

A COMPETITION COMMISSION OF INDIA

v.

STATE OF MIZORAM & ORS.

(Civil Appeal Nos. 10820-10822 of 2014)

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JANUARY 19, 2022

**[SANJAY KISHAN KAUL AND M. M. SUNDRESH, JJ.]**

- Competition Act, 2002 – ss. 2(i), 2(u), 3, 4, 19(1)(a) & 26 – Lotteries (Regulation) Act, 1998 – Mizoram Lotteries (Regulation) Rules, 2011 – Jurisdiction of Competition Commission of India – State of Mizoram issued an Invitation for Expression of Interest (EOI), inviting bids for appointment of lotteries distributors and selling agents for State lotteries – In pursuance of EOI, bids were received and four companies were selected as distributors – Respondent No.4 made a complaint to the CCI, seeking investigation in respect of State lottery – Respondent alleged that the bidders had cartelised and entered into a collusive agreement that had an appreciable adverse effect on competition in the lottery business – CCI and Director General (DG) found prima facie evidence of cartelization and bid rigging by the bidders – However, CCI opined that no prima facie case was made out against the State and rejected the complaint – DG did make some observations against Director, IF&SL and the State of Mizoram to the effect that they ought to have been more vigilant in stopping unfair trade practices – High Court in writ petition filed by the State, held that lottery business being in the nature of res extra commercium could not be covered by the Competition Act – Consequently CCI did not have jurisdiction to entertain the complaint – On appeal, held: State, under a misconception, approached the High Court, possibly in an endeavour to defend one of its officers, respondent No. 2 whose conduct has not been very favourably commented on by the DG – Lotteries may be a regulated commodity and may even be res extra commercium – That would not takeaway the aspect of something which is anti-competition in the context of the business related to lotteries – The lottery business can continue to be regulated by the Regulation Act, however, if in the tendering process there is an element of anti-competition which would require investigation by*
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*the CCI, that cannot be prevented under the pretext of the lottery business being res extra commercium, more so when the State Government decides to deal in lotteries – There was really no need for the High Court to proceed in the manner and in the direction it sought to proceed – The correct approach, more so once the statement was made on behalf of the CCI, would have been to close the proceedings filed by the State Government and let the private parties face the ultimate decision of the CCI.*

**Allowing the appeal, the Court**

**HELD:** 1. The complaint of respondent No.4 may have been also under Section 4 of the Competition Act but it had not even referred that aspect to the DG and had decided not to proceed against the State. That should have been the end of the matter so far as the State is concerned. Yet the State, under a misconception, approached the High Court, possibly in an endeavour to defend one of its officers, respondent No. 2, whose conduct has not been very favourably commented on by the DG. Even if the State felt that these comments of the DG were not sustainable, such an aspect could have been pleaded with the CCI in pursuance of its notice and possibly the matter would have been closed atthat stage. In fact, the CCI had opined, both before and after the filing of the writ petition, that it was not proceeding against respondent No.1/State under Section 4 of the Competition Act. The aforesaid gave an opportunity to respondent Nos. 5 & 6 also to approach the Court and interdict the proceedings which ought to have been concluded a long time ago. It would, in our view, have been beneficial even to the State to have come to a conclusion one way or the other. The interdict post the investigation report by the DG and prohibiting the CCI from carrying out its mandate under the Competition Act is unsustainable. The concern was limited to the role assigned to the CCI under the Competition Act, and in the context of the EoI was limited to examining any perceived bid rigging in the tendering process for appointment of selling agents and distributors for the lottery business. There was no conflict in the interplay of the two Acts that even needed reconciliation or prohibition against either one, as the limited scrutiny was to examine the mandate of Section 3(1) read with Section 3(3) of the Competition Act. Lotteries may be a regulated

