

(2002) 12 GAU CK 0041

In the Gauhati High Court

Case No : C. Miscellaneous Case No's. 96 and 101 (K) of 2002

State of Nagaland and Another

APPELLANT

Vs

Playwin Infravest Pvt. Ltd.

RESPONDENT

Date of Decision : 10-12-2002

Acts Referred:

Citation : (2003) 1 GLT 574

Hon'ble Judges : B. Lamare, J

Bench : Single Bench

Advocate : A.K. Phukan, S. Sarma, I. Jamir, R. Phukan, L.S. Jamir, B.K. Sharma, T.B. Jamir, R. De and K.L. Solo, for the Appellant; A.K. Bhattacharyya, M.Z. Sarma, B.K. Singh and B.N. Sarma, for the Respondent

Final Decision : Allowed

Judgement

B. Lamare, J.—Heard Mr A.K. Phukan, learned sr. advocate and Mr B.K. Sarma, sr. advocate for the applicants, and Mr A.K. Bhattacharyya, sr. advocate for the Respondent.

2. Briefly stated the facts leading to the filing of these two applications is that, the Government of Nagaland on 26.5.2000 executed an agreement with the applicant, CAIRS Computer Aided Information and Research Services Pvt. Ltd. for promotion of Internet based Lotteries in the State. Subsequently, to this agreement, an addendum was made on 16.11.2001 between the same parties.

3. The Respondent in this application filed a writ petition before this Court being W.P.(C) No. 190(K) 2002 assailing the said agreement and addendum. This Court, while issuing a rule in the said writ petition, by order dated 21.10.2002 has also issued an interim order by which the said agreement and addendum were stayed until further orders. Being aggrieved by the said order, the applicants who were arrayed as Respondents (for short State Respondent and private Respondent) have approached this Court by these applications.

4. According to the applicant, the State Respondents acting under the provisions

of Lotteries and Regulation Act, 1998 has undertaken to promote lottery in the State and this action of the State is part and parcel of Government functioning and completely an administrative act. It is for the Government to consider all the factors to select the best person available. Keeping the above criteria, the State Respondent has executed an agreement with the private Respondent. Pursuant to the said agreement, the private Respondent has also given a bank guarantee of Rs. 1 crore (Rupees one crore) of the ICICI Bank in favour of the State Respondent. The writ Petitioners were not even in existence when the agreement was executed on 26.5.2000. However, with great difficulty, the State Respondent could locate the private Respondent for promotion of the said Internet Lottery. Another company also approached the State Respondent, but the said company could not convince the Government of its performance and even failed to submit the bank guarantee. The private Respondent was also found to have signed MoU with foreign companies. Addendum was made for promotion of the Internet online lotteries. There was no other proposal made to the State Respondent when the agreement was executed. According to the State Respondent, the writ petition was filed only to stop the Nagaland Lottery being launched by all possible means. It is also the case of the State Respondent that the writ petition itself is defeated by delay and laches as the agreement was signed in the year 2000, and the writ Petitioner approached this Court only in October, 2002 after lapsed of more than two years.

5. The applicant, private Respondent in this application in para 7 stated as follows:

7. That, the applicant begs to state that after the execution of the agreement, steps have been undertaken by the applicant company in various fields in the implementation of the project of online lotteries. A few notable works in respect of the applicant company in some of the fields are enumerated here in below for better appreciation of the Hon"ble Court:

i) Development of infrastructure in the field of information technology and communications:

a) The applicant has executed an agreement with EDITEC, a French Company which is the leading supplier of the online lottery system. The agreement relates to supply, design, development, engineering, installation and testing of the online lottery system including supply of terminals and software for central server systems. It may be mentioned that in consultation with EDITEC, an order for a central server system has already been placed with IBM.

b) M/s. Network Solution Ltd. has been appointed as network consultants to identify the various technologies suitable for online lottery project. The network consultants have identified the technologies as VSAT, GPRS, Dialup and DSL and the trial of the said technologies have been completed successfully.

c) An order for TPM 3000 and Olivetti M380 range of online lottery terminal with EDITEC has already been placed and the first lot of twenty terminals for trial and

marketing purposes have been imported to India and is awaiting clearance from the custom authorities. Further, intimation has already been sent to the distributors for demonstration of the terminals.

d) An additional 1530 numbers of TPM 3000 terminals has been ordered from EDITEC out of which 1000 terminals are under manufacture and are expected to arrive in India within a short period of time.

e) An additional 200 numbers of Olivetti M300 terminals have been ordered with EDITEC which were expected to reach India in the month of December, 2002.

f) In technical consultation with EDITEC, the location of the data center where the central server system is going to be installed is currently under renovation and the same is expected to be completed within the first week of December.

g) The communication networks have already been installed and an agreement has already been finalised with Hughes Escort Communication Ltd. for deploying the VSAT network for the online lottery project. It would not be out of place to mention that discussions have been held with various integration companies for setting up the network on different technologies like GPRS, DBL and Dialup.

