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under Article 21 which means not merely survival or animal existence, but the right to live with human dignity and thereby includes all issues of life which involve the making of a meaningful and complete life. Obviously these facets of the right can only be achieved by means of a proper livelihood, thus the right to livelihood is an integral part of the right to life under Article 21 and cannot be infringed by withholding the means of livelihood by any process whatsoever. The action of the State is to be based on reasonableness and cannot deprive the basic human rights afforded under the Constitution. It also includes the right of a citizen to carry on business wherever he chooses or at any time subject to reasonable restrictions imposed by the Executive in the interest of public convenience.

Dawa Phuti Bhutia and Others* v. *State of Sikkim and Others* *1411-C

Constitution of India – Article 226 –In matters of disciplinary proceedings, the High Court exercises a limited power as the grounds for judicial review are limited and would be reluctant to intervene unless the findings are wholly perverse, illegal, untenable or in prejudice of the statutory provisions or principles of natural justice.

Bijay Gurung* v. *State of Sikkim and Others ***1432-A***

Constitution of India – Article 226 –It is settled law that in a matter of transfer of a Government employee, scope of judicial review is limited and the High Court should not interfere with the order of transfer lightly, be it at interim stage or final stage. This is so because the Courts do not substitute their own decision in the matter of transfer. It is also settled position of law that an order of transfer is a part of the service conditions of an employee which should not be interfered in exercise of its discretional jurisdiction under Article 226 of the Constitution of India – Government servant has no vested right to remain in a particular place of posting for a long period. He can also not insist that he must be posted at a particular place because the people of that area want him to continue at the place of posting. Transfer order can be set aside when transfer order is vitiated by violation of some statutory provisions or suffers from *mala fide*. Transfer order can be set aside when same is passed by an authority who is not competent to pass such orders. It can also be set aside when by such order the person is sent to a lower post – The allegations of *mala fide* should not be accepted lightly by the Court.

Shri Deepesh Chandra Sharma* v. *State of Sikkim and Another* *1460-A

Legitimate Expectation – Doctrine – It is generally agreed that "legitimate expectation" gives the applicant sufficient *locus standi* for judicial review. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise – Where a person's legitimate expectation is not fulfilled by taking of a particular decision, then the decision-maker is to justify the denial of such expectation by showing some overriding public interest.
***Dawa Phuti Bhutia and Others* v. *State of Sikkim and Others* 1411-D**

Promissory Estoppel – Doctrine – The doctrine of promissory estoppel which is a rule of equity flowing out of fairness, striking on behavior deficient in good faith. While applying this concept, the Court ought to be concerned with the conduct of a party for determination whether he can be permitted to take a different stand in a subsequent proceeding – The doctrine is premised on conduct of a party making a representation to the other to enable him to arrange his affairs in such a manner as if the said representation would be acted upon –The doctrine of promissory estoppel would be applicable in a case where the appellant would suffer a detriment by acting on a representation made by the Government – Documents on record do not indicate any assurance from the Government to the petitioners for construction of toilet. It is the petitioners who have submitted the representations, the prayers of which did not materialize. Legitimate expectation would have arisen if assurances had been made to the petitioners by respondents 1 and 2 – Neither of the doctrines are applicable to the petitioners in the present case.
***Dawa Phuti Bhutia and Others v. State of Sikkim and Others* 1411-E**

Promissory Estoppel – Doctrine – The doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it.
***M/s Summit Online Trade Solutions (Pvt).Ltd* v. *State of Sikkim and Another* 1475-A**

Promissory Estoppel – Doctrine – The doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was

made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it.
M/s Pan India Network Limited and Another* v. *State of Sikkim and Another ***1489-A***

Sikkim Anti Drugs Act, 2006 – Bail – Consideration – While considering an application for bail, it becomes imperative on the Court to consider the seriousness of the offence apart from the interests of the society at large. It is no secret that the law enforcement agencies in Sikkim are battling with the sale of controlled substances which are brought into the State and sold by unscrupulous people to the young and impressionable. The consumers of controlled substances, it is now widely accepted, are in fact victims but it is essential that the Courts deal with an iron hand with the sellers who encourage addiction and dependence by the consumers on the controlled substances – The interest of the society ought to be treated with priority in the instant matter considering the gravity of the offence in the context of this State.
Nabin Manger* v. *State of Sikkim ***1454-A***