- A commodity and may even be *res extra commercium*. That would not takeaway the aspect of something which is anti- competition in the context of the business related to lotteries. [Paras 37 & 38][894-F-G; 895-A-B, D-E]
  - 2. This Court take note of the expansive definition of ‘Service’ under Section 2(u) of the Competition Act. It means “service of any description”, which is to be made available to potential users. The purchaser of a lottery ticket is a potential user and a service is being made available by the selling agents in the context of the Competition Act. Suffice for us to say the inclusive mentioning does not inhibit the larger expansive definition. The lottery business can continue to be regulated by the Regulation Act. However, if in the tendering process there is an element of anti- competition which would require investigation by the CCI, that cannot be prevented under the pretext of the lottery business being *res extra commercium*, more so when the State Government decides to deal in lotteries. The intervention by the High Court was extremely premature. It ought to have waited for the CCI to come to a conclusion but on the other hand what has happened is that the CCI proceedings have been brought to a standstill while the High Court opined on the basis of some aspects which may or may not arise. [Paras 39 & 40][895-F-H; 896-A-B]
  - 3. There was really no need for the High Court to proceed in the manner and in the direction it sought to proceed. The correct approach, more so once the statement was made on behalf of the CCI, would have been to close the proceedings filed by the State Government and let the private parties face the ultimate decision of the CCI. If they were aggrieved by any adverse decision of the CCI they were entitled to avail of the appellate remedy under Section 53B of the Competition Act. The complaint having been made by respondent No.4 under Section 19 of the Competition Act, which provides that the Commission “may” inquire into certain agreements and dominant position of enterprise as envisaged under sub-section (1) of Section 3 and sub- section (1) of Section 4 of the Competition Act. The CCI found out a *prima facie* case for investigation by the DG under Section 3(1) of the Competition Act, the DG opined adversely,
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and the CCI issued notice giving an opportunity to the affected parties to place their stand before it. This process ought to have been permitted to conclude with the right available to the affected parties to avail of the appellate remedy under Section 53B of the Competition Act. [Paras 41 & 42][896-B-E]

*B.R. Enterprises v. State of UP (1999) 9 SCC 700 : [1999] 2 SCR 1111; Sunrise Associates v. Government of NCT of Delhi. (2006) 5 SCC 603 : [2006] 1 Suppl. SCR 421; Union of India v. Martin Lotter Agencies Ltd. (2009) 12 SCC 209 : [2009] 7 SCR 946; CCI v. Bharti Airtel (2019) 2 SCC 521 : [2018] 14 SCR 489; Black Diamond Beverages 19 v. Commercial Tax Officer (1998) 1 SCC 458 : [1997] 4 Suppl. SCR 133; State of Punjab v. Devans Modern Breweries. (2004) 11 SCC 26 : [2003] 5 Suppl. SCR 930; Competition Commission of India v. Steel Authority of India & Anr. (2010) 10 SCC 744 : [2010] 11 SCR 112; Sunrise Associates v. Government of NCT of Delhi (2006) 5 SCC 603 : [2006] 1 Suppl. SCR 421; R.D. Goyal & Anr. v. Reliance Industries Ltd. 10) (2003) 1 SCC 81 : [2002] 4 Suppl. SCR 231 – referred to.*

<u>Case Law Reference</u>			E
[1999] 2 SCR 1111	referred to	Para 19	
[2006] 1 Suppl. SCR 421	referred to	Para 19	
[2009] 7 SCR 946	referred to	Para 19	
[2018] 14 SCR 489	referred to	Para 22	F
[1997] 4 Suppl. SCR 133	referred to	Para 24	
[2003] 5 Suppl. SCR 930	referred to	Para 25	
[2010] 11 SCR 112	referred to	Para 26	G
[2006] 1 Suppl. SCR 421	referred to	Para 32	
[2002] 4 Suppl. SCR 231	referred to	Para 32	

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- A CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 10820-10822 of 2014.

From the Judgment and Order dated 16.08.2014 of the High Court of Gauhati, Aizawl Bench, Aizawl in W.P. (C) Nos.24, 76 and 90 of 2013.

- B With

Civil Appeal No. 1797 of 2015.

Rajshekhar Rao, Bijendra Chahar, Ritin Ray, Sr. Advs., Arjun Krishnan, Ms. Khushboo Mittal, Sumit Srivastava, Ms. Mansi Sood,

- C Shourya Bari, Rajesh Kumar, Raj Kumar Prasad, Pratyush Nandan, Vinod Kumar, Siddhesh Kotwal, Ms. Ara Upadhyay, Ms. Maniya Hasija, Ms. Pragya Barsaiyan, Akash Singh, Nirnimesh Dube, Arjun Garg, Aman Shukla, Ms. Sagun Srivastava, M/s Parekh & Co., Kedar Nath Tripathy, Advs. for the appearing parties.

- D The Judgment of the Court was delivered by

**SANJAY KISHAN KAUL, J.**

**Facts:**

- E 1. A complaint received by the Competition Commission of India (for short ‘appellant/CCI’) from respondent No.4 seeking investigation under the Competition Act, 2002 (hereinafter referred to as the ‘Competition Act’) in respect of State Lottery run by the State of Mizoram (respondent No.1) has given rise to the present dispute. The jurisdiction of CCI to inquire into allegations of bid rigging, collusive bidding, and cartelisation in the tender process for appointment of selling agents and F distributors for lotteries organised in the State of Mizoram has been challenged in the present proceedings by the successful bidders, and to a much lesser extent, by the State of Mizoram.

