

(2012) 06 GAU CK 0015

In the Gauhati High Court

Case No : Writ Petition (C) 6462 of 2011

M/s Big Star G Services Pvt. Ltd.

APPELLANT

Vs

The Bodoland Territorial Council and CAIRS Computer Aided
Information and Research Services Pvt. Ltd.

RESPONDENT

Date of Decision : 27-06-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 226, 299
Contract Act, 1872 — Section 23
General Clauses Act, 1897 — Section 13
Lotteries (Regulation) Act, 1998 — Section 12, 2(i), 3, 4, 4(c)

Citation : (2012) 5 GLT 83

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : I Choudhury, Mr. P.N. Goswami, Mr. N.J. Khataniar and Mr. Puhazh Gandhi, for the Appellant; M Bordoloi Standing Counsel, BTC, Mr. AK Bhattacharyya, Mr. DK Bhattacharyya, A. Deka, T. Talukdar and Mr. AK Choudhury, for the Respondent

Final Decision : Allowed

Judgement

A.K. Goswami

1. This writ petition under Article 226 of the Constitution of India is filed praying for setting aside and quashing the agreement dated 13.6.2011 executed by the Joint Secretary, Bodoland Territorial Council (BTC), i.e. respondent No. 2 with the respondent No. 3 and for restraining the respondent No. 3 and its agents from organizing and conducting lottery business in pursuance of the agreement dated 13.6.2011 with a further prayer for a direction to the BTC authorities to allow the petitioner to operate as a sole distributor of lotteries of BTC in terms of the agreement dated 30.9.2009. The facts, as emerged from the pleadings of the writ petition and the documents, are that the BTC issued a notice on 21.6.2009 in a National English daily newspaper inviting individuals and companies to participate in a bid process for holding of Online lottery of BTC and the petitioner,

namely, M/S Big Star (G) Services Pvt. Ltd., a company registered under the Companies Act, 1956 and one Gi Terminal i-Tech Private Limited, in order to participate in the bid, formed a consortium by an agreement dated 6.4.2009 and participated in the said bid process along with some other bidders. The bid of the consortium formed by the petitioner and Gi Terminal i-Tech Private Limited, having been found to be most responsive, a decision was taken by the authorities of BTC to accept the bid of the petitioner's consortium and a communication was issued on 11.8.2009 in this respect. By the letter dated 11.8.2009, the petitioner was directed to submit financial bid on the holding of Online lotteries. Consequent thereto, rate was offered by the petitioner and the same was accepted by the communication dated 1.9.2009. An agreement for appointment as sole distributor was executed on 30.9.2009 between the BTC and the consortium, describing the present petitioner as "The Lead Member of the Consortium (LM)", and appointing the consortium as the sole and exclusive distributor for a period of five years. The petitioner had deposited Rs. 10 lakhs as per Clause X of the agreement for Paper Lottery and Rs. 15 lakhs for Online Lottery and other games of chance. While the petitioner was conducting the lottery business as the sole distributor by making huge financial investments, the respondent authorities by executing an agreement on 13.6.2011 with the respondent No. 3, appointed the respondent No. 3 as the "Sole selling/buying agent of lotteries (Distributor)" for a term of 10 years, without issuing any notice inviting tenders and without registering the said agreement. It is pleaded that the petitioner came to learn about the said agreement in the second week of December, 2011. It has been asserted in the writ petition that the appointment of the petitioner as the sole distributor as well as the agreement dated 30.9.2009 have not been terminated and even after execution of the agreement with the respondent No. 3, by letter dated 26.8.2011, the respondent No. 2 had conveyed approval of additional cards jokes cards scheme from 6 numbers of draws to 12 numbers of draws. As the respondent No. 3 had contemplated initiation of its operation as the sole distributor of lotteries of BTC, the same prompted filing of the instant writ petition.

2. The respondent Nos. 1 and 2 had filed three affidavits- one affidavit-in-opposition on 9.1.2012 and an additional affidavit on 4.2.2012. One more additional affidavit was filed on 27.03.2012.

3. In the affidavit filed on 9.1.2012, it is pleaded that as per Rule 5 of the Assam State Lottery Rules, 1994, for short, the Rules of 1994, it was permissible to appoint a second distributor and such second distributor was appointed to maximize the revenue collection for development of infrastructure within the BTC area. It has also been stated that though the distributor ought to have conducted 24 numbers of sole and exclusive draws per day, the petitioner was conducting only six numbers of draws per day resulting in a loss of Rs. 1, 80, 000/- per day and therefore, it was decided to allot 12 numbers of sole and exclusive draws to the respondent No. 3 to augment revenue. Statements are also made that the petitioner has failed to deposit revenue since 1st October, 2010 amounting to Rs.

1.44 crores and from 2.10.2011, there was no person manning the office of the petitioner at Kokrajhar. It is also pleaded that as the petitioner got involved in disputes with the customers, the same led to law and order situation. The petitioner was also not conducting lottery from 1.10.2011. A letter dated 22.12.2011 issued by the Joint Secretary, BTC to the petitioner in connection with the aforesaid is also placed on record. In view of Clause of Arbitration in the agreement dated 30.9.2009, plea of non-maintainability of the writ petition is also canvassed. It is asserted, however, that notwithstanding the aforesaid, the petitioner had continued to be distributor of lotteries of BTC.

4. By the additional affidavit filed on 4.4.2012, the respondent Nos. 1 and 2 have placed on record the letter dated 2.1.2012 issued by the authorized signatory of the petitioner informing the respondent No. 2 that the petitioner would like to invoke arbitration as per clause XVIII of the agreement.

5. The petitioner had also filed two reply-affidavits to the affidavits filed by the respondent Nos. 1 and 2. In the reply affidavit filed on 24.1.2012, it is stated that the respondent No. 3 could not have been appointed as the distributor and the agreement dated 13.6.2011 indicates that actually, the respondent No. 3 had been appointed as the sole selling/buying agent. The reliance placed on the Rules of 1994 is also stated to be misconceived and that the Rules of 1994, in any view of the matter, cannot have the force of law. It is asserted in the said reply affidavit that there is a set of Rules, namely, Bodoland Territorial Council Lottery Rules, 2007, for short, the BTC Rules of 2007, which is awaiting assent of the Governor. Though the BTC Rules of 2007 is at a draft stage, the provisions contained in the agreement dated 30.9.2009 demonstrate that the BTC authorities, in the said agreement dated 30.9.2009, intended to effectuate the provisions of the BTC Rules of 2007. It is pleaded that even if the Rules of 1994 and BTC Rules of 2007 confer discretion on the authorities to appoint one or more distributors, the authorities of BTC having invited bids for appointment of a sole distributor of BTC and the petitioner having acted on such a promise, as spelt out in the said notice inviting bids, in view of the principles of promissory estoppel, the BTC authorities could not have appointed a second sole selling agent during the subsistence of the agreement dated 30.9.2009. That apart, it is asserted that Rule 5 of the BTC Rules of 2007, do not confer any jurisdiction upon the BTC to appoint a selling agent and in terms of Rule 2(m) thereof, the distributor/sole distributor could have only appointed a selling agent. Controverting the assertion that the petitioner did not hold 24 draws per day, it is stated that if there was any shortcoming in the functioning of the petitioner, a notice ought to have been issued to the petitioner in terms of the agreement dated 30.9.2009 and the addendum to the agreement dated 21.2.2011. It is also asserted that the petitioner was prevented from selling lottery tickets outside Bodoland area up to February 2011. With regard to the allegation that the petitioner was not depositing revenue since 1.10.2010, it is stated that the respondent Nos. 1 and 2 by letter dated 1.10.2011, had informed the petitioner that the respondent No. 1 had taken a decision to postpone the lottery operation

which necessitated the writ petitioner to issue public notice informing the general public regarding the postponement of lottery operation and that no subsequent communication had been issued permitting the petitioner to recommence its operation. The petitioner has also brought on record a letter dated 3.1.2012 which was issued with reference to the letter dated 22.12.2011.