II. Sales and Distribution:

a) The distributors have already been appointed in all major territories of the Union of India. Further, the Townwise Distributor plan has been finalised for a total of 1500 terminals in three States. Advance/deposits amounting to Rs. 2.8 crores (approximately) have been received from the distributors by the applicant and interest at the rate of 8.5% is being paid to the distributors on all such deposits received.

b) Advertisement campaigns have been undertaken and in the States of Tamil Nadu and Kerala, positive responses from 2526 retailers have been received.

c) The distributors have been required to conduct road shows at local levels to create awareness amongst retailers and considerable money has been spent in the enrollment of retailers through advertising in regional newspapers, brochures and call centers to handle retailer queries.

III. Appointment of Manpower:

More than 50% of the total manpower required to be appointed for smooth and proper implementation of the schemes of online lotteries have already been appointed and the same has resulted in fixed overhead cost of Rs. 55 lakhs per month (approximately) being incurred by the applicant.

IV. Financial investments:

a) An irrevocable Bank Guarantee of Rs. 1 crore (Rupees one crore) vide Bank Guarantee No. 294BG1602 dated 14.03.2002 of ICICI Bank Ltd., New Delhi, has already been furnished by the applicant in favour of the Director, State Lotteries, Government of Nagaland.

b) Purchase orders for 25,000 retail terminals have already been placed with EDITEC, France and the payment for the said terminals is underway through issuance of irrevocable Letters of Credit.

c) For communication, network equipment and office equipment etc. purchase orders have been placed and is awaiting delivery.

d) The applicant has approached various nationalised banks for necessary requirements of issuance of Letters of Credit and a number of nationalised banks have already sanctioned approvals for the same.

e) Apart from the above, an amount to the tune of Rs. 15 crores (Rupees fifteen crores) have already been invested in developing the infrastructure required for the smooth operation of schemes of online lotteries. The applicant craves leave of the Hon"ble Court to produce the relevant documents if required, at the time of hearing of the case.

6. It is also contended that the writ Petitioner's company has come into existence only on 28.8.2001. Therefore, the contention that they could not avail the opportunity to be selected does not arise as the agreement was signed in May, 2000. It is also contended in para 12 of the application that for appointment of the sole distributors of online computerised lotteries by the State, notices were issued and published in various national newspapers and Magazines in the month of April, 2002, and as such, it is in the knowledge of the writ Petitioner that the agreement was executed on 26.5.2000 but the writ Petitioner did not approach this Court even then. Apart from the investments of money and resources, arrangements were made to launch the scheme by appointing thousands of sub-agents across the country thereby affecting the rights of the thousands of investors in the scheme. Moreover, thousands of retailers, suppliers and other third parties besides the State Respondent and the private Respondents will also be affected if the agreement is stalled by the Court.

7. The applicant private Respondents also contended that the same writ Petitioner has approached this Court against launching of State lotteries in Manipur, Arunachal Pradesh and Meghalaya, and all those States, this Court has declined to grant of stay order. That apart, the applicant Respondent has also executed the Bank guarantee to the tune of Rs. 1 crore (Rupees one crore) with the State Respondent and has also invested huge amount to the tune of Rs. 15 crore (Rupees fifteen crore) for implementing the scheme under the agreement. Therefore, according to the applicant private Respondent, the public interest is involved and that the private Respondent as well as the State Respondent shall suffer huge loss if the agreement and addendum are stayed.

8. It is also the case of the applicant, private Respondent that the writ Petitioner has approached this Court for a private interest and if the agreement and addendum are stayed, the writ Petitioner will achieve their individual interest being a strong competitor in the business of online lottery.

9. Mr A.K. Phukan, learned sr. Counsel for the applicant submitted that the online lottery is not State largesse and the State is not bound to float any tender notice as the launching of the online lottery is purely within the administrative policy decision of the State. He also contended that Government is not bound to issue any tender notice for launching the online lottery. It is also contended that when the agreement was executed in May, 2000, the writ Petitioners were not in existence as the writ Petitioners came into existence only on 28.8.2001. Therefore, there was no discrimination or arbitrariness in executing the agreement so as to prejudice the writ Petitioner.

10. Learned sr. Counsel also submitted that the writ petition is defeated by delay and laches as the agreement was executed on 26.5.2000 and the writ Petitioner approached this Court only in October, 2002. It is also contended that in the resolution passed by the Board of Directors of the company, Mr Ravi Kolhe was authorised to file the writ petition, but in the instant case, the writ petition was filed by the Petitioner No. 2 who signed the affidavit as the share holder of the company. It is also contended that representation was submitted to the Director of Lotteries only on 18.9.2002, but before that the writ Petitioners did not take any action to challenge the agreement. Filing of the representation is only to make an excuse for the delay in approaching this Court. Therefore, in the writ petition, there is no strong explanation to explain the delay.