- G 2. The State of Mizoram issued an Invitation for Expression of Interest (for short ‘EoI’) through respondent No.2, the Director, Institutional Finance and State Lottery (IF&SL) on 20.12.2011 inviting bids for the appointment of lottery distributors and selling agents for state lotteries to be organised by the Government of Mizoram in terms of the Mizoram Lotteries (Regulation) Rules, 2011 (hereinafter referred to as the ‘Regulation Rules’) framed under the Lotteries (Regulation) H Act, 1998 (hereinafter referred to as the ‘Regulation Act’). The EoI

was for appointment of lottery distributors/selling agents to organise, promote, conduct, and market the Mizoram State Lottery through both conventional paper type and online system. The EoI specified that the minimum rate fixed by the Government of India is Rs.5 lakh per draw for Bumper and Rs.10,000 per draw for others – bids less than these rates would be summarily rejected. In pursuance of the EoI, five bids were received of which four were accepted. The accepted bids quoted identical rates as per the following table:

Rate per draw				
S.No.	Name	Paper	Online	Bumper
1.	E-Cool Gaming Solutions	-	10,000	-
2.	Summit Online Trade Solution Pvt. Ltd. (R5)	-	10,000	-
3.	M/s. NV International (R6)	-	10,000	-
4.	Teesta Distributors	10,000	-	5,00,000

These four companies/partnerships were selected as distributors to operate the lotteries as per the Regulation Rules and the Regulation Act. In accordance with the EoI, selected distributors/selling agents were *inter alia* required to furnish Rs. 5 crore each for paper and online lottery as security, a sum of Rs.1 crore each as advance payment of the sale proceeds, and a sum of Rs.1 crore each towards the prize pool.

3. Respondent No.4 made a complaint to the CCI on 16.05.2012 under Sections 3 & 4 read with Section 19(1)(a) of the Competition Act and the complaint was registered as Case No. 24 of 2012. In order to complete the array of parties defined as per Civil Appeal No.10820/2014, we may note that respondent No. 3 is the Director General of CCI and both respondent Nos. 4 & 5 are private companies while respondent No. 6 is a partnership firm.

4. The substratum of the complaint by respondent No. 4 was that identical offers of Rs.10,000 per draw were made in all four bids (one for paper and three for online) and a single bid of Rs.5 lakh per draw was made for the Bumper draw. These amounts were the minimum rates fixed under the EoI. The allegation made by respondent No. 4 was that the bidders had cartelised and entered into an agreement that had an appreciable adverse effect on competition in the lottery business in Mizoram. There was bid rigging and a collusive bidding process which

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- A violated Section 3(1) read with Section 3(3) of the Competition Act, and also caused grave financial loss to the State of Mizoram.
  - 5. Respondent No. 4 also alleged that the State of Mizoram abused its dominant position as administrator of State lotteries, by requiring distributors to furnish exorbitant sums of money towards security, advance payment, and prize pool even before the lotteries were held. This was alleged to be unfair, discriminatory and illegal and effectively restricted the supply of service of lotteries. The consequent allegation against the State was that it violated Section 4 of the Competition Act. The prayer made by respondent No. 4 was that the EoI be quashed and set aside, respondent No.1 be restrained from abusing their dominant position, a restraint be passed from awarding the tender to the selected bidders, and selected bidders be banned from carrying out business in the State of Mizoram.
- B payment, and prize pool even before the lotteries were held. This was alleged to be unfair, discriminatory and illegal and effectively restricted the supply of service of lotteries. The consequent allegation against the State was that it violated Section 4 of the Competition Act. The prayer made by respondent No. 4 was that the EoI be quashed and set aside,
- C respondent No.1 be restrained from abusing their dominant position, a restraint be passed from awarding the tender to the selected bidders, and selected bidders be banned from carrying out business in the State of Mizoram.

**The Legal Position:**

- D In order to appreciate the contours of the complaint, it may be appropriate to deal with some of the provisions of the Competition Act. The objective of the Competition Act is set out in the Preamble itself, i.e., to establish a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. Chapter II of the Competition Act prohibits certain agreements, abuse of dominant position and regulation of combinations. The prohibition of anti-competitive agreements is set out in Section 3. The relevant provisions read as under:
- E other participants in markets, in India, and for matters connected therewith or incidental thereto. Chapter II of the Competition Act prohibits certain agreements, abuse of dominant position and regulation of combinations. The prohibition of anti-competitive agreements is set out in Section 3. The relevant provisions read as under:

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**“CHAPTER II**

**PROHIBITION OF CERTAIN AGREEMENTS, ABUSE  
OF DOMINANT POSITION AND REGULATION OF  
COMBINATIONS**

*Prohibition of agreements*

- G **3. Anti-competitive agreements** (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.
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(2) Any agreement entered into in contravention of the provisions A contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations B of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical C development, investment or provision of services;

(c) shares the market or source of production or provision of D services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to E any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.— For the purposes of this sub-section, “bid rigging” F means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

[...]" G

Under the same Chapter, Section 4 prohibits the abuse of dominant position. The relevant portion is extracted hereunder:

**“4. Abuse of dominant position. – [(1) No enterprise or group shall abuse its dominant position.]** H

- A        (2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group],—
  - (a) directly or indirectly, imposes unfair or discriminatory—
    - (i) condition in purchase or sale of goods or service; or
    - (ii) price in purchase or sale (including predatory price) of goods or service.
- B        [...]"