6. Responding to the additional affidavit filed on 4.2.2012, a reply affidavit was filed by the petitioner on 13.2.2012 stating that the letter dated 2.1.2012 did not have the approval of the management of the petitioner company and in fact, steps were taken by the petitioner by requesting the postal authorities and the DTDC Courier and Cargo Limited not to deliver the said letter to the addressee. While the Postal Department, Government of India returned the letter, the petitioner was also under the impression that DTDC Courier and Cargo Limited would also not deliver the letter to the addressee and therefore, the fact of sending such a letter was not placed on record. It is further pleaded that even otherwise, the said letter dated 2.1.2012 cannot be construed to be a letter invoking arbitration clause.

7. By the additional affidavit filed by the respondent Nos. 1 and 2 on 27.3.2012, Bodoland Lottery Rules of 2007, for short, Lottery Rules of 2007, and the agreement dated 13.6.2011 were brought on record. Statements are also made in the said affidavit that the petitioner had deliberately left out the page containing Clause 1.1.9 up to Clause 1.1.15 in the agreement which was enclosed with the writ petition. It is also stated that upon superannuation of the Secretary of the department, the Joint Secretary, BTC was entrusted with the Department of Lotteries.

8. The respondent No. 3 had also filed an affidavit-in opposition raising a preliminary objection with regard to maintainability of the writ petition in view of Clause XVIII of the agreement dated 30.9.2009. In the said affidavit, plea is taken that the respondent No. 3 was appointed in accordance with the provision with the Lottery (Regulation) Act, 1998, for short, the Regulation of 1998 and the Rules made thereunder, with the objective of raising revenue collection of the BTC. It has also been asserted that after the appointment of the additional distributor in the form of respondent No. 3, the petitioner company and the respondent No. 3 would be entitled to conduct equal number of draws as the maximum number of draws to be conducted is equally divided between the parties. It is asserted that such an arrangement with the respondent No. 3 was made in the interest of the people inhabiting the council area as the respondent No. 3 has vast experience in the field of lottery, Paper Lottery as well as Online lottery and had successfully operated such business in many states. It is stated that the respondent No. 3 has completed necessary formalities and laid down the infrastructure for its operation as the sole selling agent of BTC and demonstration of the lottery was conducted on 26.12.2011.

9. I have heard Mr. I Choudhury, learned counsel for the petitioner. I have also heard Mr. AK Bhattacharyya, learned senior counsel appearing for the respondent

No. 3 and Ms M Bordoloi, learned standing counsel, BTC. I have also perused the materials on record and the records produced by the learned standing counsel, BTC.

10. Mr. I Choudhury, learned counsel for the petitioner submits that an unequivocal promise was made by the BTC authorities to appoint one distributor to act as the sole/exclusive distributor and the petitioner had acted upon such a promise and had made investments of more than Rs. 10 crores and the BTC authorities have now resiled from the promise by entering into an agreement with the respondent No. 3 to the detriment and prejudice of the petitioner. Accordingly, the learned counsel submits that in this case, the doctrine of promissory estoppel is squarely applicable and he places reliance on the following decisions: (i) Union of India (UOI) and Others Vs. Indo-Afghan Agencies Ltd., , (ii) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, , (iii) Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., and (iv) Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., .

11. He further submits that the petitioner has been subjected to unfair and discriminatory treatment and such action of the BTC authority has violated Article 14 and Article 19(1)(g) of the Constitution of India. The learned counsel further submits that on a reading of the letter dated 2.1.2012, it cannot be construed that the petitioner had invoked the arbitration clause, so as to disentitle the petitioner to seek discretionary remedy of this Court under Article 226 of the Constitution of India. He has submitted that in the said letter dated 2.1.2012, no claim was made and no name of arbitrator was also proposed. The claim of Rs. 1.44 crores was totally unjustified as the BTC authority had themselves stopped the lottery operation. The learned counsel submits that, at any rate, in an arbitration proceeding, the petitioner would not be entitled to question/challenge the appointment of the respondent No. 3 as the selling agent and therefore, the writ petition filed challenging the appointment of the respondent No. 3 is maintainable. The learned counsel submits that the petitioner cannot be left without remedy and to fortify this submission, the learned counsel places reliance on the case of Bhagubhai Dhanabhai Khalasi & Anr, reported in (2004) 4 SCC 241 . The learned counsel also lays emphasis that the letter dated 2.1.2012 did not have the sanction of the management of the Company. The learned counsel asserts that in the facts and circumstances of this case, the draft BTC Rules of 2007 is only applicable and therefore, the BTC had no jurisdiction to appoint selling agent. With regard to the applicability of the draft Rules, the learned counsel places reliance upon the cases of (i) Vimal Kumari Vs. The State of Haryana and Others, , (ii) Abraham Jacob and Others Vs. Union of India, , (iii) Union of India (UOI) through Govt. of Pondicherry and Another Vs. V. Ramakrishnan and Others, and (iv) S.M. Nilajkar and Others Vs. Telecom, District Manager, Karnataka, . The learned counsel also places reliance on the decisions of the Apex Court in (i) Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , (ii) Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, (iii) Union of India (UOI) and Others Vs. Tania Construction Pvt.

Ltd., and (iv) Karnataka State Forest Industries Corporation Vs. Indian Rocks, to fortify his argument that the plea taken by the respondents that the writ petition is not maintainable is only misconceived. Reliance placed by the BTC authorities on the Rules of 1994 is also misconceived, Mr. Choudhury submits. On the number of draws to be conducted, the learned counsel submits that in the Rules of 2010, there is only provision of maximum number of draws per day and in the agreement dated 30.9.2009 or in the addendum agreement dated 21.2.2011, there was no stipulation with regard to the number of draws that are to be conducted by the petitioner. That apart, there was also no communication to the petitioner to conduct any fixed number of draws and it was only on 26.8.2011 that the BTC authorities had asked the petitioner to increase the number of draws from 6 to 12. Mr. Choudhury also contends that the letter dated 22.12.2011, wherein certain allegations were leveled against the petitioner, was clearly an after thought, the same having been issued after the writ petition was filed on 19.12.2011 and after this Court on 22.11.2011 had passed an order directing the BTC authorities to maintain status quo. The learned counsel submits that undue favour has been bestowed on the respondent No. 3 by executing an agreement with it to conduct lottery operations without following any transparent process and such action had been taken in colourable exercise of power, on the basis of an application of the respondent No. 3 addressed to an unknown authority in the hierarchy of BTC administration. That the interest of the respondent No. 3 is sought to be sub served is also highlighted by the fact that the very basis on which the agreement was executed is fallacious inasmuch as, if the petitioner and the respondent No. 3 are to conduct equal number of draws, Annexure-A of the agreement dated 13.6.2011 could not have depicted a picture of the revenue payable by respondent No. 3 as Rs. 8, 76, 00, 000/-, which figure was arrived at basing on 24 numbers of draws assured per day at the rate of Rs. 10, 000/- per draw per day. He concludes his submissions by submitting that the agreement with the respondent No. 3 having been executed by the Joint Secretary, BTC, the same cannot withstand the scrutiny of law in view of Rule 3(13) of the Rules of 2010. In this connection, the learned counsel places reliance upon Director General, E.S.I. and another Vs. T. Abdul Razak, etc., and Anirudhsinhji Jadeja and another Vs. State of Gujarat, .

