



COMPETITION COMMISSION OF INDIA

Case No. 28 of 2019

In Re:

XYZ

Informant

And

1. Directorate of State Lotteries, West Bengal

**23A, NS Road
Fortuna Tower
9th Floor
Kolkata-700001
West Bengal**

Opposite Party No. 1

2. West Bengal Lottery Stockists Syndicate Pvt. Ltd.

**2C, Camac Court
2nd Floor, 25B
Camac Street
Kolkata-700016
West Bengal**

Opposite Party No. 2

CORAM

**Mr. Ashok Kumar Gupta
Chairperson**

**Ms. Sangeeta Verma
Member**

**Mr. Bhagwant Singh Bishnoi
Member**

Order under Section 26(2) of the Competition Act, 2002

1. The present Information has been filed by XYZ ('the Informant') under the provisions of Section 19(1)(a) of the Competition Act, 2002 ('the Act') against the Directorate of State Lotteries, West Bengal ('Opposite Party No. 1' / 'OP-1') and the West Bengal Lottery Stockists Syndicate Pvt. Ltd. ('Opposite Party



No. 2' / 'OP-2') alleging *inter alia* contravention of the provisions of Sections 3 and 4 of the Act.

2. OP-1, established under Finance Department of the State of West Bengal, organises, promotes, distributes and conducts lotteries on behalf of Government of West Bengal. Further, as per the Information, OP-2 is a private limited company registered under the Companies Act, 1956 and carries out distribution, marketing, sale and promotion of paper lotteries as per the agreement dated 20.01.2014 ('agreement') between OP-1 and OP-2 which has been renewed from time to time. OP-2 is further stated to be formed by 8 previous lottery stockists and as per the terms and provision of the agreement, OP-2 is the sole and exclusive distributor/ promoter of paper lotteries in the State of West Bengal.
3. The Informant has alleged that the aforementioned agreement allowed OP-2 to purchase paper lotteries from OP-1 at credit and discount (face value of the paper lotteries less the commission allowable on such face value) to the exclusion of the general public, stockists *etc.* Thereafter, OP-2 was free to sell the paper lotteries at face value. Accordingly, the Informant has alleged that such an arrangement between OP-1 and OP-2 leads to appreciable adverse effect on competition in the business of distribution and promotion of paper lotteries and also causes loss to the state exchequer. Thus, the Informant has alleged that the said exclusive distribution and promotion agreement between OP-1 and OP-2 is in violation of the provision of Section 3(1) of the Act and is liable to be declared void.
4. Further, the Informant has also alleged that OP-2 is the one and only company chosen since 2014 without inviting any public tender and such agreement is being extended from time to time, which shows *mala fide* intention on the part of OP-1 and OP-2. Thus, the Informant also alleged that OP-1 is abusing its dominant position in contravention of the provisions of Section 4 of the Act by



denying market access to other competitors involved in the business of lotteries.

5. The Informant has also stated that 95% of the lottery business in the State of West Bengal is from outside the State and is completely controlled by M/s Future Gaming Solutions and Hotels Pvt. Ltd. and the remaining 5% of the paper lottery business is from within the State of West Bengal and is controlled by OP-2. The Informant has alleged that both Future Gaming Solutions and Hotels Pvt. Ltd. as well as OP-2 are managed and controlled by Mr. Santiago Martin.
6. Further, the Informant alleged that OP-1 was well aware of the several breaches of the agreement by OP-2 and yet had continued with such agreement. For the same, the Informant stated that as per the terms of the agreement, the lotteries should be sold exclusively by OP-2. However, in breach of such term, OP-2 had been selling lotteries through Future Trade Solution LLP. The Informant also alleged that OP-2 unilaterally declared special prizes on paper lotteries beyond the prize declared by OP-1 in violation of the agreement. Similarly, the Informant has also stated that the terms of agreement also stipulate that the paper lottery distributor or any of his family members / business partners shall not be directly or indirectly or remotely associated in any capacity with any other company /firm /body associate engaged in the lottery business conducted or organized by any other state government. However, Mr. Santiago Martin who holds 99% shareholding in OP-2, is involved in the sale of lotteries organized by several different States, which is in breach of the agreement between OP-1 and OP-2.
7. Based on the above averments and allegations, the present information has been filed by the Informant against the OPs, alleging contravention of provisions of Section 3 and Section 4 of the Act.



