

# IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM &  
ARUNACHAL PRADESH)

## ITANAGAR BENCH

### WP(C) No. 546 (AP) 2013

Mrs. J. Geetha, Wife of Mr. Jayamurugan, carrying on business in the name and style of her proprietary establishment namely, "M/s. Sri Krishna Agency, having her office at Bagra Building, Opp SBI -VIP Road, Itanagar, Arunachal Pradesh 791 111, and also at 99, Canal Bank Road, C.I.T. Nagar, Nandanam, Chennai-600035, represented by her duly constituted Attorney Mr. Mani Bhushan Sinha, Son of Sri J. Prasad, resident Of IB, Block-1, Bhawani Enclave, Saheed Nagar, Bhubneshwar.

..... **Petitioner**

**By Advocates:**  
Mr. Diganta Das, Sr. Counsel  
Mr. R.B. Phukan  
Mr. R. Sharma

**-Versus-**

1. **The State of Arunachal Pradesh,**  
Represented by the Chief Secretary,  
Govt. of Arunachal Pradesh, Itanagar,  
Arunachal Pradesh, Pin-791 111.
2. **The Secretary to the Government of  
Arunachal Pradesh,**  
Department of State Lottery,  
Civil Secretariat, Near  
Planning Department, Itanagar,  
Arunachal Pradesh, Pin-791 111.
3. **The Deputy Secretary to the Government of  
Arunachal Pradesh,**  
Department of State Lottery,  
Civil Secretariat, Near  
Planning Department, Itanagar,  
Arunachal Pradesh, Pin-791 111.

.....**Respondents**

**By Advocates:**  
Mr. K. Ete, Addl. AG,AP.  
Mr. S. Dutta, for resp. Nos. 2 & 3

**HON'BLE JUSTICE DR. (MRS) INDIRA SHAH**

Date of hearing : 21-03-2014

Date of Judgment : 19-06-2014

**JUDGMENT & ORDER (CAV)**

Heard Mr. Diganta Das, learned Senior Counsel assisted by Mr. R.B. Phukan and Mr. R. Sharma, learned counsels appearing on behalf of the petitioner. Also heard Mr. K. Ete, learned Addl. Advocate General for respondent No.1 and Mr. S. Dutta, learned counsel appearing on behalf of the respondent Nos. 2 & 3.

2]. By filling this writ of certiorari, the petitioner who is proprietor of a firm M/s Krishna Agency, has challenged the Notice Inviting Tender (NIT) and terms and conditions in the Request for Proposal (RFP, in short) for selection of Distributors and/or Selling Agents for Marketing of Conventional Paper and on-line Lottery floated by the State of Arunachal Pradesh.

3]. Clause 3.1 of the RFP, which are under challenge as discriminatory and arbitrary, are as under:

\* *The Company should be operational in India for at least the last 5 financial years.*

\* *The Bidder should be a profitable vendor for the last 3 years with profit records and must have an annual gross turnover of not less than Rs. 50 crores per annum for the last 3 financial years (as on 31-03-2012)*

\* *The minimum experience of the Bidder should not be less than 1 year*

*during last 3 years in the capacity of working directly with any State Governments as distributor/stockist/marketing agent etc.*

4]. Narrating the background facts Mr. Das, learned counsel for the petitioner has submitted that Lottery in the State of Arunachal Pradesh was banned in the year 2010 and was re-introduced in conformity with the Central Rules 2010 with effect from 26<sup>th</sup> July, 2011. Secretary to the Govt. of Arunachal Pradesh (Respondent No.2), floated Notice Inviting Tender dated 01-11-2013 for appointment of Distributors/Selling Agents for marketing and promotion of conventional paper and on-line lottery of Arunachal Pradesh.

5]. It is contended by the learned counsel on behalf of the petitioner that Pre-qualification Requirement in Clauses 3.1.1, 3.1.2, 3.1.8 of the NIT are arbitrary, illegal etc., in view of the Clauses 3.7.1, 5.1, 5.2 and 5.3 thereof which adequately secures the interest of the State. Aforementioned clauses are quoted hereunder:-

“Clause 3.1.1.: The Bidder should have registered office in India. The company should be operational in India for at least the last five financial years.

Clause 3.1.2.: The Company should be a profitable vendor for the last 3 years with profit records and must have an annual gross turnover of not less than Rs.50 crores per annum for the last three financial years (as on 31-03-2012)

Clause 3.1.8 : The minimum experience of bidder should not be less than 1 year during last 3 years in the capacity of working directly with any State Government as Distributor/Stockist/Marketing Agent etc. The

proposal shall be supported by certificate issued by concerned State Governments along with copy of valid agreement as on date signed between concerned State Governments with bidder.