7. Chapter III deals with provisions relating to establishment, Composition, etc. of the CCI while Chapter IV sets out the Duties, C Powers and Functions of CCI. Chapter V sets out the Duties of the Director-General. Penalties are provided in Chapter VI. Chapter VIIA refers to the Establishment of the Appellate Tribunal.

8. Section 26 of the Competition Act provides for the procedure for an inquiry under Section 19, which deals with inquiries into certain D agreements and dominant position of enterprises. The relevant provisions of Section 26 are extracted as under:

- E        “**[26. Procedure for inquiry under section 19.** – (1) On receipt of a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the Director-General to cause an investigation to be made into the matter:

- F        Provided that if the subject-matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

- G        (2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no *prima facie* case, it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be.

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(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission. A

(4) The Commission may forward a copy of the report referred to in sub-section (3) to the parties concerned:

[...]" B

**The Developments:**

9. In pursuance of the complaint received from respondent No. 4, the CCI exercised its powers under Section 26(1) of the Competition Act, as it found *prima facie* evidence of cartelisation and bid rigging by the bidders and gave three reasons for the same: C

- a. Three bidders made identical bids of the minimum rate of Rs.10,000/- per draw for online lotteries;
- b. Only one party made a bid for the paper lottery segment and they quoted the minimum rate for the same. D
- c. Only one party made a bid for the bumper draw and also quoted the minimum rate for the same.

10. In the aforesaid circumstances, the CCI expressed a *prima facie* view that there appears to be contravention of the provisions of Section 3(1) read with Section 3(3) of the Competition Act by respondent Nos. 5 & 6 and other successful bidders. Accordingly, the CCI required the Director General (for short 'DG') to conduct an investigation into the matter. However, the CCI opined that no *prima facie* case was made out against respondent No.1/State of Mizoram as it could not be considered as an 'enterprise' or a 'group' under the Competition Act. Respondent No. 1's role was to regulate and monitor the business of lotteries in the State of Mizoram in exercise of its powers and functions under the Regulation Act and the Regulation Rules. It was, thus, opined that they have every right to impose financial, technical and other conditions in their bid documents as they deemed fit. The CCI, thus, rejected the complaint of respondent No. 4 under Section 4 of the Competition Act. F G

11. The DG in pursuance of the said order of the CCI, a report dated 14.01.2013 was submitted on 17.01.2013 whereby it came to the conclusion that respondent Nos. 5 & 6 along with M/s. Teesta Distributors H

- A and M/s. E-Cool Gaming Solutions (P) Ltd. had colluded, formed a cartel, and indulged in bid rigging. Thus, they were in violation of the provisions of Section 3(1) read with Section 3(3) of the Competition Act. However, no order was passed against the State of Mizoram.

12. What is relevant to note is that the DG did make some observations against respondent No.2 and the State of Mizoram to the effect that they ought to have been more vigilant in stopping unfair trade practices and their lapses raised suspicions of favouritism and collusion. The bidding committee had received the complaint of respondent No. 4 on 18.05.2012 when the Committee recommended that the successful bidders be appointed as selling agents. Thus, the DG opined that the Committee allowed rigging to happen and respondent No.2 was also instrumental in calling all four bidders together for the renegotiation of bid prices on 22.05.2012. The DG, thus, opined that it was a case of collusive bidding but the case against respondent No.1 under Section 4 of the Competition Act was dropped.
- D 13. The aforesaid report was placed before the CCI in its ordinary meeting on 12.02.2013 when it was decided to send copies of the report to the parties so that they could file their objections/replies thereto. The parties were instructed to file profit & loss accounts, balance sheets, and turnover of their enterprise for the past three financial years along with their objections to the DG's report and a date was fixed of 20.03.2013 for an oral hearing.

**The Court Litigation:**

14. We may note that surprisingly respondent No.1 filed a writ petition, being WP(C) No.24/2013, in the Gauhati High Court, Aizwal F Bench challenging both the report of the DG and the CCI's order dated 12.02.2013. The grievance of respondent No.1 was actually with the adverse observations made by the DG in his report and the fact that the CCI had forwarded the DG report to them despite observations that respondent No. 4 had failed to establish a *prima facie* case under Section G 4 of the Competition Act. We say 'surprisingly', because if at all, the grievance could have been of respondent No.2 qua the observations made, but could not have been of respondent No.1/State. That too respondent No.2 could have filed a response and it was open to the CCI to close the proceedings both against respondent Nos.1 & 2. In fact, Section 4 proceedings against respondent No.1 were already closed. H The Gauhati High Court, however, chose to pass an interim order on

18.03.2013 in the writ petition directing that no final order be passed by the CCI. On the said order being passed, the CCI vide its order dated 11.06.2013, authorised its representative to inform the High Court that it did not intend to pass an order against the State of Mizoram, and to pray that the High Court's injunction against passing a final order be lifted. In any case, that ought to have put the matter to rest.

