

COMPETITION COMMISSION OF INDIA

Case No.15 of 2010

Date: May 12, 2011

Jupiter Gaming Solutions Private Limited

Informant

v.

Government of Goa & Anr.

Opposite Parties

ORDER

The present information has been filed under section 19 of the Competition Act, 2002 ('the Act') on 05.04.2010 by M/s Jupiter Gaming Solutions Private Limited ('the informant') against the Government of Goa ('the opposite party No.1') and M/s Martin Lottery Agency Limited ('the opposite party No.2') alleging, *inter alia*, abuse of dominant position by the opposite party No.1 in formulating the pre-qualification terms and conditions of the lottery tender floated on 11.03.2010 whereby expressions of interest were invited for Goa Brand Lottery Schemes (Online and Paper Lotteries) ('the Lottery Tender').

2. A brief summary of the facts as mentioned in the information is as under:

2.1 The informant has stated that the opposite party No.1 floated the Lottery Tender with, *inter alia*, the following pre-qualification terms and conditions:

- a) The participating entity should be an income tax assessee;
- b) The participating entity should be either a proprietorship, partnership firm or a private limited company;
- c) The minimum gross turnover of the participating entity should have been Rs. 4000 crore *per annum* during the last three financial years;
- d) The participating entity should have experience of at least three years working directly with minimum two State Governments during the last five years;

- e) The participating entity should not have any dues pending towards any State Government in which it operates or had worked in the preceding five years. The said proposal was required to be supported by a certificate issued by the concerned State Government;
- f) That the participating entity should have a minimum net worth of Rs.40 crore as on 31.03.2009, duly certified by a certificate from the Auditor/Chartered Accountant;
- g) Minimum guaranteed revenue to be offered had been stipulated as Rs. 12 crore *per annum*; and
- h) A No Dues Certificate from the State Government where it was operating was required to be produced.

2.2 The informant has stated that the failure to meet one or more of the pre-qualification terms and conditions of the Lottery Tender would render the proposal of a participating entity liable to be rejected. As per the information, the last date for purchase of proposal form for the Lottery Tender was 25.03.2010, the last date for submission of the proposal was 05.04.2010 and the evaluation was fixed for 08.04.2010.

2.3 The informant has alleged that the Lottery Tender conditions had been formulated in order to favour only one entity, viz., the opposite party No.2 which was evident from the fact that among all the lottery service providers in the country, only the opposite party No.2 had a minimum gross turnover of Rs.4000 crores during the last three financial years.

2.4 It is further alleged that the entry barrier in terms of the high capital cost of entry had been designed to benefit the opposite party No.2 and to the detriment and prejudice of smaller entities including the informant who otherwise fulfilled all other conditions of the Lottery Tender and had been successfully providing the marketing and support services to the various State Governments for the past several years. Furthermore, it has been alleged that the opposite party No.1 has abused its dominant position by imposing unfair and discriminatory conditions in the Lottery Tender, which in turn have limited/ denied market access to all other entities involved in providing similar services including the informant.

2.5 The informant has, *inter alia*, prayed for deletion of the pre-condition requiring the participating entity to have had a minimum gross turnover of Rs. 4000 crore *per annum* during the last three financial years from the Lottery Tender.

3. The Commission after hearing the informant, and on perusing the information and the documents filed in support thereof formed an opinion that there exists a *prima facie* case and directed the Director General ('the DG') to cause an investigation to be made into the matter *vide* its order dated 22.04.2010 under section 26(1) of the Act.

4. The DG completed investigation and submitted a report dated 06.08.2010. The report of the DG has analyzed the lottery market in India with special emphasis on lottery operations in the State of Goa. The DG has noted that the bids received for the Lottery Tender were opened by the opposite party No.1 on 08.04.2010 and on 06.05.2010 the contract was awarded to an entity named Sugal and Damani Enterprises Private Limited ('Sugal & Damani').

4.1 The report of the DG concludes that the opposite party No.1 has abused its dominant position in violation of the provisions of section 4(2)(c) of the Act as it deprived the smaller parties from participating in the Lottery Tender. As per the report of the DG, the inclusion of the term requiring a high turnover of Rs. 4000 crore as a pre-qualification condition of the Lottery Tender denied market access to the other players in the relevant market. Therefore, as per the report of the DG, the opposite party No.1, in formulating and designing the terms of the Lottery Tender had abused its dominant position.

4.2 The report of the DG also discusses facts relating to the bidding process in the present case and concludes that there is circumstantial evidence to suggest that there has been a bid manipulation in the form of complementary bidding or cover bidding by the opposite party No.2 and Sugal & Damani in contravention of the provisions of section 3(3)(d) of the Act.