8. To examine the allegations, the Commission considered the Information in its ordinary meeting held on 22.08.2019 and *vide* an order of even date decided to forward a copy of the Information to OP-1 with a direction to file its response thereon. Accordingly, OP-1 filed its response on 13.12.2019.
9. At the outset, OP-1 submitted that the provisions of the Act can be invoked in respect of 'lottery tickets' only if these items can be regarded as 'goods' within the meaning of the provisions of Section 2(i) of the Act. However, as per OP-1, the Constitution Bench of Hon'ble Supreme Court of India in the case of *Sunrise Associates v. Government of NCT of Delhi & Ors* (2006) 5 SCC 603 held that lottery ticket is an 'actionable claim' for the purpose of Sale of Goods Act, 1930. Therefore, OP-1 claimed that 'lottery tickets' are specifically excluded from the provisions of the Sale of Goods Act, 1930 and the Competition Act as both Acts have exempted 'actionable claim' from the definition of 'goods'. Also, OP-1 denied that it is an 'enterprise' within the meaning of Section 2(h) of the Act. Allegations regarding breach of agreement between OP-1 and OP-2 are beyond the jurisdiction of the Commission as the same involve only signatories of the agreement.
10. Furthermore, OP-1 stated that regulation by State or its instrumentality regarding sale and distribution of lottery is a power conferred by virtue of provisions contained in Part XIII of Constitution of India and the same being a sovereign function of the State so the Commission does not have jurisdiction to issue any direction.
11. On merits, it was stated that initially, the lottery tickets were sold directly to the sellers. Thereafter, under the changed procedure, lottery tickets were distributed to seven stockiest for marketing.
12. Further, OP-1 stated that initially OP-2 was appointed as a distributor of lotteries by an agreement dated 20.01.2014 initially for a period of 3 years and



thereafter, the agreement was extended for a short duration. Subsequently, to have a transparent process, OP-1 issued tender No. 003/Secy(PAS)F/2018 dated 03.01.2018 for selection of sole distributor for sale of lottery tickets. The said tender process came to be litigated through a writ petition (*Jayamuruganceetha v. State of West Bengal & Others*, W.P. No. 1706 of 2018) filed before the Hon'ble High Court of Calcutta challenging the terms and conditions of the aforementioned tender. In view of the said writ petition, the State Government cancelled the aforesaid tender and undertook a comprehensive review of the terms and conditions of the tender. The Finance Department, Government of West Bengal formed a fresh tender committee on 25.09.2019 for selection of distributor for sale of lottery tickets. The first meeting of the said tender committee was held on 26.09.2019 and the second on 18.11.2019. Thus, as per OP-1, the process for selection of distributor through tender is under progress. The said writ petition was also disposed of by Hon'ble High Court *vide* order dated 01.11.2019.

13. As the tender issued on 03.01.2018 could not be given effect to due to the pendency of the writ petition and also due to a change in the Goods and Services Tax rate on lotteries, the agreement dated 20.01.2014 between OP-1 and OP-2 was extended from time to time, for short durations. Moreover, as per OP-1, these extensions of the aforesaid agreement were only an interim arrangement to ensure smooth business functioning of OP-1, as it had already taken a policy decision to award tender for distribution for sale of lottery tickets way back in 2018. It was also highlighted that agreement dated 20.01.2014 was signed with OP-2 so as to have single window dealing with the distributor of lotteries. It was denied that under the said agreement, the company is being allowed to lift lottery tickets on credit, to the exclusion of general public or other stockists. All seven stockists of West Bengal State Lotteries are stated to be part of the present syndicate. It was further denied that OP-2 has unilaterally declared special and further prize, beyond what is declared by State Government.



14. It has also been submitted by OP-1 that various terms and condition of the original agreement dated 20.01.2014 between OP-1 and OP-2 have been modified/ dropped. For instance, Para 2.3 of the agreement dated 20.01.2014, which stated that the distributor or any of his family members/ business partners shall not be directly or indirectly or remotely associated in any capacity with such other company/ firm/ body associated or engaged in lottery business conducted or organized by other government or its agent has been dropped by State Government *vide* circular No. 691.F.T/FT/0/IE-03/I3SL dated 30.05.2018.
15. Lastly, OP-1 submitted that a fresh tender is expected to be floated within 4 months and that it would take another 3 months to award the tender. It was also pointed out that OP-2 has given in writing that w.e.f. 02.03.2020, it will not be able to continue the work of distributorship of lotteries under the present terms and conditions.
16. The Commission has perused the Information and the reply/ brief synopsis filed by OP-1 besides holding preliminary conference with OP-1 on 19.02.2020.
17. At the outset, the Commission notes that OP-1 has taken jurisdictional pleas challenging the jurisdiction of the Commission. In this regard, it was contended that the issue of regulation of lottery business cannot fall within the purview of the Act as lottery tickets cannot be regarded as 'goods' within the meaning of the term as defined in Section 2(i) of the Act. It was pointed out that the term 'goods' has been given the same meaning as defined in the Sale of Goods Act, 1930 which excludes 'actionable claim' from the ambit of 'goods'. Referring to a decision of the Hon'ble Supreme Court of India in *Sunrise Associates v. Government of NCT of Delhi & Ors.* (2006) 5 SCC 603 held lottery tickets to be actionable claims. It was also claimed that distribution, sale and regulation of lotteries being a sovereign function of the State, the Commission has no jurisdiction in this regard.



