a permanent basis or for a specified period and shall be subject to such restrictions or conditions as the Government may deem necessary. It was argued that the requirement was not mandatory and it was enough, if due publicity is given to the order. The Supreme Court refused to accept the above contention and held that the power under Section 11 was in the nature of conditional legislation. The object of publication in the Gazette was not merely for information to the public. Official Gazette, as the very name indicates, is an official document. It is published under the authority of the Government. Publication of an order or rule in the Gazette is the official confirmation of the making of such an order or rule and the version as provided in the Gazette is final. Relying on the decision of Sammbhu Nath Jha Vs. Kedar Prasad Sinha and Others, AIR 1972 SC 1515 : (1973) CriLJ 453 : (1972) 1 SCC 573 : (1972) SCC(Cri) 337 : (1972) 3 SCR 183 : (1972) 4 UJ 629 and B.K. Srinivasan v. State of Karnataka: (1978) 1 SCC 658, it was held in ITC Bhadrachalam that where the parent statute prescribes the mode of publication or promulgation that mode has to be followed and that such a requirement is imperative and cannot be dispensed with.

32. Sub-rule (2) of Rule 3 of the Rules, 2010 provides that the State Government may organize a lottery or lotteries if it so decides, by issuing a notification in the Official Gazette, outlining the purpose, scope, limitation and methods thereof. The lotteries are organized under the provisions of the Act, 1998. Section 4 of the Act, 1998 prescribes conditions subject to which lotteries may be organized by a State Government, and Section 3 prescribes that save as otherwise provided in Section 4, no State Government shall organize, conduct or promote any lottery. Though, conditions subject to which the lotteries may be organized by the State Government have been given vide clauses (a) to (k) of Section 4, but, no manner or method of beginning the process of organization of lotteries by the State Government has been provided in the Act. Clause (k) of Section 4, however, clearly provides that in addition to the conditions enumerated in clauses (a) to (j), there would be such other conditions for running the lotteries as may be prescribed by the Central Government. It is in this background Rule 3(2) of the Rules, 2010 has been framed and it has been provided that if the State Government decides to run the lottery business, firstly it will have to issue a notification in its Official Gazette, which would outline the purpose, scope, limitation and methods of the same. Thus, unless the State Government comes with a definite intention by issuing a notification under Rule 3(2), in its Official Gazette, it would not be able to organize a lottery in the State. The intention of the legislature behind the said provision for stepping into the business of lottery is not for mere publicity and knowledge of the people, but is to give an authority

to the State to make out and notify complete outline of the manner and method with all reservations which it intended to follow for carrying out the lottery business.

33. It was argued by the counsel for the Respondents that the State of Sikkim had already a lottery Rules of 2003, therefore, issuance of such a notification was not mandatory.

34. It is a good example to test the nature of provisions of sub-rule (2) of Rule 3. Sub-rule (2) of Rule 3 of Rules, 2010, does not make a distinction between the State Governments which have framed their Rules and the State Governments which have not framed their Rules. Thus the question would be that if the State Government, which has not framed its Rules, decides to organize a lottery or lotteries, how it shall begin with? How it will outline the purpose, scope, limitation and methods thereof? How the public at large of such State would be able to know that the State Government is organizing a lottery? How the very purpose of the State of achieving high target of revenue for which the lotteries are organized by the State would be achieved? How public faith and fairness with no possibility of fraud, misrepresentation and deceit would be maintained in the business of the State, which are the basic requirements for running the lotteries?

35. In fact, sub-rule (2) of Rule 3 of Rules, 2010 is in the nature of conditional legislation, which applies to all the States which decide to organize a lottery or lotteries, notwithstanding the fact that a Rule already exists there.

36. In majority of cases, it has been held that no universal rule can be laid down to hold a statute or rule as mandatory or directory, but in every case, the object of the statute must be looked at and one must look to the subject-matter and consider the importance of the provision in this regard.

37. I am of the view that Rule 3(2) is mandatory because it has a definite object and purpose behind it and it gives a way to the State Governments to organize a lottery.