12. Ms Bordoloi, learned counsel for the respondent Nos. 1 and 2 submits that though letter dated 1.10.2011 was issued to the petitioner informing him the decision of the authorities to postpone the operation of the Bodoland Lottery within the BTDA area, the petitioner had not challenged the said action at any point of time. With reference to the letter dated 22.12.2011 issued by the respondent No. 2, the learned counsel submits that no revenue was paid by the petitioner on and from 1.10.2011 and as non payment of Rs. 1.44 crores had been viewed very seriously, by the said letter, the petitioner was directed to deposit the amount immediately without fail. It is also submitted by her that the decision to postpone the online lottery was prompted by the law and order situation created because of the dispute of the petitioner with the customers in

the last week of September, 2011. Though letter dated 26.8.2011 was issued increasing the number of draws from 6 to 12 numbers of draws, the petitioner never conducted 12 draws. The learned counsel submits that both the petitioner and the respondent No. 3 were conducting lottery and the petitioner had chosen to approach this Court at a belated stage and, therefore, this Court may not invoke its extra-ordinary jurisdiction. She submits that there is no distinction between the distributor and the selling agent in terms of Rules of 2010 and Rule 5 of the Lottery Rules of 2007 provides that the council may appoint one distributor or more on such terms and conditions as may be agreed upon between the distributor and the council. It is submitted by her that the word "sole distributor" appearing in the agreement dated 30.9.2009 was not preceded with the word "only" and therefore, it is permissible to have many distributors. She is emphatic in her submission that if the authority wants to have only one seller/distributor, then the agreement must indicate the appointment of distributor as "only sole distributor" and this being not the case in the instant case, the petitioner cannot question the BTC authority for appointing the respondent No. 3 as no legal right of the writ petitioner has been infringed. The learned counsel, in support of her submissions, relies on the decision rendered by this Court in the case of Limras Lottery and Trading Company (P) Ltd. Vs. N.V. Marketing Pvt. Ltd. and Others, . It is also submitted by her that there is no such Rule called Online Bodoland Lottery Rules, 2006 as appearing in the agreement dated 30.9.2009 and the same was incorporated due to bonafide inadvertence. Referring to the stand taken in the affidavits, the learned counsel submits that Joint Secretary is competent to execute the agreement with the respondent No. 3.

13. Mr. AK Bhattacharyya, learned senior counsel for the respondent No. 3 submits that the pleading is completely bereft in the writ petition to invoke the extra-ordinary jurisdiction under Article 226 of the Constitution of India. There is no pleading whatsoever with regard to the foundational facts required for invoking the doctrine of promissory estoppel. He has contended that in exercise of powers under Article 226 of the Constitution, the High Court examines the decision making process and not the decision. There is no challenge in the writ petition to the decision making process culminating in issuance of an order and what is challenged in the writ petition is an agreement which can be set aside only if the same is vitiated u/s 23 of the Contract Act, 1872. The learned senior counsel submits that there being efficacious alternative remedy available to the writ petitioner and the petitioner having expressed the intention to invoke arbitration, this court ought to decline to invoke the extra-ordinary jurisdiction.

It is also submitted by him that the submissions of the learned counsel for the petitioner that the impugned action of the BTC authorities has infringed Article 19(1)(g) of the Constitution of India is not tenable because Article 19(1)(g) is not applicable to a company. Though the learned senior counsel had tried to invoke the doctrine of proportionality in his initial stage of argument, he had ultimately given up contending that the doctrine is not attracted in the facts of

the case. It is submitted by him that letter dated 1.10.2011 postponing all kinds of drawing of lotteries was issued by the Joint Secretary, BTC and at no time, the petitioner had raised any issue contending that he had no jurisdiction to issue such letter and therefore, argument advanced that Joint Secretary, BTC was not competent to execute the agreement with the respondent No. 3 is without any merit. The learned senior counsel places reliance on the judgments of the Apex Court in (i) Radhakrishna Agarwal and Others Vs. State of Bihar and Others, (ii) Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, (iii) Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., (iv) New Era Fabrics Private Limited and Another Vs. Assam Industrial Development Corporation and Others, (v) Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, (vi) State of Arunachal Pradesh Vs. Nezone Law House, Assam, and (vii) Limras Lottery and Trading Company (P) Ltd. Vs. N.V. Marketing Pvt. Ltd. and Others, .

14. Before the contentions of the learned counsel for the parties are considered, it is appropriate to refer to the relevant provisions of the agreements as well as the Rules and Regulations, which have been referred to by the learned counsel for the parties during the course of the proceedings.

Section I of the agreement dated 30.9.2009 is the definition section and Clauses 3, 13 and 14, appearing thereunder, are quoted below:

"3. "Sub Distributor/Sub-Agent/Retailer" shall mean, the entity (a person, proprietary firm, a partnership firm or company) appointed by the Distributor for selling, distributing and marketing of lottery tickets and online games through network of retail agents.

13. "Rules" means the Lottery Regulation Act, 1998 regulated by central govt. and the Council's rules pertaining to lottery as amended from time to time and also rules pertaining to online games, if any.

14. "Distributor" in this agreement, means a company (ies) or firm(s) or person(s) or the consortium of any/all of the entities mentioned earlier represented by its lead member appointed by the Council as Distributor to market the lotteries and chance based games on behalf of the Council with whom the Council has entered into an agency agreement.

Section II under the heading "Appointment" provides that the BTC had appointed the consortium represented by the lead consortium member i.e. the petitioner, as its exclusive and sole distributor. Section IV deals with termination of agreement and, amongst others, it provides that if there is any breach of agreement by the Distributor or there are any complaints of serious irregularities of bringing disrepute to the council, it shall be deemed as a breach of agreement by the Distributor and if the breach has not been rectified within 150 days of the council bringing the breach to the notice of the distributor in writing, the council may proceed for termination of the agreement. Section IX under the heading "Tickets", amongst others, provides that lottery tickets shall be printed in accordance with the provisions of Rule 9 of the BTC Lottery Rules.

Section XIII under the heading "Responsibilities of the Distributor" provides that the distributor shall be responsible for marketing of online lotteries of the Council under the provisions of the Lotteries (Regulation) Act, 1998 and BTC Rules. Section XVI under the heading "Relationship between the Distributor and the Council" provides that the relationship between the Distributor and the Council will be one of "Buyer" and "Seller" as defined in the Indian Contract Act, 1872 as amended and shall be governed by the Lottery (Regulation) Act, 1998 and Bodoland Online Lottery Rules, 2006.

Section XVIII is the section relating to arbitration and same is reproduced herein below:

All the disputes and differences arising between the parties hereto, including any dispute or difference in regard to the interpretation of any provision or term or the meaning thereof, or in regard to the rights and obligations of any parties hereto under this Agreement or otherwise, howsoever, which cannot be resolved mutually shall be referred to arbitration. One arbitrator each be nominated by the Council and Big Star and the third arbitrator shall be appointed by the two Arbitrators. Such arbitration shall be governed by the provisions of the Arbitration and Conciliation Act, 1996 for the time being in force. The venue of the Arbitration shall be at Guwahati and the language of arbitration shall be in English. The decision of the said Arbitrators shall be final and binding on both the parties.

15. It will be also relevant to take note of the agreement dated 13.6.2011 entered into between the BTC authorities and the respondent No. 3. Section 1 is relating to "Definitions and Interpretations" and Clause 1.1.14 thereto stipulates that "Rules" shall mean the Lottery (Regulation) Rules, 2010. "Sole Selling Agent" at Clause 1.1.15 provides that the same shall mean the natural or juristic person/company and in the case in hand, the respondent No. 3, who was appointed for the purposes of purchasing lottery tickets etc. Clause 2.1 in Section 2 under the heading "Appointment and Term of Sole-Distributor/Selling Agent", the respondent No. 3 was appointed as the Sole Selling Agent for the distribution and sale of lottery tickets. Clause 10.1 u/s 10 relating to "Termination" provides that the agreement, unless renewed, is to stand automatically terminated by efflux of time at the end of 10 years from the date of signing the agreement. Annexure-A in terms of Clause 4.4, providing for minimum Guaranteed Revenue, reads as follows:

The minimum Guaranteed Revenue payable by CAIRS to the Government in terms of clause 3(10) of the Rules is as under:

Number of Draws Assured per day

Up to a max of 24 numbers

Amount assured per Draw per Day

INR 10,000/-

Total Revenue Assured per year on

24 Draws per day basis

INR 8,76,00,00,000/-

(Rupees eight crores and seventy six lakhs only)

The said agreement was executed for and on behalf of the BTC by the Joint Secretary, Lottery, BTC.