Sikkim Police Force (Discipline and Appeal) Rules, 1989 – Rule 7 – Procedure for Imposing Penalties – A bare reading of the afore-stated provisions would obtain that the role and duties cast upon the disciplinary authority extend from Rule 7(2) to Rule 7(6) – When disciplinary proceedings are to be held against a police officer it becomes incumbent upon the disciplinary authority to draw up the details as laid down in Rule 7(3)(i), (ii)(a) and (b). Thereafter, the disciplinary authority is also to ensure delivery of the documents to the delinquent specifying a time frame within which the delinquent is to file his statement of defence as emanates from Rule 7(4). Written statement is to be received by the disciplinary authority himself and none else as envisaged under Rule 7(5)(a), following which the said authority is to take steps, viz.; where the articles of charge are not admitted then he is to enquire into such of the articles which are not admitted or appoint an inquiry authority under Rule 7(2) for the said purpose. However, where the articles of charge have been admitted by the delinquent the disciplinary authority is clothed with powers to record his findings on each charge after recording evidence as he thinks fit and then take steps as per Rule 7(25) which provides for steps to be taken for imposing penalty instead of inquiring into the matter or causing inquiry.
Bijay Gurung* v. *State of Sikkim and Others ***1432-B***

Transfer Policy for Government Employees – The State Government has neither made Transfer Actnor any Rules have been framed in this regard. Even guidelines have also not been framed by the State Government – For proper functioning of Government Departments, at least some guidelines regarding transfer of its employees should be framed by the Government – State Government requested to either frame Guidelines or Rules or Act regarding transfer of its employees at the earliest.
Shri Deepesh Chandra Sharma* v. *State of Sikkim and Another* *1460-B

SLR (2018) SIKKIM 1411

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P (C) No. 05 of 2017

Dawa Phuti Bhutia and Others ….. PETITIONERS

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioners: Mr. A. Moulik, Senior Advocate with Mrs. K. D. Bhutia, Advocate.

For Respondent No.1: Mr. J. B. Pradhan, Additional Advocate General with Mr. Thinlay Dorjee, Government Advocate, Mr. S. K. Chettri, Mrs. Pollin Rai, Assistant Government Advocates and Mr. D. K. Siwakoti, Advocate.

For Respondent No.2: Mr. Jorgay Namka, Ms. Panila Theengh, Ms. Tashi Doma Sherpa and Mr. Karma Sonam Lhendup, Advocates.

For Respondent 3-5: Mr. Bhushan Nepal, Advocate.

Date of decision: 2nd November 2018

A. Constitution of India – Article 19 – Article 19 of the Constitution lists a group of rights from clause (a) to (g) which are recognised as fundamental rights. Article 19 (1)(g) extends to every citizen the right to practice any profession or to carry on any occupation trade or business. The rights enumerated under Article 19 are recognised as natural rights and although they may have different underlying philosophies, the consistent common thread however is that the State is empowered to impose restrictions to achieve certain objects – Although Article 19 of the Constitution assures citizens of the rights enumerated therein the rights cannot be absolute, uncontrolled or wholly free from restraint, they are indeed subject to reasonable restrictions as may be deemed necessary by the Government as essential for safety, health, peace, decency and order of

the community. The Constitution thus seeks to strike a balance between individual liberty and social control – If the restriction imposed is greater than permitted under clause (2) to (6) of Article 19, the Courts will necessarily declare the same as unconstitutional, as imposition of restrictions limit a person's enjoyment to the rights guaranteed – Violation of the fundamental rights of one individual by another, without State support is not envisaged in the ambit of Article 19.

(Para 13)

B. Constitution of India – Article 19 – Every person is entitled to practice any profession or to carry on any occupation, trade or business as provided under Article 19 (1)(g) of the Constitution and no one can monopolise a business. Merely because one individual apprehends loss of business on the entry of another person into the same business does not clothe him with powers to expect the State to intervene and impose restrictions on the new entrant – The exercise of a fundamental right by an individual is equal for all thus one individual cannot infringe or deter another from exercising his exact same right, unless and until reasonable restriction as found essential by the State are in place – The term "reasonable restrictions" connotes that the restriction imposed on the exercise of the right must have reasonable relation to the object which the legislature seeks to achieve and ought not to be in excess thereof or arbitrary.