Clause 3.7.1 : Interested bidders should furnish Earnest Money Deposit (EMD)/Bid Security in the following denominations: Rs.2.00 Crore only.

Clause 5.1. : **Advance Payment of Sale Proceeds.**

Selected Distributor/Selling Agent should deposit a sum of equivalent to 1 years' guaranteed (revenue) as Advance Payment of Sale Proceeds in the form of demand draft drawn on any Nationalized/Scheduled Bank located at Itanagar in favour of Secretary, Department of State Lottery, Government of Arunachal Pradesh within 10(ten) working days following the date of signing of the agreement.

Clause 5.2 : **Performance Bank Guarantee.**

A PBG of sum of equivalent amount of 1 years' guaranteed revenue would be furnished by the bidder in the form of a Bank Guarantee from Indian Public Sector Banks or Private Sector Banks authorised by the Government to conduct government transaction. Details of the bank are to be furnished in the commercial offer. The PBG should be furnished between the signing of contract and before the first draw is conducted and should be valid for six months beyond expiration of contract period. The PBG shall be returned on successful completion of the project.

Clause 5.3 : **Prize Pool Money Deposit**

Selected Distributor/Selling Agent should submit Rs.1.00 Crore (Rupees One Crore) only in the form of Demand Draft drawn on any Nationalized/Scheduled Bank located at Itanagar in

favour of Secretary, department of State Lottery, Government of Arunachal Pradesh within 10(ten) working days following the date of signing an agreement and before the first draw is conducted.”

6]. Learned counsel for the petitioner has submitted that the Scheme of Lottery, as envisaged in the Lotteries (Regulation) Rules 2010 and Arunachal Pradesh Lotteries (Regulation) Rules 2013, is that the lottery is organised/conducted or promoted only by the State Governments. The role of private parties under the Act and Rules is just confined to sell and distribution of lottery tickets only. Everyone in the business of promoting and marketing lottery, be it as a stockist/promoter/distributor/agent, has a right to participate in the tender process. Therefore, the policy decision of the State, which has culminated into pre-qualification criteria in the REP in Clause-3.1.8, is arbitrary and discriminatory. It has been incorporated to favour the tenderers of the choice of the respondents.

7]. In this respect, the case of **State of Haryana Vs. M/s Suman Enterprise and Others**, reported in (1994) 4 SCC 217, has been cited, wherein, it was held that the State itself must sell tickets through if it think necessary or proper to do so, through sole distributor or selling agent or several agents or distributors under the terms and conditions regulated by the agreement reached between the parties.

8]. It is further submitted by the learned counsel for the petitioner that the object of Lottery (Regulation) Act 1998 is primarily to earn revenue for the organising State. It is different from supply contract or any other

contract. Thus, a conjoint reading of Clause 3.7 and Clause 5.1 provides that the earnest money of successful bidder would be adjusted towards advance payment of sell proceeds. Therefore, the financial interest of the State of Arunachal Pradesh is adequately protected since one year guaranteed revenue of the State is required to be paid in advance. The revenue of the State is also protected vide performance bank guaranteed, which provides the performance bank guarantee of a sum equivalent to 1 years' guaranteed revenue should be furnished by the bidder in the form of a bank guaranteed from Indian Public Sector Banks or private sector Banks.

9]. Clause 4.6 of RFP lays down that the failure of the successful bidder to agree to the terms and conditions of the RFP shall constitute sufficient grounds for annulment of the award. Apart from above, the State is also protected by prize pool money deposit, which provides that the selected distributor/selling agent should submit Rs.1 Crore in the form of demand draft drawn on any Nationalized/Scheduled Bank located at Itanagar in favour of Secretary, Department of Lottery under Govt. of Arunachal Pradesh.

10]. There are also provisions in the Arunachal Pradesh Rules about the cash security to be kept in the shape of fixed deposit receipt, duly pledged in favour of respondent No.2 for the entire lot of printed tickets.

11]. It is submitted by Mr. Das, learned counsel that the object of organising the State to conduct lottery for the purpose of earning revenue can be achieved if there is maximum participation in the tender process. However,

the restrictive fixed pre-qualification criteria *“1 year direct”* and *“Rs.50 Crore gross turnover per annum in the last three financial year”* has denied maximum participation of players who are in the business of marketing and promoting lottery.

12]. Another limb of argument of the petitioner is that the terms and conditions of RFP are tailor made and articulated just to favour few existing parties presently in the business of selling and distributing lottery and thereby denying level playing field to other like petitioner, who is well experienced in lottery business and has adequate network and infrastructure to sell and to market/distribute the lotteries.