18. The Commission has examined the jurisdictional pleas and is of the considered opinion that the same are thoroughly misplaced.
19. The Commission notes that appointment of distributor for marketing and sale of State lotteries clearly falls within the purview of 'service'. In this regard, the Commission notes that the term 'service' has been defined in Section 2(u) of the Act, which reads as under:

“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”

20. A plain reading of the above definition indicates that ‘...service of any description which is made available to potential users...’ has been captured within the purview of the term ‘service’. As such, the contention of OP-2 that lottery cannot be construed as ‘goods’ within the meaning of the term as given in the Act, is misdirected.
21. Further, the contention of OP-1 is that it is not an ‘enterprise’ within the meaning of the term as defined in Section 2(h) of the Act as distribution, sale and regulation of lotteries is a sovereign function of the State.
22. The Commission notes that this contention is also misconceived as a Department of the Government has been specifically included within the purview of the term ‘enterprise’ which is engaged in the specified economic activities including provision of services. For ready reference, the definition of ‘enterprise’ is excerpted below:



‘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 relating 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.”

23. Further, regulation, sale and distribution of lottery tickets, by no stretch of arguments, can be taken as an activity relating to sovereign functions of a Government. The question as to what constitutes ‘sovereign’ or ‘non-sovereign’ function is well-settled and the courts have taken a very narrow view of the term ‘sovereign function’ by confining the same to strict constitutional functions of the three wings of the State. Welfare activities, commercial activities and economic activities have been kept outside the purview of the term ‘sovereign functions’. Resultantly, only primary, inalienable and non-delegable functions of a constitutional government have been held to qualify for exemption within the meaning of ‘sovereign functions’ of the government under section 2(h) of the Act. Welfare, commercial and economic activities, therefore, are not covered within the meaning of ‘sovereign functions’ and the State, while discharging such functions is as much amenable to the jurisdiction of competition regulator as any other private entity discharging such functions (Union of India v. Competition Commission of India & Ors., W.P.(C) 993/2012 decided on 23.02.2012).



24. Having disposed of the preliminary and jurisdictional pleas raised by OP-1, the Commission notes that the main grievance of the Informant relates to appointment of OP-2 by OP-1 as distributor for marketing and sale of State lotteries without following a competitive process. This has been addressed by the State, as noted *supra*.
25. From the reply of OP-1, it is observed that OP-1 signed the agreement dated 20.01.2014 with OP-2 so as to have a single window dealing with the distribution of lotteries. Further, it was pointed out therein that OP-2 was initially appointed as a sole distributor of lotteries through the said agreement for a period of 3 years and thereafter the agreement was extended from time to time for short durations. The Commission also notes that in meanwhile, OP-1 also decided to float a tender, which came to be litigated before Hon'ble High Court by way of writ petition. Due to pendency of the writ petition and other factors detailed in the reply, the tendering process could not be implemented. Moreover, as per OP-1, the interim arrangement of extension of the aforesaid agreement was taken to ensure smooth business functioning of OP-1, although way back in 2018, OP-1 had taken a policy decision to award tender for distribution for sale of lottery tickets.
26. Further, the learned counsel appearing on behalf of OP-1 during the course of the preliminary conference held on 19.02.2020 assured the Commission that the tendering process for selecting distributor of State Lotteries in the State of West Bengal would be initiated soon. Accordingly, the Commission *vide* its order dated 19.02.2020 directed OP-1 to file a status report within one week of the completion of the tendering process.
27. In view of the above discussion, the Commission is of the opinion that no case of contravention of the provisions of the Act is made out against OPs and the Information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.



28. The Secretary is directed to inform the parties, accordingly. A copy of this order be also sent to Chief Secretary, State of West Bengal for information and compliance.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi
Date: 11/05/2020