4.3 The DG, *inter alia*, relied on the following facts which according to his findings rendered the tendering process doubtful:

- a) The bid documents for more than one company were purchased by the same person;
- b) An additional clause was inserted in ink in the financial proposal; and,
- c) The use of whitener on the date of the proposal.

As per the observations made by the DG in the report, the opposite parties were not able to provide any satisfactory explanation on these facts.

4.4 The report of the DG further states that owing to the tacit understanding between opposite party No.2 and Sugal & Damani, the former submitted a defective bid which resulted in rejection of the same and consequently the tender was awarded to Sugal & Damani. This, as per the report of the DG, caused a loss to the opposite party No.1. According to the report of the DG, if two parties were awarded the contract, the opposite party No.1 would have got a revenue of Rs. 24 crore (approx.). However, as per report of the DG, the opposite party No.2 intentionally and deliberately filed a defective bid with an extra condition inserted in ink to facilitate awarding of the tender to Sugal & Damani. Consequently, the opposite party No.1 awarded the contract to one operator only and, the net revenue in this case, as per the DG report, would be Rs.14.5 crore (approx.).

4.5 in view of the aforesaid observations, the DG has concluded that the acts of the opposite party No.1 amount to an abuse of dominant position in contravention of the provisions of section 4(2)(c) of the Act and the opposite party No.2 along with Sugal & Damani have manipulated the bidding process in contravention of the provisions of section 3(3) of the Act.

5. The opposite party No.1 in its reply/ comments/ objections to the report of the DG has denied all the observations and findings in so far as the same relate to it.

5.1 The opposite party No.1 has argued that the findings of the DG are not correct and are based on mis-appreciation of the entire factual situation relating to the tender process adopted by it. The opposite party No.1 has contended that the adverse findings of the DG cannot be sustained in law or otherwise.

5.2 It was further submitted that the DG failed to take into consideration the motive of the informant for initiating these proceedings as, in fact, it had not even purchased the bid form and therefore had no reason to feel aggrieved. The opposite party No.1 has further argued that the matter had become infructuous as the information was sought to be withdrawn by the informant on 11.05.2010.

5.3 The opposite party No.1 in its reply to the report of the DG has submitted that the lotteries are to be marketed or operated as per the Lotteries (Regulation) Act, 1998 ('the Lotteries Act') and the rules made thereunder. The opposite party No.1 explained in detail the process adopted by it in the Lottery Tender and stated that the interested parties were required to submit their proposals along with the requisite EMD and other relevant documents as specified.

5.4 The opposite party No.1 has submitted that the conditions of the Lottery Tender including the following had been designed as per the market conditions:

- i. The minimum turnover of the participating entity should be Rs. 4000 crore *per annum* during the last three financial years;
- ii. The minimum experience of the participating entity should be three years during the last five years in the capacity of marketing agent/ distributor directly with minimum two State Governments;
- iii. The minimum net worth of the participating entity should not be less than Rs.40 crore as on 31.03.2009 and for that a certificate should be submitted from a Chartered Accountant; and
- iv. The proposal must be submitted along with an EMD of Rs.5.00 crore.

5.5 As per the opposite party No.1, it had notified that an interested party may purchase the proposal form along with terms and conditions from the office of the Joint Secretary, Finance Department by making a payment of Rs.25,000.

5.6 It has been averred that in response to the Lottery Tender, nine parties had purchased the proposal form from the opposite party No.1 and only two parties submitted their proposals for appointment as marketing agent *viz.*, Future Gaming

Solutions Pvt. Ltd. (earlier known as M/s Martin Lottery Agency Limited) i.e., the opposite party No.2 and Sugal & Damani.

5.7 As per the opposite party No.1, a participating entity had to offer a net guaranteed revenue of Rs. 12 crore *per annum* on a turnover of Rs.1000 crore. Further, for an additional turnover of over and above 1000 crore, the participating entity was required to pay 0.25% of the total additional turnover. Accordingly, only such entities which could *inter alia* guarantee to pay revenue of Rs.12 crore *per annum* would be eligible to operate and market all kinds of Goa brand lotteries. The opposite party No.1 has argued that the above indicates that it was willing to appoint one or more marketing agent, if the requisite terms and conditions, as mentioned in the Lottery Tender, were fulfilled.