13]. Lottery in the State of Arunachal Pradesh was banned with effect from 1<sup>st</sup> April, 2010 and it was re/introduced on 26<sup>th</sup> July, 2011. Thus, no lottery was conducted in the State of Arunachal Pradesh from the year 2010. In fact, lottery is conducted in a very few States in India, namely, Goa, Nagaland Sikkim, Mizoram, Kerala, Maharashtra, West Bengal and Punjab.

14]. As per Clause 4(i) of the Arunachal Pradesh State Rule 2013, any distributor/selling agent against whom Government has initiated recovery money suits both civil and/or criminal shall not be allowed to participate in the process of appointment of distributor or selling agent till such time their dues are recovered as per award of the Court or are cleared by the then defaulting distributor. The State Government in the RFP mentioned that any bidder should not have been black listed by any State Government for which it was acting as distributor or selling agent during the last 5 years

and there should not be any pending civil/criminal cases against the distributor on matters relating to marketing and/or defaulting payment of dues in the State of Arunachal Pradesh or other States.

15]. In spite of the aforesaid Rules and RFP, the State Government, in complete violation of these norms have allowed Future Gaming Solutions Private Ltd. to participate in the tender process knowing well that there are number of cases pending against its Director.

16]. It is further submitted that only 8 persons have participated in the bid process and out of 8 persons, only 3 companies have been qualified to be appointed as distributors.

17]. Clause 6.7 of the RFP stipulates the State can appoint 3 distributors/selling agents for marketing lottery. Therefore, 3 distributors, out of 3, have been appointed as distributors by the State which shows that there is no fair play in level playing and/or tailor made to suit few favoured bidders of the State. The action of the State also denies maximum participation thereby frustrating the object of lottery.

18]. Per contra, learned counsel for the respondent(s) has submitted that although the contentions of the petitioner that the prescription of conditions of having 1 years' experience in the lottery business during the last 3 years and turnover of Rs.50 Crores is bad and unreasonable but the petitioner has not stated what according to her would have been good and reasonable. Moreover, the fact remains that her firm M/s Krishna Agency, which is a bidder in the present case, has submitted nil return of turnover for the year 2012-13 and

therefore, even if her contention is accepted, she would not have emerged as bidder within the zone of consideration. The petitioner also stands disqualified for non submission of any proof of its existence. No documentary prove like registration under the Shop and Establishment Act and Municipal Trade Licence etc have been furnished. The address of the petitioner's company is different in different documents. The petitioner does not have a single day's experience of working with any State not to speak of any experience after coming up lotteries (Regulation) Rules 2010. Its experience of working as sub-distributor/agent of distributor cannot be regarded as qualification of working experience with the Government.

**19].** It is further submitted by learned counsel for the respondents that the petitioner has not alleged mala fide in framing the terms and conditions of NIT. Therefore, it cannot be said that the conditions are tailor made. The fact remains that at least 8(eight) firms have participated in the Tender Process whereas a tailor made condition is set up keeping in view only one particular entity.

**20].** The doctrine of level playing field would come into play among equal and among equals and not unequal. The petitioner is not one among equals and as such, she cannot maintain a complaint against the conditions of tender merely because it does not suit her.

**21].** While conducting the lottery, the State has to earn revenue and it also has to take care of the entitlements of the prospective purchasers of the tickets. The reputation of the State may get spoiled at the

hands of unscrupulous entity if it would run away with the money generated through sale of tickets. Therefore, a formula of check and balance is of indispensable requirement and prescription of certain conditions necessary to select the best by eliminating the rest. The process of selection cannot survive in absence of a yardstick and therefore, it is reasonable that such yardstick is incorporated in the form of terms and conditions. It is submitted by Mr. S. Dutta, learned counsel for the respondent Nos. 2 & 3 that the conditions, in this case are aimed at testing the worth and capability of the bidders to run the business in lottery, generate revenue and assure guaranteed return not only to the State but to the buyers of tickets.

**22].** It is further submitted by the learned counsel for the respondents that the company of petitioner's husband had participated and was selected in response to Nagaland Government's tender dated 10-12-2001. The prequalification criteria in the said tender were (1) turnover of Rs.5000 crores and (ii) good knowledge and experience in lottery business for marketing and sale of Nagaland Lottery Tickets, Referring the judgment dated 21-12-2012 in WP(C) 130 (K) of 2012, learned counsel submits that the petitioner did not challenge such stricter condition in aforesaid writ petition.