16. It will be also relevant to notice some of the provisions of the Lottery (Regulation) Act, 1998 :

3. Save as otherwise provided in section 4, no State Government shall organize, conduct or promote any lottery.

4. Conditions subject to which lotteries may be organized, etc.- A State Government may organize, conduct or promote a lottery, subject to the following conditions, namely:

.....

(c). The State Government shall sell the tickets either itself or through distributors or selling agents;

Rules 11 and 12 enable the Central Govt. and the State Govt, respectively, to make Rules by notification in the Official Gazette to carry out the provisions of the Act.

17. Under the Lottery (Regulation) Rules, 2010, distributor or selling agent has been defined in Rule 2(c) and the same reads as under:

2(c)-"distributor or selling agent" 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 3(6) thereto provides that number of draws except bumper draw by an organizing state, from all the lottery schemes put together, shall not be more than 24 per day.

Rule 3(13) provides that the organizing State shall designate an officer, not below the rank of the Secretary, as the designated authority, who shall be responsible for organizing the lottery in the State. Organising State in terms of Rule 2(f) means the State Government which conducts the lottery either in its home territory or sells its tickets in the territory of any other State.

Rule 3(15) provides that in cases where an Organising State appoints or authorizes distributors or selling agents, it shall be the responsibility of the Organising State to ensure that the said distributors or selling agents act in conformity with the provisions of the Act and these rules.

18. As the learned counsel for the petitioner had referred to BTC Rules of 2007, it is also considered appropriate to take note of the relevant provisions:

Rule 2(k) defines distributor to mean a party, person, firm or company with whom an agreement for distribution of lottery tickets is executed. The term selling agent is defined in Rule 2(m) to mean a firm, a company or any person(s) with whom the distributor, sole distributor or stockists entered into an agreement for retail sale of lottery ticket to the public or people. Rule 4 provides for appointment of distributor(s) and the same reads as follows:

4. The Council may, by floating tenders or by way of direct settlement appoint person or persons, Company, firm having at least ten years experience in running lotteries for a specified period as determined by the Council in accordance with the terms and conditions as determined by the Council.

Rule 5 provides for appointment of stockist or selling agent and the same reads as follows:

5. The Distributor(s) so appointed under the aforesaid clause may appoint Stockists, Selling Agents to sell Lottery tickets to the Public. The list of such stockists or Selling Agents with necessary particulars, address etc. shall be submitted to the Director along with the scheme.

Rule 20 of the said Rules provides for arbitration in case of any difficulties or disputes between the distributor and the council or between the council and the selling agent on any matter or arising out of an agreement relating to the conduct of lotteries of the BTC.

19. The reference to the Rules will not be complete unless provisions relevant for the purpose of this case, as it find place in the Assam State Lottery Rules, 1994, are not taken note of.

The definition of agreement, distributor, lottery as defined in Section 2(a), (c) and (e) are reproduced herein below:

2(a) "Agreement" means an agreement signed between the Government of Assam through the Director of State Lotteries of Government of Assam with any other person, firm, company etc., for selling or printing the tickets of Assam State Lottery:

2(c) "Distributor" means a person or firm or company which is engaged by an agreement for selling tickets, under definite terms and conditions approved by the Government;

2(e) "Lotteries" means Assam State Lotteries; Rule 5 that provides for appointment of distributor is also relevant and the same is quoted herein below:

5(1) The Government may appoint one Distributor or more under such terms and conditions as may be agreed upon between the Distributor and the Government which shall be in the procedure of payment of sale proceeds of tickets. The State

Lottery tickets shall normally be made available to the public/subscribers through the Distributor or through such other channel as may be decided from time to time by the Government. The Government also reserves the right to sell tickets direct to the public through departmental arrangement.

5(2) Whenever any fresh appointment of any distributor is required to be made, the Government may make the selection by inviting the tender. Past experience and performance as a distributor in State lotteries of any Government and financial standing of the tenderer shall be taken into consideration by the Government in making the selection.

20. Relevant provisions of one more Rule, namely, Bodoland Lottery Rules, 2007 are also required to be taken note of. Distributor under the said Rules is defined in Rule 2(c) to mean a person, firm or company which is engaged by an agreement for selling tickets under definite terms and conditions approved by the council.

Rule 5 provides for appointment of distributor and the same is quoted herein below:

5(1) The Council may appoint one Distributor or more under such terms and conditions as may be agreed upon between the Distributor and the council, which shall be in the procedure of payment of sale proceeds of tickets. The Lottery tickets shall normally be made available to the public/subscribers through the Distributor or through such other channel as may be decided from time to time by the Council. The Council also reserves the right to sell tickets direct to the public through departmental arrangement.

5 (2) Whenever any fresh appointment of any distributor is required to be made, the Council may make selection by inviting the tender. Past experience and performance as a Distributor in State lotteries of any Government and financial standing of the tenderer shall be taken into consideration by the Council in making the selection.

Rule 14 and 17(ii) of the said Rules are also relevant and the same are quoted herein below:

14. There shall be an arbitration clause in the Agreement.

17(ii) The Distributor may appoint stockiest (s)/selling agent(s) in any State, where the sale of ticket is permissible but he shall furnish the details of such stockiest (s) and selling agent(s) to the Director.

21. As the learned counsel for the respondents have raised the question of maintainability of the writ petition on the ground of alternative remedy being available and also in view of the provision of arbitration in the agreement dated 30.09.2009, it will be appropriate, at the outset, to consider the question of maintainability of the writ petition.

22. In Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and

Another, , the Supreme Court, while examining the nature and scope of Article 226 of the Constitution of India, at paragraph 4 laid down as follows:

This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Art. 226 of the constitution with that of the English Courts to issue prerogative writs is to introduce the Unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government into a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that the High Courts can function arbitrarily under this article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels.

23. In the context of contentions advanced that the State, acting in its executive capacity through its Government or its officers, even in the contractual field, cannot escape the obligations imposed upon by Article 14 of the Constitution, in Radhakrishna Agarwal (supra), the Supreme Court held that at the very threshold or at the time of entry into the field of consideration of persons with whom the Govt. would contract at all, the State acts in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of this Constitutional powers. It is also held that if the State or its agents have entered into ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se and in such situation, no violation of Article 14 or any other constitutional provisions arises when the State and its agents perform any act within this field. The Supreme Court also held that for the adjudication of a question where Article 14 of the Constitution can possibly be said to have been violated as between persons governed by some similar contracts, they must be properly put in issue and established. In the facts of the case, the Apex Court held that the allegations are of such a nature that the issues could not be decided without a detailed adduction of evidence, which is only possible in ordinary civil suits, to establish that the State, acting in its executive capacity through its officers, has discriminated between parties identically situated.

24. In *Whirlpool* (supra), the Supreme Court pointed out that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution and this power can be exercised by the High Court not only for issuing writ in the nature of habeas corpus, mandamus, prohibition, quo warranto and Certiorari for the enforcement of any of the fundamental rights but also for any other purpose. It has also been laid down that under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. However, there are certain restrictions in the exercise of such powers and one of such restrictions is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. It has also been pointed out that availability of alternative remedy will not operate as a bar in cases where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principles of natural justice or where an order or proceeding is wholly without jurisdiction or where the virus of the Act is challenged.