(Para 17)

C. Constitution of India – Article 21 – No person shall be deprived of his life and personal liberty except according to procedure established by law. Enjoyment of quality life by a person is the essence of the right guaranteed under Article 21 which means not merely survival or animal existence, but the right to live with human dignity and thereby includes all issues of life which involve the making of a meaningful and complete life. Obviously these facets of the right can only be achieved by means of a proper livelihood, thus the right to livelihood is an integral part of the right to life under Article 21 and cannot be infringed by withholding the means of livelihood by any process whatsoever. The action of the State is to be based on reasonableness and cannot deprive the basic human rights afforded under the Constitution. It also includes the right of a citizen to carry on business wherever he chooses or at any time subject to reasonable restrictions imposed by the Executive in the interest of public convenience.

(Para 18)

D. Legitimate Expectation – Doctrine – It is generally agreed that "legitimate expectation" gives the applicant sufficient *locus standi* for judicial review. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise – Where a person's legitimate expectation is not fulfilled by taking of a particular decision, then the decision-maker is to justify the denial of such expectation by showing some overriding public interest.

(Para 21)

E. Promissory Estoppel – Doctrine – The doctrine of promissory estoppel which is a rule of equity flowing out of fairness, striking on behavior deficient in good faith. While applying this concept, the Court ought to be concerned with the conduct of a party for determination whether he can be permitted to take a different stand in a subsequent proceeding – The doctrine is premised on conduct of a party making a representation to the other to enable him to arrange his affairs in such a manner as if the said representation would be acted upon –The doctrine of promissory estoppel would be applicable in a case where the appellant would suffer a detriment by acting on a representation made by the Government – Documents on record do not indicate any assurance from the Government to the petitioners for construction of toilet. It is the petitioners who have submitted the representations, the prayers of which did not materialize. Legitimate expectation would have arisen if assurances had been made to the petitioners by respondents 1 and 2 – Neither of the doctrines are applicable to the petitioners in the present case.

(Paras 21, 22 and 23)

Petition dismissed.

Chronological list of cases cited:

1. Sub-Divisional Inspector of Post, Vaikam and Others, etc. v. Theyyam Joseph, etc., AIR 1996 SC 1271.
2. A. P. Pollution Control Board II v. Prof. M. V. Nayudu (RETD.) and Others, (2001) 2 SCC 62.
3. Tamil Nadu Centre for Public Interest Litigation, represented by K. K. Ramesh v. State of Tamil Nadu and Another, (2017) 6 SCC 734.

4. Danial Latifi and Another v. Union of India, (2001) 7 SCC 740.

5. Mithilesh Garg and Others v. Union of India and Others, (1992) 1 SCC 168.

6. Nataraja Agencies v. The Secretary, Ministry of Petroleum and Natural Gas, Government of India, New Delhi and Others, 2005 (1) Current Tamil Nadu Cases (CTC) 394 : MANU/TN/1588/2004.

7. Hans Raj Kehar and Others v. The State of U.P. and Others, AIR 1975 SC 389.

8. The Nagar Rice and Flour Mills and Others v. N. Teekappa Gowda & Bros. and Others, AIR 1971 SC 246.

9. T.B. Ibrahim, Proprietor, Bus Stand, Tanjore v. The Regional Transport Authoirty, Tanjore, AIR 1953 SC 79.

10. Harman Singh and Others v. Regional Transport Authority, Calcutta Region and Others, AIR 1954 SC 190.

11. M/s. Laxmi Khandsari and Others v. State of U.P. and Others, AIR 1981 SC 873.

12. Olga Tellis and Others v. Bombay Municipal Corporation and Others, (1985) 3 SCC 545.

13. Bannari Amman Sugars Ltd. v. Commercial Tax Officer and Others, (2005) 1 SCC 625.

14. M/s. Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others, (1979) 2 SCC 409.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioners, crying foul, are before this Court exhorting that the Respondents No.3, 4 and 5 ought not to be allotted stalls in the ground floor of the "Non-Veg." building for the purpose of selling Fish, dressed Chicken and Mutton as it would sound the death knell for similar business being run by the Petitioners on the first floor. It is reasoned that the ground floor being easily accessible to customers would deter them from taking the walk up to the first floor when similar goods are available at a convenient location at the same price. It is also the averment of the Petitioners that the

stalls now allotted to the said Respondents had infact been earmarked for construction of toilets for use of the vendors, workers and the customers of the said building but has instead been allotted to the Respondents without adherence of the tender process and turning a blind eye to the hygiene conditions in the building.