38. Learned Additional Advocate General argued that a composite notification under sub-rule (2) and sub-rule (3) of Rule 3 of the Rules, 2010 was issued by the State Government on 23.02.2015, which was published in the Official Gazette of the State on 28.02.2015. Thus, there was sufficient compliance of Rule 3(2).

39. The said notification has been brought on record vide Annexure R-14. The contents on the notification would show that it was purported to be issued under sub-rule (2) and sub-rule (3) of Rule 3 of the Rules, 2010. If we go through the provisions of these rules, it would be clear that both these sub-rules operate in two different fields and, as stated above, the notifications under these sub-rules are required to be issued separately at different stages by the State Government. A notification under sub-rule (2) is required to be issued just after the State Government takes a decision to run lottery business, whereas a notification

under sub-rule (3) is required to be issued when all the formalities are complete and the distributor etc. are already appointed. Admittedly, the said notification (Annexure R-14) was published on 28.02.2015 i.e. after all the formalities were completed and, as the contents would show, after appointment of the distributor and execution of the agreement on 24.01.2015. Thus, the above notification dated 28.02.2015 cannot fulfill the requirement of a notification to be issued under sub-rule (2) of Rule 3. We must keep in mind that when a statute prescribes a particular mode of publication of the notifications that has to be followed so long it has not been amended/modified/struck down. Thus it is clear that this is a case in which no notification under Rule 3(2) was published by the Government.

40. Now, the next question arises as to what should be the stage of notification under Rule 3(2)? A plain reading of Rule 3(2) of the Rules, 2010 would make it clear that the State Government, if it so decides, may organize a lottery or lotteries by issuing a notification in its Official Gazette, outlining the purpose, scope, limitation and methods thereof. "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver". "When a language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself". (See: Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edition 2004, Page 46).

41. In Rule 3(2), the words used are precise and unambiguous, thus the language is plain which clearly conveys that the stage of issuance of a notification under this sub-rule would come if the State Government takes a decision to run the lottery business and then all other processes would follow in accordance with further provisions of the Rules and subject to the conditions laid down in the Act. The stage of appointment of a distributor, thus, in these circumstances, would certainly come after the stage of such notification. Therefore, one cannot say that the stage of notification under Rule 3(2) would come after the appointment of the distributor. This also may be understood by keeping Rule 3(3) in juxtaposition, which also talks about a notification in the Official Gazette, to be issued by the State, which stage comes after appointment of the distributor, but before commencement of the lottery. It is clear from Rule 3(3) that in the notification, which shall be issued by the organizing State in advance in their Official Gazette, name or names of the distributors or selling agents with their addresses and contact information, etc. are to be announced by the Government, as per clause (e) of Rule 3(3).

42. I am of the view that a notification under Rule 3(2) of the Rules, 2010, thus, was required to be issued at the very beginning after the decision was taken by the State which shall certainly be a stage prior to the appointment of the distributor.

43. Mr. Das next contended that the notification issued under Rule 3(3) was also

invalid. According to him, the said notification was published in the Official Gazette of the State on 11.03.2015, whereas the draws of the lotteries had started from 09.03.2015 and three draws had already taken place on 09.03.2015, 10.03.2015 and 11.03.2015, even prior to the publication of the said notification. Thus, it is unfair and illegal.

44. The dates of the notification and draws of the lotteries have not been disputed by the Respondents. However, they argued that it will make no difference. The notification under Rule 3(3) has been brought on record by the Respondents as Annexure R-17. Rule 3(3) of the Rules, 2010 lays down that the Organising State shall announce in advance, by way of a notification, in the Official Gazette, the information, about every lottery, which are enumerated in clauses (a) to (j) of this sub-rule. The legislature has used the words "in advance" in the very opening sentence of this sub-rule which clearly conveys its intention that the notification under Rule 3(3) should be published in the Official Gazette, well in advance, prior to the date of commencement of the draws. The very purpose appears to be that the people who want to purchase lottery tickets with high hopes of winning prizes must know all requisite information about the concerned lottery in which they are going to participate. If such a notification is notified under the authority of the Government, it earns high trust of the people, who intend to invest their money. Thus, it is a kind of measure for publicity and to earn high degree of trust so that more and more persons may invest in the concerned lottery and the object of achieving high revenue is met-out.