5.8 The opposite party No.1 has also stated that M/s Pooja Fortune Pvt. Ltd had filed a writ petition *viz.*, Writ Petition (Civil) No.265/2010 before the Hon'ble High Court of Bombay at Goa praying for setting aside/ quashing the Lottery Tender issued by the opposite party No.1 for appointment of marketing agent/ distributor. It was contended in the writ petition that the said expression of interest was framed to favour two parties, *viz.*, Playwing and SNJ & Company and the petitioner was prevented from participating in the tender process. It was also contended that the Lottery Tender was unreasonable as it contained arbitrary conditions having no relevance to the object and scope of the Lotteries Act.

5.9 It is also pertinent to mention that the opposite party No.1 filed an affidavit before the Hon'ble High Court of Bombay at Goa in the said case, stating that Playwing and Sjn Company had not purchased the proposal form, and therefore, no question of favoritism arises. It was also stated that the proposals submitted by the opposite party No.2 and Sugal & Damani were opened and scrutinized on 08.04.2010, and were subject to satisfying and qualifying criteria.

5.10 It was further stated that the Hon'ble High Court of Bombay at Goa *vide* its order dated 13.04.2010 dismissed the abovesaid writ petition holding the terms and conditions in the expression of interest as *bonafide* and legitimate which ensured that only serious and eligible bidders could participate in the bid process. It was further

stated by the opposite party No.1 that the Court in the case also noted that the requirement to have a minimum of Rs. 4000 crores as gross turnover during the last three financial years was obviously to ensure that the participants would be in a position to raise a turnover of Rs.1000 crore and held that it was well within the opposite party No.1's right to include the above term as a pre-condition of the Lottery Tender.

5.11 It was further stated that the evaluation of the bid was done on 01.06.2010. Sealed proposals were opened in the presence of the parties in the Chamber of the Secretary-Finance, Government of Goa. It has been further submitted that with respect to the proposal received from the opposite party No.2, the evaluation committee had observed that the opposite party No.2 had failed to provide the requisite no-dues certificate from the State of Maharashtra. The opposite party No.1 has further stated that the opposite party No.2's proposal was also not as per the terms of the Lottery Tender which, *inter alia*, required the participating entity to accept the condition of guaranteeing Rs.12 crore *per annum* for a turnover of Rs.1000 crore and 0.25% of the total additional turnover for a turnover over and above Rs.1000 crore. In view of the above, the opposite party No.1 has submitted that the proposal of the opposite party No.2 was not accepted. It is further submitted that Sugal & Damani was appointed as a market agent and agreement was signed on 06.05.2010.

5.12 The opposite party No.1 has argued that the DG has failed to obtain the relevant information from the other State Governments which also run various lottery schemes as well as tenders for the online lottery schemes as per the market conditions.

5.13 It has been stated that there is no abuse of dominant position by the Government of Goa. The opposite party No.1 has also argued that the agreement entered into with Sugal & Damani for marketing of online lotteries as well as paper lotteries is not in contravention of the provisions of the Act. The opposite party No.1 has submitted that it has not adopted any unfair or discriminatory condition while appointing the marketing agent.

5.14 It is further argued that the DG has failed to take into consideration the order dated 13.04.2010 passed by the High Court of Bombay at Goa in Writ Petition (Civil) No.265 of 2010 as discussed above. The opposite party No.1 has also contended that the DG has failed to produce any document/ evidence to establish that the opposite party No.1 had abused its dominant position by designing bid document in any manner to deprive the legitimate parties to participate in the tender process and the findings/ observations of the DG are based on conjectures and surmises.

5.15 The opposite party No.1 has also submitted that the DG has failed to produce any document/ evidence to show that there is any cover bidding or complementary bidding in any form by any party, particularly to substantiate the alleged understanding between Sugal & Damani and the opposite party No.2.

5.16 In view of the above, the opposite party No.1 has prayed to the Commission to close the enquiry in the present matter.

6. The opposite party No.2 has in its reply/ comments/ objections to the report of the DG has argued that the order dated 22.04.2010 directing the DG to investigate into the matter does not reflect any application of mind. It is further argued that the order does not contain reasons as to how the *prima facie* case was established in the present matter.

6.1 The opposite party No.2 has contended that under section 26(1) of the Act, the Commission is required to arrive at a finding that a *prima facie* case exists in the light of the information and only upon finding the existence of a *prima facie* case, the Commission can direct the DG to investigate into the matter. In support of its arguments, the opposite party No.1 has cited the decision of the Hon'ble Supreme Court of India in *Competition Commission of India v. Steel Authority of India Ltd.*, Civil Appeal No.7779 of 2010, where it was held that while forming an opinion under section 26(1) of the Act, reasons are to be provided by the Commission for the same.