25. In *Harbanslal* (supra), the Apex Court had observed that rule of exclusion of writ jurisdiction in view of availability of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its writ jurisdiction in the contingencies as indicated in *Whirlpool* (supra).

26. In *Indian Rocks* (supra), the Apex Court had laid down that although ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable.

27. In *Tantia Construction* (supra), the Supreme Court reiterated the proposition that alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court and that without exhausting of such alternative remedy, a writ petition would be maintainable. The Apex Court also laid down that the constitutional powers vested in the High Court or the Supreme Court cannot be fettered by any alternative remedy available to the authorities and injustice, whenever and wherever it takes place, has to be struck down as anathema to the rule of law and the provisions of the Constitution.

28. In *Kerala State Electricity Board* (supra) the Supreme Court stated as follows:

11. A statute may expressly or impliedly confer power on a statutory body to enter into contracts in order to enable it to discharge its functions. Dispute arising out of the terms of such contracts or alleged breaches have to be settled by the ordinary principles of law of contract. The fact that one of the parties to the agreement is a statutory or public body will not by itself affect the principles to be applied. The disputes about the meaning of a covenant in a contract or its enforceability have to be determined according to the usual principles of the

Contract Act. Every act of a statutory body need not necessarily involve an exercise of statutory power. Statutory bodies, like private parties, have power to contract or deal with property. Such activities may not raise any issue of public law. In the present case, it has not been shown how the contract is statutory. The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract. Whether any amount is due and if so, how much and refusal of the appellant to pay it is justified or not, are not the matters which could have been agitated and decided in a writ petition. The contractor should have been relegated to other remedies.

29. The agreement dated 30.9.2009 recites, amongst others, that the council has decided to appoint the consortium as its sole and exclusive distributor for marketing, selling and distributing the council's lotteries within the Bodoland as well as in other States in India. The agreement was for a period of five years which may be extended for another term of five years based on a written letter. The decision to appoint the consortium as the sole and exclusive distributor was accepted by the consortium. After accepting the offer, consortium invested in the infrastructure required for marketing and distributing of the council's lottery tickets and online games in Bodoland as well as in rest of the country.

30. By the letter dated 22.12.2011, which was a letter issued in response to a letter issued by the petitioner asking explanation for the postponement of Bodoland Lotteries, it was informed to the petitioner that the BTC had not received required revenue and share of BTC's revenue since 1.10.2010 amounting to Rs.1.44 crores had not been paid. It was also indicated that dispute of the petitioner with the customers led to a law and order situation which forced the BTC to postpone Online Bodoland Lotteries until further orders. Letter dated 2.1.2012 was written by the petitioner in response to the said letter. A perusal of the said letter indicates that the petitioner was hearing news of BTC exploring ways of appointing a new distributor and that appointment of the new distributor had caused loss of business and embarrassment and in the context of the loss suffered, a question was posed as to how BTC expected settlement of amount as claimed by it and in the said backdrop, it is stated that the petitioner would like to invoke arbitration as per Clause XVII of the agreement dated 30.09.2009. The stand taken in this proceeding by the petitioner is that the petitioner had requested the postal authorities and the courier not to deliver the letter, but the courier had, apparently, delivered the letter to the BTC. A letter dated 3.1.2012 was issued as a reply to the letter dated 22.12.2011. In this letter, apart from other aspects, it is contended that based on the representation that the BTC would be strictly abiding by the sole distributor agreement, the petitioner was persuaded to invest heavily to set up and develop the infrastructure. Both the letters dated 2.1.2012 and 3.1.2012 were issued subsequent to the filing of the writ petition on 20.12.2011. Even assuming that

the letter dated 2.1.2012 having reached the addressee, the petitioner is bound by the statements made in the said letter, it appears that forum of arbitration was referred to in connection with the amount claimed by the BTC, which is not the subject matter of dispute in this writ petition. There is another dimension in the matter i.e. appointment of the respondent No. 3 as sole distributor/selling agent by the agreement dated 13.6.2011, which is under challenge in this writ petition. Respondent No. 3 is not a party to the agreement dated 30.9.2009 and therefore, considering the nature of the controversy, this court is of the considered opinion that arbitration proceeding as envisaged in the agreement dated 30.9.2009 cannot be construed to be an equally efficacious alternative remedy available to the petitioner. It may be correct, as contended by the learned senior counsel for the respondent No. 3 that the cause of action has arisen out of a contract. It is on this premise that the learned senior counsel has also submitted that this court may not invoke its writ jurisdiction. The activity of distribution, marketing and selling of lottery tickets of the State organized lottery is permissible only in terms of the Lotteries (Regulation) Act, 1998 and the Rules framed thereunder, if any, and therefore, the impugned action, relatable to the agreement, is traceable to the provisions of the Lottery (Regulation) Act, 1998. In view of the judgments of the Apex Court noted above, it is difficult to hold that the impugned action is a matter purely in the realm of contract and therefore, I am of the opinion that the impugned action is amenable to judicial review of this court under Article 226 of the Constitution of India. This court is of the considered opinion that it cannot be said by reason of the issuance of the letter dated 2.1.2012 and because of provision of arbitration provided for in the agreement dated 30.9.2009, that this writ petition is not maintainable in law and accordingly, the contention that the writ petition is not maintainable is found to be without merit.

31. In the agreement dated 30.9.2009, reference was made to BTC Rules, 2007 in Section IV and Section XIII and to the Bodoland Online Lotteries Rules, 2006. There was no reference to Lottery Rules of 2007 in the agreement. In the additional affidavit filed on 27.3.2012 it has been stated that BTC Rules, 2007 was not passed by the Council Assembly and the Lottery Rules of 2007, though passed by the BTC Legislative Assembly, was awaiting assent of the Governor. In the said affidavit, reliance has been placed on Rule 5 of the said Lottery Rules of 2007. In the affidavit filed on 9.1.2012 by the respondent Nos. 1 and 2, reliance on Rule 5 of Lotteries Rules, 1994 was placed to justify that the Government may appoint one or more distributors and therefore, there is no illegality in appointing a second distributor for the purpose of maximizing revenue collection. In the last affidavit dated 27.3.2012, no reference has been made to the Lotteries Rules, 1994 and to advance the very same proposition, reliance on Rule 5 of the Lottery Rules of 2007 was placed. In spite of filing three affidavits, the BTC authorities did not spell out clearly which Rule it was following. It surely reflects very poorly on the administration. It would appear that the respondent Nos. 1 and 2 had abandoned reliance on Lotteries Rules, 1994, after the writ petitioner had, in its

affidavit-in?reply dated 24.1.2012, questioned the application of Lotteries Rules, 1994, which was an enactment of the State of Assam prior to coming into force of Lotteries (Regulation) Act, 1998. During the course of hearing also, Ms. Bordoloi had only referred to Lottery Rules of 2007. The writ petitioner, on the other hand, had placed reliance on BTC Rules, 2007 as the draft Rule which had been acted upon, in order to buttress the contention that it is the distributor under Rule 5 of the said Rules who can appoint stockists, selling agents. In Rule 17 of the Lottery Rules of 2007 it is also provided that distributor may appoint stockists/selling agents. Rule 5 of the Lotteries Rules, 1994 and Lottery Rules of 2007 is *pari materia* with the word "Government" in the former Rule being replaced by the word "Council" in the latter Rules as well as the word "The State Lottery Tickets" in the former being replaced by "The Lottery Tickets".