11. Mr Phukan further contended that the writ Petitioner is already operating the online lotteries for three States, therefore, the State Respondent did not consider their representation on the ground that if the writ Petitioner is allowed to operate the Nagaland online State lotteries, the State would be flooded with lotteries of other States. The learned Counsel also submitted that the State Government has taken care of to ensure that the online lotteries of the State to be launched as scheduled.

12. Mr B.K. Sarma while supporting the contention of Mr A.K. Phukan submitted that the writ Petitioner is only a sub-agent in running the online lottery for the State of Sikkim as the agent for the State of Sikkim was Tashi Delek Gaming Solution Private Ltd. In support of this contention, Mr Sarma also produced the agreement between the writ Petitioner and the said company. Learned Counsel also contended that as per the statement made in para 7 of the application that arrangement has been made by the private Respondent/applicant to launch the online lottery for the State of Nagaland, huge amount was invested, and therefore, the applicant/private Respondent would suffer huge loss. It is also contended that if the stay order is not vacated, not only the private Respondent/applicant shall suffer but all those action taken for supply of machines from foreign countries and the agents appointed and the amount received from different agents and all other consequential actions taken after execution of the agreement would be put into jeopardy and the whole system would be paralised, and therefore, the applicant/private Respondent as well as the State shall suffer irreparable loss. It is also contended that in case, the stay order is not vacated,

the State of Nagaland shall have to face legal action from different quarters with whom the private Respondent has made all arrangements for launching the online lottery. It is also contended that the entire matter has become fait accompli, and there is no question of re-opening the matter at this stage by granting stay order. It is further contended that the writ Petitioners have approached this Court with respect to the online lotteries in Arunachal Pradesh, Meghalaya and Manipur, but in all these States this Court has refused to grant stay.

13. Mr A.K. Bhattacharjee, learned sr. Counsel appearing for the writ Petitioners submitted that as authorised by the company, the vakalatnama was signed by the authorised person Mr Ravi Kolhe, therefore, there is no question of the Petitioner having no locus standi to file this writ petition. The learned Counsel also contended that although the applicants have made statement regarding the action taken in their application, no document was annexed to support their contention. It is also contended that execution of the agreement is very much a distribution of the State largesse, and in that context floating of a tender is a must. The public interest is going to subserve by floating tender that every interested person or company can apply. There is no delay in approaching this Court whatsoever as the agreement dated 26.5.2000 shows of Internet lotteries, but not online computerised lotteries. Therefore, the writ Petitioner did not consider it fit to approach this Court when the agreement was made for Internet lotteries. The writ Petitioner was concerned only after the addendum was made on 16.11.2001 by which the agreement was changed to computerised electronic lotteries. On coming to know of this addendum, the writ Petitioner approached the State Government by making representation requesting for issue of tender and to cancel the agreement and the addendum.

14. Mr Bhattacharjee also contended that the stand taken by the State Respondent and the private Respondent in these applications is totally contrary to the extent that the State Respondent stated that the MoU was signed with the company in U.S.A., whereas, the private Respondent stated that arrangement were made with the French company, however, no documents were produced in this regard. Learned Counsel also contended that the income of the State is paramount in public interest and to safeguard the revenue of the State. He also cited the cases of Sikkim, Karnataka and Maharashtra where agreements were signed, and in their agreements, the interest of the State was fully protected to ensure regular and proper flow of income to the State. In support of this contention, the learned Counsel produced the agreements of the said States. It is also the case of the writ Petitioner that the private agreements can be allowed only in exceptional case and that too the Government shall have a strong reasons for making the private arrangements. Therefore, in the instant case, the applicants/Respondents are bound to show grounds on which the agreement was executed and also to establish prima facie case for vacating the stay order.

15. On perusal of the records with regard to the locus standi to file the writ

petition, the company has authorised Mr Ravi Kolhe to file the writ petition. Vakalatnama was also signed by Mr Ravi Kolhe on behalf of the Company. Mr Sanjay Jain is a share holder of the company. The writ petition was not filed by him but the authorised agent of the company Mr Ravi Kolhe. Therefore, the Petitioners have locus standi to file the writ petition.