6.2 It was further submitted that power to determine the relevant market under the Act lies only with the Commission. In view of the provisions contained in sections 19(5), 19(6) & 19(7) read with sections 2(r), 2(s) and 2(t) of the Act, contraventions of

sections 3 and 4 of the Act may be found only by the Commission. It has been submitted that the DG has been empowered under section 41 of the Act to assist the Commission only in investigating into any contravention of the provisions of the Act and does not possess the power to determine the relevant market under the Act.

6.3 It is also urged that in order to inquire into any alleged contravention of the provisions contained in section 3 & 4 of the Act, it would be imperative to determine whether the said activity comes within the purview of the Act. It is stated that on perusal of both sections 3 and 4 of the Act, such activity should be with respect to or in relation to goods or services. It has been argued by the opposite party No.2 that lottery is neither a good nor a service and hence the present matter is beyond the purview of the Act.

6.4 It has been argued that the activity in question in the present case relates to appointment of the distribution/ marketing agents of the lotteries organized and promoted by the State of Goa. It has been submitted that such an activity is a sovereign function performed by the department of the State Government. Floating of tenders for appointment of agents is an inalienable activity that can only be performed by the State Government as under the Lotteries Act only the State Government is empowered and authorized to organize, conduct or promote a lottery.

6.5 Thus, referring to the definition of enterprise given in section 2 (h) of the Act, the opposite party No.2 has argued that the activity in question relates to the sovereign function of the opposite party No.1 and hence the Commission does not have jurisdiction to enquire into the present matter.

6.6 The opposite party No.2 has argued that the facts as alleged in the information are not sustainable against it. It is argued that the DG in his report has made certain remarks against the answering opposite party while investigating contravention of section 3 of the Act. It was argued that as the *prima facie* opinion was formed for alleged contravention of section 4 of the Act and the opposite party No.2 has participated in the investigation *qua* the same. Thus, if a contravention of section 3 of the Act was established, the answering opposite party ought to have been given an opportunity to place its submissions to controvert the same.

6.7 It has been submitted that the remarks made by the DG against the opposite party No.2 are based on mere surmises and assumption. The inference drawn by the DG is false and completely wrong.

6.8 In view of the above submissions, the opposite party No.2 has prayed *inter alia* that the investigations against it be dropped.

7. Before we proceed to frame the points which arise for determination in the present case, we may note that the informant filed an application to withdraw the information on 11.05.2010 on the ground that since the tender had already been awarded the prayer sought for by it had become infructuous. However, the above application was rejected by the Commission *vide* its order dated 11.10.2005 since the Commission had found a *prima facie* case and directed the DG to cause an investigation to be made into the matter.

8. After considering the information, report of the DG, replies/ comments/ objections filed by the parties to the report of the DG and on perusal of the entire material available on record, the following points arise for determination:

- I. Whether the Commission has jurisdiction on the subject matter, i.e., the lottery services in the present matter.
- II. Whether the activity of appointing agents for distribution and marketing of lotteries is a sovereign function.
- III. Whether the opposite party No.1 has contravened the provisions of section 4 of the Act.
- IV. Whether the provisions of section 3 of the Act have been violated.

Point No.I: Whether the Commission has jurisdiction on the subject matter, i.e., the lottery services in the present matter

9. It has been urged before us by the opposite party No.2 that the Commission does not have the jurisdiction in the present matter as the activity in question is neither good nor service and hence beyond the purview of the Act. In support of the contention, the opposite party No.2 has referred to and relied upon the following decisions: *Sunrise Associates v. Government of NCT of Delhi*, (2006) 5 SCC 603; *Union of India v. Martin Lottery Agencies Limited*, (2009) 12 SCC 209; and *B.R. Enterprises v. Union of India*, (1999) 9 SCC 700.

10. We have perused the decisions cited by the opposite party No.2 and we shall discuss the relevant cases at the appropriate stage.

11. To examine the contention urged by the opposite party No.2, a reference may be made to the below quoted definition of the term 'service' as provided in section 2(u) of the Act:

*'service' means service of **any** description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;*

12. Thus, from a bare perusal of this definition, it is evident that the Act seeks to cover service 'of **any** description' within its purview. The expression 'service of any description' has a wide meaning as by insertion of the word 'any' the scope of the section has been expanded to include all kinds of services.