32. In *Bimal Kumari* (supra) the Supreme Court had laid down that draft rules cannot be treated to be rules made under Article 309 of the Constitution of India and cannot legally exclude the operation of any executive or administrative instruction on the subjects covered by the draft rules nor can such draft rules exclude the jurisdiction of the government or for that matter, any other authority, including the appointing authority, from issuing executive instruction for regulating the conditions of service of the employees working under them. It is also held that it is always open to the government to regulate the service conditions of the employees for whom the rules are made even in their draft stage provided there is clear instruction on the part of the government to enforce those rules in near future and recourse to such draft rules is permissible only for the interregnum to meet any emergent situation.

33. In *Abraham Jacob* (supra), the Supreme Court laid down that it is too well settled that the service conditions of employees in the absence of statutory rules could be governed by administrative instructions.

34. In *V Ramakrishnan* (supra), the Apex Court laid down that draft rules can be acted upon to meet urgent situation when no rule is operating. In *Gujarat Kisan Mazdoor Panchayat* (supra), the Apex Court stated that draft Rules which are made to lie in nascent state for a long time cannot be the basis for making appointment or recommendation and that Rules even in their draft stage can be acted upon provided there is clear intention on the part of the government to enforce those rules in near future.

35. The records produced by BTC leave a lot to be desired. The records are not found to be systematically arranged and pages are also not found in uniform chronological order. In the record produced by the BTC in File No. BTC/Lottery/27-2010, in the context of the proposal submitted by the respondent No. 3 addressed to "The Chief", BTC, for appointment as an exclusive and sole distributor of lotteries organized and promoted by the BTC, reliance has been placed in the note sheet, on Lottery Rules of 2007. It is also indicated there that the agreement entered into with the consortium was subject to the provisions of Lottery Rules of 2007 though the Rules was not assented to by the Governor. As

the BTC Rules, 2007 was not even passed by the BTC, it cannot be said that the same was a draft rule of BTC. As such, contention of Mr. Choudhury that Rule 5 of BTC Rules provides for appointment of selling agent only to the distributor and as such, the appointment of respondent No.3 is illegal, has no substance. May be, because of reference to BTC Rules, 2007 in the agreement dated 30.9.2009, Mr. Choudhury had assumed that BTC Rules, 2007 was the draft Rule instead of Lottery Rules of 2007, which had been passed by the Council. In the aforesaid background, it appears to this Court that a conscious decision was taken by the BTC authorities to follow the Lottery Rules of 2007.

36. In the note addressed to the Chief, EM in-charge, P. Secretary, prepared by the Secretary on 29.10.2010, it was indicated that on the basis of the papers submitted by the respondent No. 3, its present status of conducting the Nagaland State Online Lotteries as sole distributor could not be established. It was noted that respondent No. 3 had assured the maximum revenue of Rs. 8.76 crores per annum. It is also indicated that the writ petitioner was appointed as the sole and exclusive distributor for marketing, selling and distributing the council's lotteries within the Bodoland territory as well as other States of India for a period of five years. Referring to Rule 5 of the Lottery Rules of 2007, it was indicated that whenever any fresh appointment of distributor is required to be made, the council may make selection by inviting tenders. There is also a note dated 16.3.2011 of the Secretary to invite the respondent No. 3 for discussion with reference to the application submitted by it for appointment as exclusive sole distributor of the lotteries organized and promoted by the BTC. From the note dated 28.3.2011 of the Executive Member, in-charge Lottery, it appears that a meeting was held with some representatives of the respondent No. 3 and a proposal was placed before the "Chief" for appointment of respondent No. 3 as sole, exclusive distributor of BTC Lotteries and the same was approved on 29.3.2011 itself. Thereafter also, the Secretary had put a note to the Chief, EM in-Charge, Lottery and P. Secretary drawing attention of Rule 5 of the Lottery Rules of 2007 which provided for floating of tenders whenever any fresh appointment of distributorship is made. The tenor of the said note indicates that the matter should be reconsidered. It would appear that the P. Secretary had also agreed with the view of the Secretary, Lottery that bid/open tender for running of lotteries was required to be issued. However, approval dated 14.6.2011 was given to the effect that both the petitioner and the respondent No. 3 may be allowed to run the Bodoland lotteries. The agreement made between the respondent No. 3 and the BTC was approved by the "Chief" on 14.6.2011.

37. It appears that before the agreement was approved on 14.6.2011, it was executed on 13.6.2011. There is, of course, an overwriting in the date of approval of the agreement.

38. At this juncture, the objection of Mr. Choudhury that the proposal of respondent No.3 was submitted before an unknown authority may be disposed of. The proposal was submitted to "The Chief", BTC and the records indicate that

the Chief Executive Member, BTC is addressed as "The Chief" in the note sheets and therefore, the submission lacks substance.

39. The agreement dated 13.6.2011 was signed by Sri Ranjit Kalita, Joint Secretary, BTC for and on behalf BTC. In the body of the agreement it is indicated that the agreement was executed between BTC, through Mr. Ranjit Kalita, Secretary, Lotteries. The learned counsel for the petitioner had submitted that in view of Rule 3(13) of the Lotteries (Regulation) Rules, which required that there shall be an officer not below the rank of Secretary to be designated by the Organising State as the designated authority, who shall be responsible for organizing the lottery in the State, the execution of the agreement on behalf of the BTC by the Joint Secretary is illegal and without jurisdiction.

40. In *Director General, ESI & Anr. -Vs- T. Abdul Razak*, reported in (1996) 4 SCC 708, the Apex Court laid down as follows:

14. The law is well settled that in accordance with the maxim *delegatus non potest delegare*, a statutory power must be exercised only by the body or officer in whom it has been confided, unless sub-delegation of the power is authorised by express words or necessary implication

41. In *Anirudhsinhji Karansinhji Jadeja & Anr.Vs. State of Gujarat*, reported in (1995) 5 SCC 302, the Supreme Court stated as follows:

13. It has been stated by Wade and Forsyth in *Administrative Law*, 7th Edn. at pp. 358-359 under the heading "Surrender, Abdication, Dictation" and sub-heading "Power in the wrong hands" as below:

Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least in part, by the wrong authority, and the resulting decision is *ultra vires* and void. So strict are the courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them

Ministers and their departments have several times fallen foul of the same rule, no doubt equally to their surprise.

42. The letter dated 7.6.2011 issued by the Secretary, BTC indicates that on superannuation of one A.K. Boruah, ACS, Secretary, BTC, Ranjit Kalita, Joint Secretary, BTC, was entrusted with the Department of, amongst others, Lottery for smooth functioning of departmental works. There is no averment in the pleadings of the writ petitioner that he has been designated as designated authority. There is also no allegation that there is no designated authority or that the designated authority had abdicated his power and therefore, the cases cited

by the learned counsel for the petitioner are not found applicable in the facts of this case. The records reveal that the agreement was approved at the highest level of BTC and therefore, this Court is unable to accept the contention of the learned counsel for the petitioner that the agreement is liable to be invalidated by reason of the Joint Secretary, BTC executing the agreement.

43. By the notice inviting bids dated 16.06.2009, the BTC invited bids to act as sole distributor of BTC for the BTC Lottery. The said notice was published, according to the petitioner, on 21.06.2009 and accordingly, on being selected on a bidding process, an agreement styled as "agreement for ppointment of sole distributor" was executed by the BTC authorities with the petitioner on 30.9.2009. A perusal of the said agreement shows that the petitioner was appointed as BTC's sole and exclusive distributor for marketing, selling and distributing the Council's Lotteries within the Bodoland territories as well as the other states in India for a period of 5 years. The petitioner had also accepted to invest in infrastructure required for marketing and distribution of the Council's Lottery tickets and Online games in Bodoland as well as the rest of India. The agreement also recites that as the agreement envisaged substantial investment, the agreement shall be exclusive for appointment of distributors for the selling and distribution of the lottery tickets and Online games for a period of 5 years.