**23].** In to-day's system of computerised transaction, learned counsel for the respondents submits that the business of lottery has also undergone sea change. The expressions "Online Lottery" , "Central Computer Server", "Parallel Server" stipulated under Rule 2(9), 2(21) and 3(6) would indicate the complexity in conducting lottery business. The necessity of maintaining requisite

infrastructure to run the lottery though a large net work maintained all over India with the use of expensive software and computer terminals spread across various States in India is a necessary concomitant. Therefore, the contention of the petitioner that no experience or expertise is necessary to conduct of lottery business is not correct under the framework of the Lotteries (Regulation) Rules.

24]. Relying on the decision of **Reliance Energy Ltd. Vs Maharashtra State Board Development Corpn. Ltd., (2007) 8SCC 1**, it is submitted by learned counsel for the petitioner that the doctrine of level playing field is an important concept while construing Article 19(1)(g).

25]. Per contra Mr. S. Dutta, learned counsel for the respondent Nos. 2 & 3 submitted that the petitioner has sought for enforcement of her rights under Article 14, 19(1)(g) and 298 of the Constitution of India. Subject matter of challenge is few conditions of eligibility incorporated in a tender document. In catena of decisions, it has been held that the business in lottery is not a 'trade' and therefore Article 19(1)(g) and 298 do not attract.

26]. In the cited case of **Michigan Rubber (India) Ltd. Vs. State of Karnataka & Others, (2012) 8SCC 216**, the Apex Court revisited the case of **Tata Cellular Vs. Union of India, (1994) 6SCC 651**; **Raunaq International Ltd. Vs I.V.R. Construction Ltd., (1999) 1 SCC 492**; **Union of India Vs. International Trading Co., (2003) 5 SCC 437**; **Assn. of Registration Plates Vs. Union of India, (2006) 10 SCC 1**; **Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517**; **Tejas Constructions &**

Infrastructure (P) Ltd. Vs. Municipal Council Sendhwa, (2012) 6 SCC 464 and observed as under:-

***“23.....From the above decisions, the following principles emerge:***

***(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;***

***(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited.***

***(c) In the matter of formulating conditions of a tender document and awarding a contract, grater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted.***

***(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and***

***(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.***

***24. Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:***

***(i) Whether the process adopted or decision made by the authority is malafide or intended to favour some one; or whether the process adopted or decision made is so arbitrary and irrational that the court can say; “ the decision is such that no responsible***

*authority acting reasonably and in accordance with relevant law could have reached" ? and;*

*(ii) Whether the public interest is affected? If the answers to the above questions are in the negative, then there should be no interference under Article 226."*

27]. It is settled law that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Government must have a free hand in setting the terms of the tender. The Court would interfere with administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias. 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 Courts can interfere only if the policy decision is arbitrary, discriminatory or malafide.

28]. The petitioner in this case has averred that she was out of the lottery business because of centralisation and monopoly of lottery business by Sugal Group and Martin Group and See TV Group. Admittedly M/s Krishna Agency (Firm of the petitioner) has submitted 'NIL' returns of turnover for the year 2012 & 2013. As per averment of petitioner, Lottery in Arunachal Pradesh was banned in the year 2010 and was re-introduced with effect from 26<sup>th</sup> July, 2011. The NIT was for marketing and promotion of conventional paper and on-line lottery of Arunachal Pradesh was issued on 01-11-2013. The prescription of minimum experience of one year during last three years directly with any State Governments cannot be termed arbitrary, unreasonable or malafide. The petitioner has not claimed that she had

participated in any tender process in any of the States in India.

**29].** The prescription of turnover of Rs.50 crores also cannot be termed as unreasonable or arbitrary in view of the fact that in other State (Nagaland) even the turnover of Rs.5000 crores in tender conditions were neither challenged nor interfered by the High Court. (WP(C) No.130 (K) 2012, referred).

**30].** Apart from above, business in lottery is not a 'trade' and therefore Article 19(1)(g) and 298 of the Constitution are not attracted. The law also does not recognize a fundamental right to do business in lottery and therefore Article 14 of the Constitution is also not attracted.

**31].** The petitioner has claimed her experience on the basis experience of her husband in lottery business. Her experience as sub-distributor and sub-stockist of V. Natarajan were not supported by documentary proof like registration, Municipal Trade Licence etc. She has claimed her experience on the basis of agreements only which are unregistered documents. Her own experience after coming into operation of Lotteries (Regulation) Act 1998 and Lotteries (Regulation) Rules 2010 is Nil.

**32].** In view of the aforesaid discussion, the petition filed by the petitioner stands dismissed. The State respondents are at liberty to finalize the tender process.

**JUDGE**