16. The next question is that, whether the online State lottery is the State largesse for which the tender is required to be floated or the State is at liberty to select the company of its own in exercise of its administrative function. Mr Phukan cited the cases reported in:

- (1) State of Haryana Vs. Suman Enterprises and Others,
- (2) G.D. Zalani and another etc. Vs. Union of India and others,
- (3) B.R. Enterprises Vs. State of U.P. and Others,
- (4) M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa,

Mr A.K. Bhattacharjee has also cited in cases reported in:

- (1) 1986 Vol. 2 SCC 594
- (2) AIR 1997 SC 294
- (3) Rashbihari Panda etc. Vs. State of Orissa,
- (4) Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others,
- (5) Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others,
- (6) 1997 7 SCC 593
- (7) Netai Bag and Others Vs. The State of West Bengal and Others,

17. I have gone through the said citations and I am of the opinion that since the question to be decided is with regard to the vacation of the stay order, the reference to the decisions in those cases would not be proper as it may affect the merits of the case.

18. Thus keeping in mind the question to be decided in these applications, I now proposed to go into the materials available on records. The agreement was executed on 26.5.2000 and the addendum was executed on 16.11.2001. Since then, the said agreement nor addendum were not assailed or challenged at any point of time till the present writ petition was filed after lapse of more than 2 years of the execution of the agreement and one year of the addendum. In course of the passage of time, preparation for launching the online lottery was going on, and as per the statement made by the applicant/ Respondent, the preparation for launching the online lottery was in full progress at different stages.

19. The Petitioners have approached the State Respondent to consider their proposal at a very belated stage, which according to the statement made by the State Respondent in para 6 of their application that, the proposal of the Petitioners being inferior apart from being belated would have to be rejected. Records also shows that for preparation of the Internet online lotteries, it was necessary to make extensive arrangements to locate persons with investments capacity and to ensure proper distribution of the entire network is an extensive network to be done. This statement made by the State Respondent is also supported by the statement made in para 7 of the application of the private Respondent.

20. The preparation for the online lottery was nearing completion and the targeted date for launching the lottery was scheduled on 31.12.2002. Records also shows that the statement made by the applicant/private Respondent in para 7 of the application was not denied by the writ Petitioners in para 11 of their affidavit-in- opposition while replying to para 7 of the application. The only contention made by the writ Petitioner is that, the statement made in para 7 of their application were not supported by any positive proof. The writ Petitioner who are doing business in the same line ought to have made a specific statement with regard to preparation made by the private Respondent/applicant. In absence of all such definite denial of the action taken by the applicant/private Respondent as stated in para 7 of the writ petition, the contention of the applicant/ private Respondent cannot be thrown out.

21. From the documents produced shows that the applicant/private Respondent has also deposited a Bank guarantee No. 294BG1602 from ICICI Bank in favour of the Director of State Lotteries, Nagaland for a sum of Rs. 1 crore (Rupees one crore). This fact was also not denied by the writ Petitioners.

22. The question therefore not is that, in view of the above position, whether the writ Petitioners or the Respondents shall suffer loss and injury in case of stay be granted in favour of the writ Petitioners. In my considered opinion, the party who will suffer loss and injury are the applicants/private Respondent. The writ Petitioners have not invested anything nor are likely to suffer loss and injury as they have not come to the picture at all. No assurance was also given by the writ Petitioners that they are ready to compensate the loss and injury suffered by the applicant/Respondent.

23. From the perusal of the statement made by the applicants in their applications, particularly the statement made in para 7 of the application of the private Respondent will show that not only the Respondent would be affected but all those companies and persons who are already involved in the process of preparation for the online lottery would suffer, and the whole process of preparation shall become stagnant if stay order is granted. I also found force in the statement of the learned Counsel for the State applicant that in case the stay order is granted it will invite legal action against both the Respondents from those persons/companies who have already invested in the process for

preparation of online lottery as their interest also would be affected if the stay order is granted.

24. It is also admitted position that when the agreement was executed, the writ Petitioner was not in existence, therefore, the question of their having a chance to apply if the tender is issued does not arise. Even after the addendum was issued on 16.11.2001 and the writ Petitioners came into existence on 28.8.2001 the writ Petitioner did not approach this Court at any point of time till this writ petition is filed after lapsed of more than one year. Taking into consideration of all the aspects of the matter, I am of the opinion that the writ Petitioners would not suffer anything even if the stay is not granted. None of their rights will be affected, as they have approached this Court only for a direction for issue of tender notice and by virtue of this approach, no right has accrued to the writ Petitioners. Therefore, the balance of convenience is in favour of the applicants who are already in the field for preparation of launching the online lottery.

25. For the aforesaid reasons, I find that there are sufficient grounds to vacate the interim stay order granted by this Court. Accordingly, the interim order dated 21.10.2002 passed by this Court staying the operation of the impugned agreement dated 26.5.2000 and the addendum dated 16.11.2001 Annexure-4 and 5 to the writ petition are hereby vacated.

The applications are allowed and disposed of.