2. The facts leading to the instant Petition are summarised hereinbelow. The Petitioners are local vendors in the business of selling dressed Chicken, Mutton and Fish from their stalls in the first floor of a building known as the "Non-Veg." building at "Khanchanjunga Shopping Complex" since the year 2006. It is asserted that they have been in the business since the last 60 years viz.; when the Old Lal Market, Gangtok, was functioning from tinsheds. Subsequently the Khanchanjunga Shopping Complex was constructed with structures known as the "Veg." and "Non-Veg." buildings. Twenty-seven stalls each in the ground and first floor of the "Non-Veg." building are allotted for the business of selling meat, inasmuch as live and dressed Chicken, Mutton and Fish are sold on the first floor, known as the "Fish Market", while Beef, Buffen and Pork are sold on the ground floor. The business is the means of livelihood of the Petitioners with which they provide for their families. That one hundred and eighty people including the stall owners work in the said stalls sans provision for toilets since the year 2006, resulting in unhygienic conditions including foul smell emanating in the vicinity of the complex consequent to the outside area being utilised by people to ease themselves. Vacant space available on the ground floor adjacent to the staircase leading to the shops of the Petitioners was utilised temporarily by them for disposing garbage. The Petitioners had requested for construction of toilets in the said vacant space towards which a sum of Rs.7,32,600/- (Rupees seven lakhs, thirty two thousand and six hundred) only, was approved by Respondent No.1 but construction was not initiated despite assurances by the said Respondent. In April 2016, the much awaited construction commenced and the Petitioners were informed that this would be utilised as toilets while a portion thereof would be utilised for garbage disposal. Upon completion in January 2017, the stalls were instead allotted to the Respondents No.3, 4 and 5 for running meat shops by arbitrary selection, bypassing the tender or selection process.

3. In the said circumstances, the prayers enumerated in the Petition are as follows;

"(i) A Rule upon the respondent nos.1 and 2 and each of them to show-cause as to why orders/agreements/ allotment of shops in favour of respondent nos.3 to 5 and trade licence of such shops in their respective names be not cancelled and upon hearing the parties to make the Rule absolute;

(ii) A writ or order or direction or declaration that the space on the ground floor adjacent to staircase leading to first floor which place was used by the petitioners for dumping garbage shall not be allotted to the respondent nos.3 to 5 or to any other persons to use it as shop(s). In the event allotment has already been made to respondent nos. 3 to 5 then all such allotments including agreements if any be cancelled;

(iii) A writ or order or direction or declaration against the respondent nos.1 and 2 that the newly constructed concrete structure shall be converted into public toilet by dismantling inner structures and toilets and garbage room be constructed in the said newly constructed structure for user by public and petitioners;

(iv) A writ or order or direction or declaration that the allotment of the shops in the names of respondent nos.3 to 5 issued by UD&HD stands cancelled and the same space shall be converted into public toilet and garbage room;

(v) A writ or order or direction or declaration that the licence issued to respondent nos.3 to 5 by Gangtok Municipal corporation/respondent no.2 for running meat shops in the newly constructed rooms on the ground floor similar to those of the petitioners shall stand cancelled and the said stalls/ shops be converted into public toilet and for garbage room;

(vi) A writ or order or direction or declaration that the space and the construction on the ground floor attached to the staircase leading to first floor shall not be allotted to anyone in future and shall stand reserved for public toilet and garbage bin;

(vii) A writ or order or direction or declaration that no shop(s) of any item be allowed to run in the newly constructed rooms in the ground floor of the Non-Veg. building attached to the staircase leading to the first floor;

(viii) Costs of the proceedings;

(ix) Any other writ/writs, order, direction as this Honble Court may deem fit and proper in the interest of justice.**"**