45. The contents of the above notification, Annexure R-17, would show that it was published on 11.03.2015, whereas the three draws had already taken place on 09.03.2015, 10.03.2015 and 11.03.2015, and the next draws were fixed on each day from 12.03.2015 to 15.03.2015. This is about one lottery draw. The other lottery draws, as contained in Annexure R-17, were also fixed on the same days. Thus, it is not a case in which the Government had issued the said notification "in advance" but the notification was issued very late i.e., after few draws were already over. Thus, there was no proper compliance of Rule 3(3) of the Rules, 2010 also.

46. Mr. Das lastly contended that out of five bidders, four were related to each other and the bids offered by all the bidders were collusive with a view to support the 4th Respondent. Thus, the bidders had formed cartel and there was nothing like fair competition. He furnished the following chart during the course of arguments, showing the Directors and share-holding details of each bidder:--

"DIRECTORS AND SHARE HOLDING DETAILS"

47. The above chart appears to be a reproduction of the details already filed by the Petitioner along with the writ petition as Annexure - 6 (page 186). Mr. Das has contended that out of five bidders, M/s. Future Gaming (R-4), M/s. Divya Jyoti Distributors, M/s. Teesta Distributors and M/s. Pooja Fortune are related to each other inasmuch as Mr. S. Martin is Managing Director and share-holder in M/

s. Future Gaming (R-4) and M/s. Divya Jyoti Distributors. Mr. Jethmal Mehta is an other Director and share-holder in M/s. Divya Jyoti Distributors and he is also a Director and share-holder in other two concerns i.e. M/s. Teesta Distributors and M/s. Pooja Fortune. He also submitted that the Technical bid of M/s. Divya Jyoti Distributors and M/s. Pooja Fortune were earlier rejected and M/s. Teesta Distributors and Future Gaming (R-4), 2 related concerns, were there in the field along with M/s. Bigstar G Services Pvt. Ltd. for opening of their price bids. He submitted that in this situation, how one can say that the prices quoted by M/s. Teesta Distributors and M/s. Future Gaming (R-4) were not known to each other. About, M/s. Bigstar G Services, he argued that it had quoted Rs. 7,24,00,000/- per annum, which was less than the Minimum Assured Revenue of Rs. 15.00 crores per annum fixed by the Government, vide condition (k) mentioned under heading "Financial bid" of the eligibility conditions in the tender document. According to him, if M/s. Bigstar G Services would have really been interested in contesting the bid, it would have offered a bid which would have been at least Rs. 15.00 crores or more than that. Thus collusion between the parties could well be inferred.

48. It may be noted that none of the above bidders, except the 4th Respondent, have been made parties in the writ petition. Therefore, such personal allegations, made against them, cannot be tested behind their back without affording them any opportunity of being heard. Moreover, I do not find it necessary to go into the above controversy, because I have already held that the entire process of selection stands vitiated for want of mandatory notification under Rule 3(2) of the Rules 2010 and on other accounts (supra).

49. For the aforesaid reasons, the writ petition is partly allowed on the following terms:--

"(i) Clauses 4(3)(a)(i) and (iii) of the Sikkim State Lotteries Rules, 2003, as amended by Rules, 2014, are valid and intra vires;

(ii) Rule 3(2) of the Lotteries (Regulation) Rules, 2010 is mandatory and its non-compliance has vitiated the entire proceedings of the lottery undertaken by the State. Therefore, the proceedings undertaken by the State, including the appointment of Distributor, etc. are set aside. If so desired, the State may undertake fresh proceedings by issuing a notification under Rule 3(2) of the Rules, 2010.

(iii) The draws conducted till date, inclusive of 22.06.2015, shall remain unaffected.

(iv) No costs."