44. In Cambridge dictionary the meaning of sole is described as "being one only; single". Sole also means that only one person or organization is involved in an activity. In Oxford dictionary, sole means: 1) sole amongst other means solitary, lonely; secluded, 2) being, or consisting of, one person only, 3)in predicative or quasi-advb. use : With no other person or persons; without participation, etc., in something, 4) one and only, singular, unique, unrivalled, 5) of things, rights, duties, etc.: Pertaining or due to, possessed or exercised by, vested in, etc., one person or corporate body to the exclusion of all others; exclusive, 6) Uniform or unvaried, 7) of things, qualities, etc.: Standing alone.

45. In Limras Lotteries (supra) a Division Bench of this court had occasion to consider the meaning of the expressions "sole distributor" and "sole distributors" as appearing in the Arunachal Pradesh State Lotteries Rules, 2001. The appeal was preferred against a judgment and order of a learned Single Judge whereby the agreement dated 25.02.2002 entered into between the State respondents and the appellant appointing the latter as a distributor had been set aside.

46. The State of Arunachal Pradesh had entered into an agreement with M/s N.V. Marketing (P) Ltd., the petitioner, as its distributor by an agreement dated 10.10.1997 for a period of 5 years and in Clause (4) of the said agreement, it was mentioned that all the lotteries of the Government of Arunachal Pradesh covering the period of the agreement are to be distributed through the writ petitioner only. The case of the petitioner was that the writ petitioner was appointed as the sole distributor and it had created a nationwide infrastructure investing huge amount of money. In the meantime, Lotteries (Regulation) Act, 1998, had come into force w.e.f. 2.10.1997. In exercise of powers conferred by

Section 12 of the Lotteries (Regulation) Act, 1998, Arunachal Pradesh State Lotteries Rules, 2001 was framed and that came into effect with immediate effect. The terms of the agreement with the petitioner was extended by appointing the writ petitioner as the sole distributor.

47. The observations of this Court in paragraphs 32, 34 and 37 are relevant and the same are quoted herein below :

32. It is note worthy that on the body of the Rules both the expressions "Sole Distributor" and "Sole Distributors" appear. Does the expression "Sole Distributor" connote a lone or only Distributor for the purpose of Arunachal Pradesh State Lotteries in terms of the Rules" The answer according to us lies in the correct interpretation of the word "Distributor" appearing in Section 4(c) of the Act and the expression "Sole Distributor" used in the Rules.

.....

34. The Rules as noticed hereinabove have been framed in exercise of the powers u/s 12 of the Act and have been framed for carrying out the purpose of the Act. It is in the form of a subordinate legislation and, therefore, cannot supplement any provision of the Act. Rather it has to be subservient to the Act and in tune with it. The legislature in its wisdom has used the word "Distributors" (emphasis supplied), in Section 4 (c) of the Act. Under the said clause, State Government has been mandated to sell tickets of a State organized lottery either by itself or through Distributors or Selling Agents. The word "Distributors" has been used evidently in the plural number. Section 13 of the General Clause Act, 1987, lays down that all the Central Acts and Regulations unless their is anything repugnant in the subject or context the words in singular shall include the plural and vice versa. On reading of the provisions as a whole, we do not find any repugnancy in the subject or context in construing the word "Distributors: used in the Section 4(c) to include the word "Distributor" in singular. In other words, we are of the view that the word "Distributors" used in Section 4(c) of the Act envisages "Distributor" as well. As noticed hereinabove, the expression "Sole Distributor" defined in Section 2(i) means the firm or party with whom the agreement for distribution of lottery tickets is executed. Rule 4 deals with the appointment of "Sole Distributor" requiring that the Government may appoint a person or persons or firm having at least three years of experience in running lotteries as the "Sole Distributor". A combined reading of the definition of the expression "Sole Distributor" and Rule 4 of the Rules makes it sufficiently clear that more than one person can be appointed as the "Sole Distributor" for the purpose of marketing, distribution and sale of lottery tickets for the Arunachal Pradesh State Lotteries. The expression "Sole Distributor" as defined under the Rules, however, does not indicate in any way that the person or persons, firm or party appointed as such would enjoy the exclusive distributorship rights in all matters pertaining to the Arunachal Pradesh State Lotteries. None of the provisions under the Rules reasonably hint at such a construction of the expression "Sole Distributor". As noticed above the

expression "Sole Distributors" also appear in the Rules. On a scrutiny of the scheme of the Rules we are, therefore, unable to hold that the nomenclature "Sole Distributor" as used in the Rules signifies the only "Distributor", be it a person or persons or a firm or a party. This we consider to be in harmony with the true purport of the word "Distributors" used in Section 4 (c) of the Act. Any interpretation of the expression "Sole Distributor" applied in the Rules to mean a single, lone or exclusive Distributor thereby making it obligatory for the government to appoint a single Distributor for its lotteries would fly in the face of Section 4 (c) of the Act and as observed hereinabove is not warranted on a proper construction of the Rules. In Punjab Land Development Reclamation Corporation Limited, Chandigarh (supra), the Apex Court while construing the purport of the word "means" used in the definition of retrenchment had observed that when a statute says that a word or phrase shall "mean" and not merely that it shall "include" certain things or acts, the definition is a hard and fast definition and no other meaning can be assigned to the expression than is put down in the definition. That is so. However, in order to provide a true meaning to a word used in a statute the scheme and contents thereof cannot be overlooked and no interpretation divorced therefrom would be acceptable. On a scrutiny of the Rules in hand we are unable to persuade ourselves to hold that the expression "Sole Distributor" used in the Rules connotes one and, only one Distributor. We are therefore, of the considered view that the Act and the Rules do not restrict the Government to appoint only one Distributor for the purpose of marketing, distributing and selling of its lottery tickets.

.....

37. Does the use of the expression "Sole Distributor" in the orders of extension by itself signify the appointment of the respondent No. 1-writ petitioner by the State as its lone Distributor under the original agreement so as to bind the Government of Arunachal Pradesh to honour its exclusive distributorship rights to the complete exclusion of others and that too in the face of the Acts and the Rules" We think not. In our view the expression "Sole Distributor" used in the orders of extension is only a matter of nomenclature imported from the Rules with no purport to suggest that thereby alone the respondent No. 1-writ petitioner was accepted as the only distributor of the Arunachal Pradesh State Lotteries under the original agreement. We have dealt with this aspect of the matter hereinabove. It, therefore, does not commend to us that the use of the words "Sole Distributor" in the orders of extension by itself is of any special significance so as to warrant conclusion that the respondent No. 1-writ petitioner was recognised to be the only or the lone Distributor of the Arunachal Pradesh State Lotteries either under the original agreement or in the orders of extension.

48. From the aforesaid, it is clear that this Court had held that under the Lotteries (Regulation) Act, 1998 and the Arunachal Pradesh State Lotteries Rules, 2001, there was no restriction upon the Government to appoint more than one distributor for the purpose of marketing, distributing and selling of its lottery

tickets. This Court also concluded that neither under the original agreement nor in the orders of extension, was the writ petitioner recognized to be the only or the lone distributor.

49. Section 3 of the Lotteries (Regulation) Act, 1998 prohibits all State Governments to organize, conduct and promote any lottery. Section 4, however, provides that a State Government may organize, conduct and promote lottery subject to the conditions laid down. Logically, it follows that in organizing, conducting and promoting a lottery, the State has to conduct itself as enjoined by the stipulations prescribed by the Act. In *Limras (supra)* this court laid down any agreement between the State Government and the distributor or for that matter any clause thereof which is not in consonance with the Act and the Rules would not be valid and enforceable de hors the Act and the Rules. Clause 4 of the agreement in *Limras (supra)* which stipulated that all the lotteries of the Government of Arunachal Pradesh covering the period of the agreement shall be distributed by the distributor, namely, M/s N.V. Marketing Private Ltd. only was held to be not permissible under the Arunachal Pradesh State Lotteries Rules, 2001 and interpreted the word "all" appearing therein by reading down the same to limit its application to the existing lottery schemes or conceived of or agreed to by the parties at the time of making of the agreement.