4. The State-Respondent No.1 through the Additional Secretary, Urban Development and Housing Department (UD&HD), by filing Counter-Affidavit would aver that the Respondent Department in 2016 on receipt of request for allotment of stalls in the Non-Veg. building could identify no vacant space in the Fish Market which already had thirty meat stalls, but found space in the ground floor and accordingly allotted it to the Respondents No.3, 4 and 5. That, the grievances of the Petitioners are not genuine and *bona fide* as by filing the Writ Petition they seek to restrain others from entering into the business which they intend to monopolise. In any event, construction of toilets and garbage disposal in the vacant space now allotted to the Respondents No.3, 4 and 5 was discarded in view of the hygiene conditions, as the utilities would be adjacent to the Fish Market. Besides, the Department has constructed toilets for the public on the ground floor of an adjacent Hotel which has compartments for ladies and gents as also bathing space at a distance of about 40-50 metres away from the Non-Veg. building making it easily accessible. A Central Garbage Collection area has also been provided near the Non-Veg. building. The Petition being motivated with the purpose of discouraging competitors, be dismissed.

5. The Respondent No.2 in its Counter-Affidavit through the Municipal Commissioner denied the allegations made by the Petitioners and submitted that the preamble of the Sikkim Municipalities Act, 2007, in clear terms specifies that municipal governance is to be in conformity with the provisions of the Constitution of India and based on the principles *inter alia* of participation to improve the quality of life of the urban dwellers of Sikkim. That, any individual or organisation that fulfils the criteria as laid down for issuance of a Trade Licence will and must be issued a Trade Licence. The Petitioners having fulfilled the criteria were issued the Trade Licence by the Respondent No.2.

6. The Respondents No.3 to 5 filed a joint Counter-Affidavit admitting that presently they are running a business of fish and chicken in the space allotted to them below the staircase leading to the Fish Market of the Non-Veg. building with no violation of any law in such allotment. Pursuant to the allotment they have been issued Trade Licences. The Writ Petition is thus liable to be dismissed on the ground that the Petitioner has no *locus standi* to canvass the legality or correctness of the action taken by the Respondent No.1 in allotting premises to the Respondents as the Petitioners case is not that they had sought for allotment of the premises now allotted to the Respondents. The prayer of the Petitioners is in violation of the fundamental rights guaranteed to the Respondents under Article 19(1)(g) of the Constitution of India. That, the grounds set out by the Petitioners are not sustainable in the eyes of law and hence the Writ Petition is liable to be dismissed outright.

7. In Rejoinder, the Petitioners would dispute the contention of the Respondent No.1 that the toilets cannot be allowed in the Non-Vegetarian Complex due to hygiene considerations as toilets exists on each floor of the adjacent Veg. building. The averment that an accessible toilet has been constructed nearby is erroneous, since it is at a distance of 300 feet away from the building where the Petitioners stalls are located. Moreover, when the space was allotted to the Respondents No.3, 4 and 5 exclusively for the purpose of selling "dry items" it is not conceivable as to how the Trade Licence was granted for selling meat.

8. Mr. A. Moulik, Learned Senior Counsel for the Petitioners while drawing the attention of this Court to the averments made in the Petition submitted that Representations were made to the Chief Minister in 2016 and 2017 and to the Secretary, UD&HD in 2016, objecting to the allotment of stalls to the Respondents No.3, 4 and 5 *inter alia* on the grounds that allotment of such shops for the same business on the ground floor would adversely affect the Petitioners business. The Chief Minister endorsed the representation to the concerned Department to examine the matter in public interest and the Department in sum and substance agreed to incorporate the "Swachh Bharat Abhiyan" in the Non-Veg. building which however remained unimplemented. Meanwhile, three rooms constructed on the ground floor came to be allotted to the Respondents No.3, 4 and 5 for selling dry items, however, contrary to the terms of allotment Trade Licence was issued for sale of meat. That, even if the Licence is for sale of dry items the Petitioners remain aggrieved as the space had been identified for use as