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15. It, thus, does appear to us that the respondent No.1 lent its shoulder to assist the other private parties and respondent No. 6 filed a writ petition, being WP(C) No.76/2013, praying for quashing of the DG report and all proceedings pending before the CCI. Respondent No. 6 sought to raise a plea that they had struck an agreement with respondent No.1 on 22.07.2010 as per which they were formally assured of at least 25% of the total number of draws held per day once lotteries were reopened. An agreement was struck to settle an amount of Rs.2.89 crore stated to be owed by respondent No.1 to respondent No. 6 and, thus, it was pleaded that the very question of forming a cartel or indulging in bid rigging did not arise. Respondent No. 5 also sought to take advantage of the proceedings initiated by respondent No.1 and filed a writ petition, being WP(C) No.90/2013 seeking similar relief. Among the pleas raised by respondent No. 5 was that lotteries were not covered by the Competition Act and, thus, the CCI did not have jurisdiction to conduct an inquiry under Section 26(1) of the Competition Act.

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16. The three writ petitions were taken up together and admitted by the Gauhati High Court vide its order dated 29.10.2013 and the operation of interim directions issued on 18.03.2013 were continued, restraining the CCI from delivering the final order.

17. The CCI aggrieved by the same moved this Court against the said interim direction dated 29.10.2013. Notice was issued in the SLP(C) No. 4438-4441/2014 on 10.03.2014 and the High Court was permitted to proceed with the matter in the mean time. The High Court, thus, passed its final order in the three writ petitions on 16.08.2014, which made those SLPs infructuous and were consequently dismissed as withdrawn on 25.08.2014.

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**The Impugned Order:**

18. The final order dated 16.08.2014 sought to be impugned in the present proceedings shows that the merits of the case were not really urged but the arguments were confined to the show cause notice issued

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- A by the CCI. Thus, what the High Court examined was whether the Competition Act would be applicable entitling the CCI to entertain the complaint/information given by respondent No. 4.

19. The High Court went into the question of the nature of the business sought to be carried out, i.e., of lotteries. In this behalf relying
- B on the judgment of this Court in *B.R. Enterprises v. State of UP*<sup>1</sup> it was held that lotteries cannot be considered to be trade and commerce within the meaning of Articles 301-303 of the Constitution of India. The High Court also observed that the lottery tickets have no value in and of themselves (*Sunrise Associates v. Government of NCT of Delhi*).<sup>2</sup>
- C The right covered by a lottery ticket is nothing but an actionable claim and, therefore, it was concluded from the definition of 'goods' under the Sale of Goods Act, 1930 that they were excluded from such definition and other tax statutes. Lastly, relying upon the judgment of this Court in *Union of India v. Martin Lotter Agencies Ltd.*<sup>3</sup> it was opined that lotteries, being akin to gambling activities, came under the purview of
- D the doctrine of *res extra commercium*. The Competition Act, it was opined, was applicable to legitimate trade and goods, and was promulgated to ensure competition in markets that are *res commercium*. Thus, lottery activity being in the nature of *res extra commercium* could not be covered by the Competition Act and consequently the CCI did not have jurisdiction to entertain the complaint of respondent No. 4. The
- E High Court also took note of the stand of the CCI, which found no contravention of Section 4 of the Competition Act by the State of Mizoram and, thus, there was no question of any further proceedings being allowed by the CCI against the State of Mizoram.
- F 20. We may place at this stage itself our caveat to the manner in which the High Court proceeded. On the statement of the CCI indicating its intent not to proceed against the State of Mizoram, that petition could have been put to rest. In fact, even earlier there was no intent to take out any proceedings against the State of Mizoram and only some observations had been made against respondent No.2 in the manner in
- G which they proceeded to carry out the allotment pursuant to the EoI. The *lis* really was between the private parties and whether their conduct could have been inquired into by the CCI.

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<sup>1</sup> (1999) 9 SCC 700.

<sup>2</sup> (2006) 5 SCC 603.

H <sup>3</sup> (2009) 12 SCC 209.

