(2012) 03 GAU CK 0123

In the Gauhati High Court

Case No : Misc. Case No. 211 of 2012 in WP (C) No. 179 of 2012

Pooja Fortune Private Ltd. and Others — APPELLANT

Vs

State of Nagaland and Others — RESPONDENT

Date of Decision : 07-03-2012

Acts Referred:

Constitution of India, 1950 — Article 14
Lotteries (Regulation) Act, 1998 — Section 12(1)

Citation : (2012) 2 GLD 626

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : K.N. Choudhury, Sen, for the Appellant; K.N. Balgopal, AG, Nagaland, for the Respondent

Final Decision : Allowed

Judgement

A.K. Goswami, J.—This is an application for seeking leave of this Court for finalization of the tenders received from the prospective bidders in terms of the Notice Inviting Tender published vide No. DSL/17-10/2010-11 dated 10-12-2011 in terms of this Court''s order dated 11-01-2012 passed in W.P.(C) No. 179 of 2012. Heard Mr. K.N. Choudhury, learned Senior counsel appearing for the writ petitioners and Mr. K.N. Balgopal, learned Advocate General, Nagaland, representing the respondents in the writ petition.

2. The writ petition is filed praying for setting aside and quashing the Tender Document dated 10-12-2011 as well as Clause 13(a) of the Distributorship Manual for appointment of distributor of Nagaland State Lotteries.

3. By the Tender Document dated 10-12-2011, sealed tenders Were invited from Individuals/Registered Firms/Companies for appointment as Distributor of Nagaland State Lotteries (on line or paper or both). Clause 13(a) of the Distributorship Manual, laying down terms and conditions for appointment of Distributor of Nagaland State Lotteries, requires that total turn over of the Company for the last five years should not be less than Rs. 4,000.00 crores, to

be duly certified by a registered Chartered Accountant in respect of those Companies who are already in lottery business as Distributor or Sole Selling Agent.

4. The respondents In the affidavit-in-opposition has categorically stated that the Distributorship Manual is not applicable in the present process of tender and the same was a one time guideline issued by the Government to all the interested parties in the year 2010.

5. Mr. K.N. Choudhury, learned Senior counsel for the petitioners submits that Clause 2 (vi) of Instructions to Tenderers/Bidders of the tender document dealing with eligibility of the prospective tenderers fixing total turn over of the Company for the last five years to be not less than Rs. 5,000.00 crores is unreasonable, discriminatory, irrational, mala fide and arbitrary and that the said Clause has been incorporated to accommodate tenderers of the choice of the respondents, which amounts to favoritism and nepotism. The learned Senior counsel submits that after coming into force of the Lotteries (Regulation) Rules, 2010, for short, the Rules of 2010, no discretion vests in the State to lay down conditions of eligibility as per its own sweet will and it is obligatory on the part of the State to frame Rules and prescribe conditions of eligibility. There is also no rational behind fixing turn over of Rs. 5,000.00 crores for the last five years in view of the fact that the Rules of 2010 have put a ceiling of not more than 24 draws per day on the number of lottery draws except bun per draw from all the lottery schemes put together and that the State shall not offer a prize on a lottery ticket or in on line lottery on the basis of single, double or triple digit in any form or combination. It is also his contention that such a clause as finding place in Clause 2 (vi) has the potential of creating monopoly and the same is against the intent of Competition Act, 2002. The learned Senior counsel has also placed reliance on the judgment of the Apex Court in Lakshman Khatik Vs. The State of West Bengal, .

6. The learned Advocate General submits that the petitioner No. 1 had challenged a condition prescribing minimum gross turn over of Rs. 4,000.00 crores, per annum, during the last three financial years incorporated in the terms and conditions of "Expression of Interest" issued by the Government of Goa for appointment of marketing agent/distributor under the Goa Brand Lottery Scheme as unreasonable, arbitrary, mala fide and irrational, by filing a writ application which was registered as Writ Petition No. 265 of 2010 in the High Court of Bombay at Goa. It was also the contention of the petitioner No. 1 that the said exercise was undertaken by the Government of Goa to favour two particular parties named in the writ petition.

7. Drawing attention to the judgment dated 13-04-2010 passed in the said Writ Petition No. 265 of 2010, the learned Advocate General points out that the plea of mala fide was found to be totally unfounded on facts as the two parties named by the petitioner therein had not even participated pursuant to the said "Expression of Interest". It has also been submitted that the Division Bench of

the High Court of Bombay at Goa had dismissed the writ petition holding that the State respondents were well within their rights to require a participant to have a minimum gross turn over of Rs. 4,000.00 crores per annum, during the last three financial years. Compared to the aforesaid requirement of turn over, the minimum turn over fixed by the Government of Nagaland at Rs. 5,000.00 crores over a period of five years is much less than the minimum limit fixed by the Government of Goa, he submits. The learned Advocate General also submits that the said judgment and order has not been appealed by the petitioners and, therefore, the petitioners have accepted the said position.

8. The learned Advocate General has also submitted that pursuant to the Rule of 2010, in exercise of the powers conferred by-Section 12 (1) of the Lottery (Regulation) Act, 1998, for short, the Act of 1998, the Governor of Nagaland was pleased to notify Lottery (Regulation) Rules, 2010 to regulate the lotteries organized and conducted by the State Government and, therefore, according to him, this case stands on an entirely different footing qua the notice inviting tender issued by the State of Arunachal Pradesh which was referred to in the interim order passed by this Court on 11-01-2012 inasmuch as in the case of State of Arunachal Pradesh, no Rules were framed by the State of Arunachal Pradesh subsequent to Rule of 2010 coming into force. The minimum turn over of Rs. 5,000.00 crores for the last five years was fixed taking into account all relevant considerations and this Court may not interfere with the terms of the Tender Notice, he submits. He further contends that the petitioners have also participated in the tender process by submitting tender on 16-01-2012. Accordingly, he prays that the Misc. Case be allowed by granting leave to the State respondents to finalise the tender process as lottery is one of the major sources of revenue for the State. He places reliance on the judgment of the Apex Court rendered in the case of Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, .

9. It is an admitted position that the petitioners'' writ petition challenging the prescription of minimum total turn over of Rs. 4000.00 crores, per annum, during the last three financial years was dismissed by an order dated 13-04-2010 by the High Court of Bombay at Goa and no appeal was filed against the said judgment and order. The petitioners have also participated in the present process initiated by Tender Document dated 10-12-2011. The Rules of 2010 had come into force on 01-04-2012 and the judgment of the High Court of Bombay at Goa was passed after the Rule of 2010 had come into force.

10. The notice inviting tender issued by the State of Arunachal Pradesh, which is a subject matter of challenge in W.P.(C) No. 4712 of 2011, prima facie, is not applicable to the facts of the instant case as a perusal of the interim order passed in the aforesaid case would go to show that no Rules were framed by the State of Arunachal Pradesh after coming into force of Rules of 2010.

11. The award of a contract is essentially a commercial transaction and the State can fix terms of invitation to tender. In Directorate of Education (supra), in

paragraph 12, the Apex Court held thus :

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstance. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Court can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

12. The reliance placed by Mr. K.N. Choudhury in Royappa (supra) to contend that mala fide exercise of power and arbitrariness is hit by Article 14 of the Constitution of India, is an established proposition of law. Prima facie, this Court is of the view that no case of violation of Article 14 is made out.

13. Considering the matter in its entirety and in view of the discussions above, I am inclined to grant leave to the State respondents to finalise the tender process. Misc. Case stands allowed.