13. In *Managing Director, Maharashtra State Financial Corporation and Ors. v. Sanjay Shankarsa Mamarde*, MANU/SC/0463/2010 decided on 09.07.2010, the Hon'ble Supreme Court, while interpreting the term services as given in section 2(o) of the Consumer Protection Act, 1986 observed that the use of the words 'any' and 'potential' in the context indicates that the width of the clause is very wide and extends to any or all actual or potential users.

14. The Hon'ble Supreme Court while interpreting the term 'any' in *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787 observed as under:

In Black's Law Dictionary the word `any' has been explained as having a `diversity of meaning' and may be "employed to indicate all and every as well as some or one and its meaning in a given statute depends upon the context and subject matter of statute.

15. The aforesaid meaning given to the word 'any' has been accepted by the Supreme Court in the case of *Raj Kumar Shivhare v. Assistant Director, Directorate of Enforcement* (2010) 4 SCC 772 where while construing the expression 'service of any description' under section 2(o) of the Consumer Protection Act, 1986, the Court held that the meaning of the word 'any' depends upon the context and the subject matter of the statute.

16. In this regard, we may also note that the definition of the term service as given in section 2(u) of the Act is not restrictive but an inclusive one. The Hon'ble Supreme Court in *Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. and Ors.* (1987)1 SCC 424 observed:

The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction, which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions.

17. In view of the above, it is manifest that lottery services are also covered within the meaning of the term service as defined in section 2(u) of the Act and accordingly the Commission has the jurisdiction to entertain the present information. Thus, we find no merit in the plea raised by the opposite party No.2 challenging the jurisdiction of the Commission and the same is therefore rejected.

Point No.II. Whether the activity of appointing agents for distribution and marketing of lotteries is a sovereign function.

18. It has been contended by the opposite party No.2 that the present activity in question is with respect to appointment of the agents for the distribution and marketing of lotteries organized and promoted by the State of Goa. It has been further submitted that such an activity is a sovereign function performed by the respective department of the State Government. It is urged that floating of tenders for appointment of agents is an inalienable activity which can be performed only by the State Government as under the Lotteries (Regulation) Act, 1998 only the State Government is empowered and authorized to organize, conduct or promote a lottery. Hence, it is sought to be canvassed before us that the appointment of agents or distributors being under the scheme of the Lotteries Act and the same can only be performed by the State Government. Referring to the definition of enterprise as given in section 2 (h) of the Act, it is sought to be argued that the term enterprise has been defined as any person or department of the Government which is or has been engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services. However, it is urged that the definition excludes any activity relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

19. It has been submitted before us by the opposite party No.2 that the emphasis, in the definition of the term enterprise, is on excluding activity that is relatable to the sovereign functions of the Government. It has been contended before us that in the present case floating of tenders as well as appointment of agents or distributors of the State lotteries can only be performed by the State Government of Goa to the

exclusion of everyone else under the Lotteries Act and therefore, the activity in question is relatable to the sovereign function of the Government of Goa and hence the Department of the State Government of Goa is outside the scope of the term enterprise under the present investigation and hence no investigation can be initiated in relation to the same.

20. Before we proceed to examine the issue, we may note that the Commission is empowered under the Act to inquire into any alleged contravention of the provisions contained in sub section (1) of section 3 (Anti-competitive agreements) or sub section (1) of section 4 (abuse of dominant position) by any *enterprise*. The Commission may also inquire into any contravention of the provisions contained in section 6 (Regulation of combinations) by an *enterprise*.

21. Thus, before inquiring into any alleged contravention of the aforesaid provisions, it is incumbent to establish that the alleged violation has been done by an 'enterprise'. The word 'enterprise' has been defined in section 2(h) of the Act as under:

“enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body, corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.”

22. We may now refer to some judicial pronouncement elucidating the concept of sovereign functions as the same may throw some light on the meaning and scope of the term sovereign functions for our present purposes.

23. In *Bangalore Water Supply & Sewerage Board v. A Rajappa*, (1978) 2 SCC 213, a seven judges Bench of the Supreme Court while interpreting the term 'industry' as defined in section 2(j) of the Industrial Disputes Act, 1947 exempted the sovereign functions from the ambit of industrial law. However, the *Court confined only such sovereign functions outside the purview of law which can be termed strictly as constitutional functions of the three wings of the State, viz., executive, legislative and judiciary and not the welfare activities or economic adventures undertaken by government or statutory bodies.*

24. In *N Nagendra Rao & Co. v. State of AP*, (1994) 6 SCC 205 the Supreme Court also approached the issue in the similar manner by observing that in welfare State, functions of the State are not only defence of the country or administration of justice or maintenance of law and order but it extends to regulating and controlling the activities of people in almost every sphere - educational, commercial, social, economic and political etc. It further observed that demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. And thus, *the Court observed that barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional government, the State cannot claim any immunity.*

25. Recently, the Supreme Court in *Common Cause v. Union of India*, (1999) 6 SCC 667 also quoted with approval its aforesaid view on the issue.