21. The Special Leave Petitions were filed by the CCI and respondent No. 4 against the orders passed in the three petitions and leave was granted with all the matters being tagged together. A

**Appellant's case:**

22. Mr. Rajshekhar Rao, learned senior counsel sought to canvas the case on behalf of the CCI. It was urged that the High Court had not appreciated the contours of the case sought to be examined by the CCI. The CCI was not concerned with the carrying out, regulation, or prohibition of lottery business at all; but its concern was only about potential bid rigging in the tender process for appointment of selling agents and distributors of lotteries. There is stated to be no conflict between the Competition Act and the Regulation Act. There was not even an overlap between the two which would require us to exclude the particular tender process from the mandate of Section 3(1) read with Section 3(3) of the Competition Act. It was urged that notwithstanding the fact that lotteries are a regulated commodity under the Regulation Act, the CCI would continue to have jurisdiction over the competition law aspect of such regulated commodity. In this behalf, he referred to the judgment of this Court in *CCI v. Bharti Airtel<sup>4</sup>*, which examined the contours of the Telecom Regulatory Authority of India Act, 1997 (hereinafter referred to as the 'TRAI Act') and the Competition Act in the context of the exercise of power by the Telecom Regulatory Authority of India (for short 'TRAI') and the CCI. It was observed in that context that the Competition Act frowns on anti-competitive agreements and it prohibits:

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- (a) where agreements are entered into by certain persons with a view to cause an appreciable adverse effect on competition;
- (b) where any enterprise or group of enterprises, which enjoys dominant position, abuses the said dominant position; and
- (c) regulating the combination of enterprises by means of mergers or amalgamations to ensure that such mergers or amalgamations do not become anti-competitive or abuse the dominant position which they can attain."

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<sup>4</sup>(2019) 2 SCC 521.

- A        23. In the aforesaid context, it was, thus, observed that the function assigned to the CCI was distinct from the function of the TRAI under the TRAI Act. What the CCI was supposed to find out was whether there was concert and collusion thereby forming a cartel. Whether a particular agreement would have an appreciable adverse effect on competition within the relevant market in India was, thus, held to be within the exclusive domain of the CCI.

B        24. Learned senior counsel referred to us the definition of ‘Service’ under Section 2(u) of the Competition Act, which reads as under:

- C        “**2. Definitions.** – In this Act, unless the context otherwise requires,—
- xxxx                  xxxx                  xxxx                  xxxx
- D        (u) “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;”
- E        It was, thus, urged that the expression ‘service’ would mean 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 matter. In the aforesaid context it was urged that the sale or distribution of lottery tickets to a prospective buyer on behalf of the State for consideration should be construed as “service”. While referring to the definition of ‘service’ it was submitted that a reading of the definition would show it as a “means” and “includes” definition and the ‘includes’ part does not narrow down the width of the ‘means’ part. Thus, the widest amplitude must be given to the definition of ‘service’ in this case to mean “service of any description”. To support this contention,
- F        learned senior counsel referred to the view taken by this Court in *Black Diamond Beverages v. Commercial Tax Officer*<sup>5</sup>. Wherein, it was observed in paragraph 7 that the first part of the definition gives the meaning of the expression “sale price” and must have its ordinary, popular

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H        <sup>5</sup> (1998) 1 SCC 458.

or natural meaning which is not controlled or affected by the second part which 'includes' certain other things in the definition. The same principle, it was urged, would apply in the given scenario.

25. Learned senior counsel also urged that had the Parliament intended to exclude any service from the application of the Competition Act, then they would have specifically stated so under Section 2(h) or Section 54 of the Competition Act. Section 54 forms part of Chapter IX of the Competition Act under the general heading 'Miscellaneous' and it specifically empowers the Central Government to exempt from the application of the Act or any provision thereof and for such period as it may specify in such notification. It was urged that no such notification has been issued. The present activity could hardly be called a sovereign function. On the different cases referred to in the impugned judgment and by the respondents, it was urged that they were all in the context of tax laws to be tested on the touchstone of Article 19(1)(g) of the Constitution of India while the present case really dealt with the interplay of the Competition Act and the Regulation Act. In such a scenario the doctrine of *res extra commercium* would only apply where the issue was whether the State Government can regulate (by taxation or otherwise) certain kinds of trades, which would otherwise be free for regulation/subject to reasonable restriction. It was argued that the business of acting as distributors/selling agents cannot be said to come within the purview of such a doctrine (*State of Punjab v. Devans Modern Breweries*<sup>6</sup>).

26. Lastly, it was urged that the High Court ought not to have entertained a petition under Article 226/227 of the Constitution of India as an order passed under Section 26(1) of the Competition Act was in the nature of an administrative direction. There were no adverse civil consequences. The proceedings were akin to a show cause notice and even the DG's report did not amount to a final decision. The respondents were also stated to have the alternative efficacious remedy of an appeal under Section 53B of the Competition Act whereby it could approach the appellate tribunal aggrieved by any decision or direction or order *inter alia* under sub-section (2) of Section 26 of the Competition Act. The commission is expected to form an opinion about the existence of a *prima facie* case for contravention of certain provisions of the

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<sup>6</sup> (2004) 11 SCC 26.