50. In *Biswanath Tea (supra)*, the Supreme Court laid down that a juristic person such as a corporation is not entitled to any of the freedoms guaranteed by Article 19. Article 19(1)(g) guarantees fundamental freedom to a citizen and the Company being not a citizen is not entitled to complain breach or violation of fundamental rights under Article 19(1)(g) and therefore, the petitioner cannot complain that there is violation of Article 19(1)(g) of the Constitution of India.

51. In *Lotus Hotel (supra)*, the Gujarat State Financial Corporation had sanctioned a loan to M/s Lotus Hotels P Ltd., and as a part of the deal, M/s Lotus Hotels had to create an equitable mortgage in favour of the Corporation for securing the loan. However, due to certain reasons, which is not necessary to be gone into in this case, the Financial Corporation resolved not to disburse the loan to M/s Lotus Hotels. On a writ petition filed, the learned Single Judge had issued a mandamus directing the Corporation to disburse the promised loan and in appeal also the order of the Single Judge was upheld. The Apex Court held that the principle of promissory estoppel would estop the Corporation from backing out of its obligation arising from a solemn promise made by it to the respondent. The Apex Court also, in the facts of the case, held that the Corporation was acting in a very unreasonable manner. The Supreme Court also held that the State and its instrumentalities cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from any unreasonable conduct and in such a situation, the court is not powerless to enforce the promise by a writ of mandamus and accordingly, dismissed the appeal.

52. In *Motilal Padampat Sugar Mills (supra)*, the Supreme Court held that where the government makes a promise knowing or intending that it would be acted

upon by the promisee, and, in fact, the promisee, acting in reliance on it, alters its position, the government would be held bound by the promise and the promise would be enforceable against the government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in formal contract as required by Article 299 of the Constitution. The Apex Court also held that in order to attract the applicability of the doctrine of promissory estoppels, it is not necessary that the promise, acting in reliance on the promise, should suffer any detriment and what is necessary is only that the promisee should alter its position in reliance on the promise.

53. In *M/s Indo-Afghan Agencies* (supra) the Supreme Court has laid down that a party who has acted on a representation made by the government to claim that the government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of formal contract as required by the Constitution.

54. In *Bhatanagar* (supra), the Supreme Court laid down that promissory estoppel has to be pleaded and established. The plea of promissory estoppel is to be supported by the necessary factual particulars and it is only if those factual particulars are pleaded that the other side has an opportunity to answer the same.

55. In *Nezon Law House* (supra), the Supreme Court laid down that in order to invoke the doctrine of promissory estoppel, clear, sound and positive foundation must be laid in the petition itself by the party invoking the doctrine and bald expressions without any supporting material to the effect that the doctrine is attracted because the party invoking the doctrine has altered its position relying on the assurance of the government would not be sufficient to press into aid the doctrine. It is also laid down that the Courts are bound to consider all aspects including the results sought to be achieved, because while considering the applicability of the doctrine, the Courts have to do equity and the fundamental principles of equity must forever be present in the mind of the Court.

56. In *Godfrey Philips* (supra), the Supreme Court held that there can be no doubt that the doctrine of promissory estoppel is applicable against the Government in exercise of its Governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. The Apex Court also stated that there can be no promissory estoppel against the legislative in the exercise of its legislative functions nor can the Government or Public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It was also held that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. Promissory estoppel being an equitable doctrine, it must yield to when the equity so requires.

57. This Court in *New Era Fabrics (supra)*, on consideration of the judicial precedents on the applicability of the doctrine, had summarized the principles of doctrine of promissory estoppel.

58. In the writ petition, specifically, the plea of doctrine of promissory estoppel has not been taken. However, in the affidavit-in-reply, the writ petitioner has specifically pleaded foundational facts to sustain the plea of doctrine of promissory estoppel. There cannot be any doubt that the BTC authority, under the law, is empowered to appoint more than one distributor of lotteries. The notice inviting bid, however, clearly spelt out that it had invited bids to act as sole distributor for the BTC lotteries. The agreement dated 30.9.2009 also leaves no room for doubt that the petitioner was appointed as sole distributor. Even if the word exclusive, which is used on couple of occasions in the agreement dated 30.9.2009, is ignored, then also the only conclusion that can be drawn is that the petitioner was appointed as the sole distributor for marketing, selling and distributing the council's lotteries. The argument of Ms. Bordoloi that because the word "only" was not preceding the word "sole distributor" in the agreement dated 30.9.2009, it was possible to appoint another distributor is clearly misplaced. The notice inviting bid and the agreement having clearly held out that the petitioner was appointed as a sole distributor, the BTC authorities could not have appointed another sole distributor or sole selling agent during the subsistence of the agreement with the petitioner in respect of the very same schemes for which the petitioner was appointed as sole distributor. It is on record that the petitioner is permitted to hold 12 draws and maximum number of draws permissible under the Lotteries (Regulation) Act, 1998 shall not be more than 24 per day of all the lottery schemes put together. Unlike in *Limras (supra)*, in the instant case, the agreement recognized the petitioner to be the sole distributor of lotteries. This does not, however, mean that no other distributor or sole distributor can be appointed by BTC. In view of the law laid down in *Limras (supra)*, appointment of the petitioner in all forms of lotteries in clause II of the agreement dated 30.9.2009, has to be read down to mean the existing lottery schemes or conceived of or agreed to by the parties at the time of making of the agreement as otherwise it will defeat the provisions of Lotteries (Regulation) Act, 1998 and it is permissible for the BTC to appoint distributor(s) in respect of other schemes. The respondent No. 3 is sought to be given permission on the basis of the agreement dated 13.6.2011 to hold 12 draws. The minimum guaranteed revenue by the respondent No. 3 was shown to be Rs. 8, 76, 00, 000/-, based on maximum number of 24 draws, which could not have been the basis as the distributorship of the petitioner is subsisting and the petitioner, at the relevant point of time was allowed to hold 6 draws, which subsequently came to be increased to 12 draws. Clearly, on the face of it, decision making process is vitiated. The appointment of the respondent No. 3 was also not followed by a transparent process of invitation of tenders. The records produced by BTC also reveals that if at all a new distributor was required to be appointed, it was considered necessary to issue notice inviting tender in terms of Rule 5(2) of the

Lottery Rules of 2007.

59. In view of Section 23 of the Contract Act, 1872, an agreement, the object or consideration of which involves or implies injury to a person and property of another, is unlawful and every agreement, the object or consideration of which is unlawful, is void. It is seen that no order has been issued to the respondent No. 3 appointing him as the distributor and based on the approval granted, the agreement was executed by the BTC authorities on 13.6.2011 with the respondent No. 3. The agreement dated 13.6.2011 is unlawful and therefore, this Court is unable to accept the contention of Mr. Bhattacharyya that the agreement is not liable to be interfered with. In *Limras Lotteries (supra)*, also, the order of the learned Single Judge was not set aside on the ground that the learned Single Judge had no jurisdiction to set aside the agreement entered into between the State respondents and the appellant in that case.

60. In the writ petition, there is no challenge to the order dated 1.10.2011 by which the respondents had taken the decision to postpone the lottery operation. However, a prayer has been made for a direction to the BTC authorities to allow the petitioner to operate as the sole distributor of lotteries of the BTC in terms of the agreement dated 30.9.2011. In absence of any challenge to the order dated 1.10.2011, no directions are called for in this regard, as prayed for by the petitioner.

61. In the result, in view of the discussions aforesaid, agreement dated 13.6.2011 between BTC and the respondent No.3 is set aside. The writ petition is partly allowed as indicated above. No costs.