26. From the analysis of case law on the question as to what constitutes 'sovereign' or 'non-sovereign' function, it appears that the courts have taken the view that the term 'sovereign function' is confined to strict constitutional functions of the three wings of the State.

27. In the present case, we have already held that lottery is a service for the purposes of the Act. Under the Lotteries Act the opposite party No.1 has been given the exclusive authority to run the lotteries in the State of Goa and it is engaged in the activity of appointing operators for this purpose. Therefore, the opposite party No.1 is covered within the definition of the term enterprise. Accordingly, it is held that the activity in question is covered under the definition of the term enterprise. Further, keeping in view, the nature of the activities involved, the same cannot be exempted from the purview thereof on the ground that it relates to sovereign functions. Thus, we hold that the Commission has jurisdiction to inquire into the present matter.

Point No.III: Whether the opposite party No.1 has contravened the provisions of section 4 of the Act.

28. The informant has alleged that the opposite party No.1 enjoys a dominant position in the relevant market and has abused its dominant position by contravening the provisions contained in section 4(2) of the Act.

29. For determination of this issue it is necessary to first determine and define the 'relevant market' in the present case. The report of the DG has analyzed the lottery market in India with special emphasis on lottery operations in the State of Goa. The report of the DG defines the relevant market as the lottery market in the State of Goa for the Goa Brand Lottery Scheme (Online and Paper Lotteries) under the Lotteries Act.

30. Before we proceed to examine the issue, it needs to be highlighted that the lottery business is owned exclusively by the government and it is a regulated activity. The Lotteries Act regulates the lottery operations in the country. Under sections 4 and 5 of the Lotteries Act only state government has been authorized to organize, conduct, promote a lottery or prohibit such act. The Lotteries (Regulation) Rules, 2010 authorize the State government to conduct online and paper lottery. Rule 4 of the said Rules authorizes State government to specify qualification, experience and other

terms and conditions for appointment of distributors or selling agents. Thus, the decision to engage operators in the lottery business rests with the State government. As per the provisions of the Lotteries Act and the rules made thereunder since no person is authorized to undertake this activity in market without the approval of the State government and accordingly, the State government by virtue of its statutory powers to decide the entities who operate in the lottery market, enjoys a position of strength in this market.

31. As per the explanation to section 4 of the Act, the term 'dominant position' is defined as under:

Explanation.—For the purposes of this section, the expression—
(a) "dominant position" means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—
(i) operate independently of competitive forces prevailing in the relevant market; or
(ii) affect its competitors or consumers or the relevant market in its favour.

32. As mentioned above, the opposite party No.1 has been given the exclusive authority to run the lotteries in the State of Goa and it is engaged in the activity of appointing operators for this purpose and is therefore in a position of strength to operate independently in the relevant market. The mere fact that this position is enjoyed by virtue of a statute viz., the Lotteries Act, does not preclude the opposite party No.1 from enjoying a dominant position.

33. In view of the above, it is clear that the opposite party No.1 enjoys a dominant position in the relevant market and the activities of the opposite party No.1 in relation to the relevant market are subject to examination in terms of the provisions of the Act.

34. As per the allegations in the information, the opposite party No.1, which enjoys a dominant position, has abused the same by incorporating the condition requiring a participating entity to have a minimum gross turnover of Rs. 4,000 crore *per annum*

during the last three financial years which was designed to favour the opposite party No.2.

35. We have perused the submissions/ responses by the opposite parties, material on record and the report of the DG on the issue.

36. It has been submitted by the opposite party No.1 that the impugned condition in the Lottery Tender was incorporated to ensure participation of *bonafide* entities. The opposite party No.1 has also supported its submissions by citing examples where governments in other states in their respective lottery markets have incorporated similar conditions in the expression of interest issued by them.

37. At this stage, we may also note that the Hon'ble High Court of Bombay at Goa in the matter of *M/s Pooja Fortune Private Limited v. The Government of Goa*, Writ Petition (Civil) No.265 of 2010 *vide* its order dated 13.04.2010 has upheld the conditions as incorporated by the opposite party No.1 in the Lottery Tender. The petitioner in the above matter had challenged the conditions including the impugned condition of the Lottery Tender as being unreasonable and arbitrary. The Hon'ble High Court of Bombay at Goa held that the above submission is not well founded and the Government of Goa i.e. the opposite No.1 is well within its right to require a participant to have minimum gross turnover of Rs. 4000 crore *per annum* during the last three financial years. The Hon'ble High Court also opined that the manner in which an entity's capability to participate in the lottery tender is to be ensured is left to the decision of the State.