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- A Competition Act and then passes a direction for the DG to cause an investigation into the matter. Post the report of the DG it can proceed further or close the proceedings. (*Competition Commission of India v. Steel Authority of India & Anr.*<sup>7</sup> confirmed in *CCI v. Bharti Airtel*<sup>8</sup> case.) That stage had not even arisen. The final report of the CCI was yet to mature and the CCI was not even bound by the report of the DG.
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- C 27. The aforesaid was also in the context of the CCI having already made it clear that it did not intend to pass any adverse orders against the State of Mizoram and that the DG being the investigative arm was duty bound to report all facts to the CCI.

**Respondent No.1's Arguments:**

- D 28. The State of Mizoram actually prayed to be deleted as a party as they contended that the appeal had become infructuous in the context of the order passed by the CCI on 07.06.2012 and 11.06.2013 when it was opined that no fault could be attributed to the State and they would not pass any adverse orders against it. As noted, what is surprising is that there was originally also no cause for the State of Mizoram to have approached the High Court.
- E 29. Learned counsel for the State sought to contend that they had never prayed for quashing of the proceedings against the private parties. They only restricted their prayer against the continuation of proceedings against the State, something which we have already failed to appreciate and, once again, fail to appreciate. The last submission of the State of Mizoram was, once again, surprising – that it was a victim of cartelisation and would continue to cooperate with the CCI. If it was so, then the proceedings should have been permitted to continue before the CCI and the State ought to have given appropriate assistance as is sought to be volunteered now.

**Respondent No.5's arguments:**

- G 30. The only real contesting party before us and the beneficiary of what was complained against was respondent No. 5. Their contention was based on the fact that Section 3(1) of the Competition Act would have no application as there was no “goods” or “provisions of services”

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<sup>7</sup> (2010) 10 SCC 744.

H <sup>8</sup> (supra)

which could give rise to the CCI's jurisdiction. Lottery tickets were not goods and there was no provision of any services. Lottery business being *res extra commercium*, it had to be strictly regulated under the provisions of the Regulation Act. The definition of "goods" under Section 2(i) of the Competition Act, which refers to the definition of Sale of Goods Act, reads as under:

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**"2. Definitions.** – In this Act, unless the context otherwise requires,—

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(i) "goods" means goods as defined in the Sale of Goods Act, 1930 (8 of 1930) and includes—

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(A) products manufactured, processed or mined;

(B) debentures, stocks and shares after allotment;

(C) in relation to goods supplied, distributed or controlled in India, goods imported into India;"

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31. Section 2(7) of the Sale of Goods Act specifically excludes actionable claims from the ambit of goods, which reads as under:

**"2. Definitions.**—In this Act, unless there is anything repugnant in the subject or context,—

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XXXX                  XXXX                  XXXX                  XXXX

(7) "goods" means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;"

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32. A lottery ticket has been held to be only an actionable claim (*Sunrise Associates v. Government of NCT of Delhi*<sup>9</sup>) and was, thus held to not be a good. Where an actionable claim was sought to be included within the definition of 'goods', it was specifically so done. For example, debentures are specifically included within the definition of 'goods' under Section 2(i)(B) of the Competition Act. A comparison was also sought to be made with the Monopolies and Restrictive Trade

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<sup>9</sup> (2006) 5 SCC 603.

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- A Practices Act, 1969 where there was no such inclusion and, thus, debentures were opined to be excluded (*R.D. Goyal & Anr. V. Reliance Industries Ltd.*<sup>10</sup>).
33. Respondent No. 5 claimed to be merely a distributor which did not provide any services to any potential user of lottery and such distribution does not constitute a service under Section 2(u) of the Competition Act, which has been extracted above.
34. It may be relevant to note here that the definition of service is inclusive and the principles of specifying certain inclusions would, thus, apply without inhibiting the first part of the definition clause.
- C 35. Lastly it was contended that lottery business is *res extra commercium* and strictly regulated by State. Therefore, it could not have been the intent of the legislature to promote or sustain competition in lottery business. The Competition Act will thus not apply as there was a special act promulgated for conduct of lotteries.
- D **Our View:**
36. In the conspectus of the arguments, we find that a simple aspect of anti-competitive practices and cartelisation has got dragged on for almost ten years in what appears to be a mis-application by the High Court of the interplay of the two Acts, i.e., the Competition Act and the Regulation Act. We have already observed that respondent No. 1 seems to have played a very non-appreciable role in our opinion. What ought to have weighed with respondent No.1/State is what is sought to contend now, i.e., it is a victim of cartelisation and it is in its interests to cooperate with the CCI.
- F 37. The complaint of respondent No.4 may have been also under Section 4 of the Competition Act but it had not even referred that aspect to the DG and had decided not to proceed against the State. That should have been the end of the matter so far as the State is concerned. Yet the State, in our view, under a misconception, approached the High Court, possibly in an endeavour to defend one of its officers, respondent No. 2, whose conduct has not been very favourably commented on by the DG. Even if the State felt that these comments of the DG were not sustainable, such an aspect could have been pleaded with the CCI in
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- H <sup>10</sup> (2003) 1 SCC 81.