38. It is pertinent to quote the relevant observations from the aforesaid decision of the Hon'ble High Court of Bombay at Goa and the same are noted below:

"5.[T]he respondents are well within their rights to require a participant to have a minimum gross turnover of Rs.4000 crores, per annum, during the last three financial years. This is obviously to ensure, as far as possible, that the participant would be in a position to raise revenue per annum upto a turnover of Rs.1000 crores. The

manner in which the same is to be ensured must be left to the decision of the respondents.

6. *The contention that a participant is required to pay only Rs. 12 crores is also not well founded, as the proforma letter itself indicates that a participant is bound to pay 0.25% in respect of the turnover, over and above Rs.1000 crores, per annum.”*

39. The Court also relied on the decision of the Hon'ble Supreme Court in *Directorate of Education v. Educomp Datamatics Limited* (2004) 4 SCC 19 where the government was given flexibility to set the terms of the tender.

40. It is useful to quote the following observations made by the Hon'ble Supreme Court of India in *Directorate of Education v. Educomp Datamatics Ltd.*, AIR 2004 SC 1962:

'... [T]he 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, malafide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. 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 mala fide.'

41. We are conscious of the inherent limitations of judicial review of *administrative* action as observed by the Hon'ble Supreme Court in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 where at the Hon'ble Supreme Court observed that the Government is the guardian of the finances of the State and is expected to protect the financial interest of the State. It was also observed that the right to refuse the lowest or any other tender is always available to the Government and the right to choose

cannot be considered to be an arbitrary power. It was further held that if the said power is exercised for any collateral purpose, the exercise of that power will be struck down.

42. We have given our thoughtful consideration on the issue in the light of the aforesaid observations of the Hon'ble High Court of Bombay at Goa and the Hon'ble Supreme Court.

43. In the present matter, it is noted that the very fact that two entities *viz.*, the opposite party No.2 and Sugal & Damani satisfied the requirements as laid down in the impugned condition negates the informant's contention that the impugned condition was tailored by the opposite party No.1 to favour only the opposite party No.2.

44. Further, there is no material on record to substantiate any *malafide* intention or bias on the part of the opposite party No.1 for incorporating the impugned condition in the Lottery Tender. The fact that the Lottery Tender was finally awarded to just one entity *viz.*, Sugal & Damani and the bid by the opposite party No.2 was rejected further goes against the contention that the conditions of the Lottery Tender were drafted to favour only the opposite party No.2 and to the detriment and prejudice of smaller entities such as the informant.

45. Therefore, in our view the allegation that the impugned condition was incorporated by the opposite party No.1 to favour participation by only the opposite party No.2 is devoid of any substance and the same is rejected.

46. Moreover, there is nothing on record to even suggest that but for the criterion in the impugned condition, there would have been enhanced participation in the Lottery Tender leading to entry of more number of players in the relevant market.

47. Thus, there is no substance in the allegation that the action of the opposite party No.1 in keeping high turnover criteria of Rs. 4000 crore led to denial of market access to the other players in the relevant market in the present case and therefore, the allegation that section 4(2)(c) of the Act has been violated is not made out.

48. In view of the above discussion, we find that the terms and conditions in the Lottery Tender as formulated by the opposite party No.1 do not amount to an act of abuse of dominance and the same is not in contravention of section 4 of the Act.

Point No.IV: Whether the provisions of section 3 of the Act have been violated.

49. The DG in his report has also noted that the manner in which the bids for the Lottery Tender were submitted suggests that there has been a case of bid manipulation in the form of complimentary bidding or cover bidding which is violative of the provisions of section 3(3)(d) of the Act.

50. According to the report of the DG, the circumstantial evidence suggests the possibility of a tacit understanding between the opposite party No.2 and Sugal & Damani due to which the former filed a defective bid so that the same may be rejected facilitating the award of the tender to Sugal & Damni. Further, as per the report of the DG, the above actions of the opposite party No.2 caused a loss to the opposite party No.1.