pursuance of its notice and possibly the matter would have been closed at that stage. In fact, the CCI had opined, both before and after the filing of the writ petition, that it was not proceeding against respondent No. 1/ State under Section 4 of the Competition Act. The aforesaid gave an opportunity to respondent Nos. 5 & 6 also to approach the Court and interdict the proceedings which ought to have been concluded a long time ago. It would, in our view, have been beneficial even to the State to have come to a conclusion one way or the other. The interdict post the investigation report by the DG and prohibiting the CCI from carrying out its mandate under the Competition Act is unsustainable.

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38. We are in agreement with the line of arguments advanced by Mr. Rajshekhar Rao, learned senior counsel for the CCI where he has succinctly sought to point out that the concern of the CCI was not at all with the carrying out, regulation or prohibition of the lottery business as was governed by the Regulation Act. Rather, the concern was limited to the role assigned to the CCI under the Competition Act, and in the context of the EoI was limited to examining any perceived bid rigging in the tendering process for appointment of selling agents and distributors for the lottery business. There was no conflict in the interplay of the two Acts that even needed reconciliation or prohibition against either one, as the limited scrutiny was to examine the mandate of Section 3(1) read with Section 3(3) of the Competition Act. Lotteries may be a regulated commodity and may even be *res extra commercium*. That would not take away the aspect of something which is anti-competition in the context of the business related to lotteries.

39. We must take note of the expansive definition of ‘Service’ under Section 2(u) of the Competition Act. It means “service of any description”, which is to be made available to potential users. The purchaser of a lottery ticket is a potential user and a service is being made available by the selling agents in the context of the Competition Act. Suffice for us to say the inclusive mentioning does not inhibit the larger expansive definition. The lottery business can continue to be regulated by the Regulation Act. However, if in the tendering process there is an element of anti-competition which would require investigation by the CCI, that cannot be prevented under the pretext of the lottery business being *res extra commercium*, more so when the State Government decides to deal in lotteries.

- A        40. We would like to say that the intervention by the High Court was extremely premature. It ought to have waited for the CCI to come to a conclusion but on the other hand what has happened is that the CCI proceedings have been brought to a standstill while the High Court opined on the basis of some aspects which may or may not arise.
- B        41. We are, thus, of the view that there was really no need for the High Court to proceed in the manner and in the direction it sought to proceed. The correct approach, more so once the statement was made on behalf of the CCI, would have been to close the proceedings filed by the State Government and let the private parties face the ultimate decision
- C        of the CCI. If they were aggrieved by any adverse decision of the CCI they were entitled to avail of the appellate remedy under Section 53B of the Competition Act.
- D        42. The complaint having been made by respondent No.4 under Section 19 of the Competition Act, which provides that the Commission “may” inquire into certain agreements and dominant position of enterprise as envisaged under sub-section (1) of Section 3 and sub-section (1) of Section 4 of the Competition Act. The CCI found out a *prima facie* case for investigation by the DG under Section 3(1) of the Competition Act, the DG opined adversely, and the CCI issued notice giving an opportunity to the affected parties to place their stand before it. This process ought to have been permitted to conclude with the right available to the affected parties to avail of the appellate remedy under Section 53B of the Competition Act.
- Conclusion:**
- F        43. We, thus, set aside the impugned judgment of the High Court and direct that the proceedings in WP(C) No. 24/2013 filed by respondent No.1 would stand closed in view of the statement made on behalf of the CCI before the High Court on 11.06.2013 and the proceedings against the other parties would continue. Since the State Government has already volunteered in the present proceedings to cooperate, we are sure a proper sequitur to the investigation would follow. WP(C) No. 76/2013 and WP(C) No. 90/2013 filed by the private parties would stand dismissed. We are conscious of the fact that much time has passed but then the material forming basis of the investigation is already with the CCI and it will have to proceed in accordance with law. This will have a future impact even
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if the contracts have come to an end and also in the context of the jurisdiction of the CCI, and that is why we have proceeded to pen down the judgment. A

44. The appeals are accordingly allowed leaving the parties to bear their own costs.

Ankit Gyan  
(Assisted by : Rahul Rathi, LCRA)

Appeals allowed.