51. The facts and circumstantial evidence on which the DG has based his findings are summarized as under:

- a) *The opposite party No.2 despite losing the bid has given detailed submissions defending the position of the opposite party No. 1.*
- b) *Normally a party losing a bid would have also written against the sponsoring authority. However, the opposite party No.2 avoided any allegation against the opposite party No.1. Further, the opposite party No.2 challenged the rejection of its bid by the opposite party No.1 only after issuance of notice from the DG's office on 06.05.10.*
- c) *There appears to be some meeting of minds among parties in course of bidding process as, inter alia, the same person had purchased forms for more than one participating entity.*

- d) *The copies of the set of bid documents submitted by the opposite party No.2 do not contain the stamp of the Joint Secretary, Government of Goa (the opposite party No.1) and was not on the pre- printed forms supplied by it.*
- e) *The copies submitted to the DG did not contain the additional conditions in the financial proposal due to which the bid was rejected. It is possible that the insertion of an additional clause in the financial proposal in the bid documents in ink might have been inserted by the opposite party No.2 to make its bid defective and hence liable for rejection. Further, the use of whitener by the opposite party No.2 to change the date of the proposal also raises some suspicion.*

52. Before recording our conclusions and findings on the above specific circumstances highlighted and relied upon by the DG, we may mention that the findings recorded by the DG are neither categorical nor have the same been substantiated by any cogent material and evidence. In the absence of any corroborative evidence, it is not possible to hold that there was any meeting of mind or collusion or conspiracy or concerted action amongst the bidders or between the opposite parties.

53. We have gone through the aforesaid circumstances highlighted by the DG and our brief observations thereon are recorded below:-

54. The mere fact that the opposite party No.2 submitted detailed replies defending not only itself but also the opposite party No.1 is not sufficient to indicate that the two were in a tacit arrangement in violation of section 3(3)(d) of the Act.

55. We may further note that the opposite party No.2's replies were limited to the allegation in the information and did not extend to whether or not the sponsoring authority i.e., the opposite party No.1 wronged in rejecting the bid of the opposite party No.2. With regard to the timing of the challenge of the rejection of its bid by the opposite No.1, the opposite party No.2 challenged the rejection *vide* its letter dated 18.05.2010. It is clear that letter informing the opposite party No.2 regarding the

rejection of its bid and the notice from the DG in the present matter were both issued on the same date i.e., 06.05.2010. However, the fact that the letter challenging the rejection of opposite party No. 2's bid was sent after 06.05.2010 cannot be interpreted to mean that the decision to challenge the rejection was taken by the opposite party No.2 only after or because of the notice issued by the office of the DG. Accordingly, it is held that the above findings of the DG do not adequately support the conclusion regarding a possible bid manipulation or a tacit understanding in the present case.

56. While the facts relating to purchase of forms by the same person as noted by the DG raise doubts on the independent approach by the parties purchasing the forms for the Lottery Tender. However, in the absence of corroborative evidence, such facts are not in themselves sufficient to substantiate the finding that there was some meeting of minds between the opposite parties or between the opposite party No.2 and Sugal & Damani, in particular.

57. The DG in his report has also noted that the copies of the set of bid documents submitted by the opposite party No.2 do not contain the stamp of the Joint Secretary, Government of Goa and was not on the pre- printed forms supplied. In this connection, we may note the response of the Joint Secretary (Budget), Government of Goa to the DG's questions which explains that there was no condition requiring the bid proposals to be submitted on pre-printed forms only. Further, it was sought to be clarified that the bid documents could have been submitted without having the seal of the Government of Goa.

58. Thus, it is apparent from the responses of the opposite party No.1 that the submission of the bid documents did not require either to be on the pre-printed forms or have a stamp of the Government of Goa. Accordingly, we are of the opinion that failure to submit the bid proposals on pre-printed forms and without the stamp of the opposite party No.1 cannot be construed as evidence to substantiate the alleged violations of section 3 of the Act.

59. It may be noted that the findings of the DG on contravention of section 3 of the Act are not definite and the same are not backed by cogent evidence as discussed

above. Besides, the informant has also not alleged such collusive conduct amongst the bidders. Moreover, in the absence of impleadment of necessary parties, a finding of contravention of section 3 of the Act would not be appropriate.

60. Therefore, in view of the forgoing discussion and after perusing the entire material available on record, the Commission is of the considered view that no contravention of the provisions contained in sections 3 and 4 of the Act is made out against the opposite parties.

61. The information is found to be devoid of any merit and the same is rejected.

62. The Secretary is directed to inform the parties accordingly.

Sd/-	Sd/-	Sd/-	Sd/-	Sd/-
Member (G)	Member (P)	Member (GG)	Member (AG)	Member (T)

Chairperson