toilets. It is suggested that if the Government Respondents seek to accommodate the Private Respondents, allotment of some stalls can be made on the roof of the building above the stalls of the Petitioners thereby causing no negative effect on the Petitioners business. That, the policy adopted by the State-Respondents is against the principles of fair play, justice and equity and the right to life and means of livelihood of the Petitioners have been jeopardised at the whims and caprice of the Respondents. Relying on the decision of ***Sub-Divisional Inspector of Post, Vaikam and Others, etc***. vs. ***Theyyam Joseph, etc.***[1], Learned Senior Counsel would submit that welfare measures are required to be taken by the State and directive principles of the State Policy enjoin upon the State Government duties under Part IV of the Constitution of India. Hence, being a welfare State it is the responsibility of the Respondent No.1 to provide proper facilities for basic amenities such as toilets. Attention of this Court was also invited to the ratio in ***A. P. Pollution Control Board II*** vs. ***Prof. M. V. Nayudu (RETD.) and Others***[2] and it was urged that in the said matter it was found that drinking water is of primary importance in any country and India was a party to the Resolution of the UNO passed during the United Nations Water conference in 1977, wherein it was held that as drinking water is fundamental to life a duty is cast on the State under Article 21 to provide clean drinking water to its citizens. Similarly, in the matter at hand it is clear that hygienic and clean surroundings are fundamental to life and the State is responsible under Article 21 to provide such surroundings and to ensure that there is no environmental pollution in view of the large number of persons attending to natures call outside the Non-Veg. building. That, in ***Tamil Nadu Centre for Public Interest Litigation, represented by K. K. Ramesh*** vs. ***State of Tamil Nadu and Another***[3] the Supreme Court while considering the deaths of farmers in Tamil Nadu would observe that the State stands on the position of a *loco parentis* to the citizens and it was obligatory on the part of the State to express concern and sensitivity to do the needful. The same attitude needs to be adopted by the State-Respondents in the instant matter towards the Petitioners. Further, Senior Counsel would also rely on ***Danial Latifi and Another*** vs. ***Union of India***[4] and contend that the concept of right to life and liberty guaranteed under Article 21 of the Constitution of India would include the right to live with dignity which the Petitioners have been deprived

[1] AIR 1996 SC 1271
[2] (2001) 2 SCC 62
[3] (2017) 6 SCC 734
[4] (2001) 7 SCC 740

of as the absence of toilets in the Non-Veg. building causes them immense inconvenience. That, allotment of three stalls in the ground floor where the toilets ought to have been constructed is in abrogation of the fundamental rights of the Petitioners to a clean, healthy and hygienic environment. Invoking the doctrine of legitimate expectation and Promissory Estoppel Learned Senior Counsel would canvass that funds for construction of toilets had been sanctioned and the plan approved, hence after the construction the State-Respondent ought not to have altered the plan of utilisation of the space as toilets. That apart, the Private Respondents failed to obtain any permission from the Animal Husbandry Department before the Respondent No.2 issued Licences to them for selling Fish and meat, therefore the Licences have been obtained contrary to established practice. Hence, the prayers in the Petition be granted.

9. The *contra* arguments of Learned Additional Advocate General were that the Petitioners are not entitled to make unreasonable demands to prevent the Private Respondents from carrying on trade for their livelihood as they are also citizens of the country and equally entitled to the right to livelihood as manifest in Article 19(1)(g) and Article 21 of the Constitution of India. The Petitioners in the garb of objecting to non-construction of the toilets are infact urging that allotment of stalls ought not to be made to the Private Respondents for selling meat. This would tantamount to depriving the Private Respondents of their right to livelihood when no Statute debars them from running a business in the country. That, Respondent No.1 is infact the allotting authority and the Respondent No.2 is the authority who issues Licences. There is no restriction on the powers of the Respondent No.2 to issue Licence on assessment of the requirements of the Petitioners who are entitled to make a living. There is no illegality on the issuance of the Licence and the Petition reflects the utter selfishness of the Petitioners in depriving the Respondents No.3, 4 and 5 to earn income, on this count Learned Additional Advocate General would rely on ***Mithilesh Garg and Others*** vs. ***Union of India and Others***[5]. That the ratio clearly lays down that Article 19(1)(g) of the Constitution guarantees to all citizens the right to practice any profession or to carry on any occupation, trade or business subject to reasonable restrictions imposed by the State under Article 19(6) of the Constitution. Hence, the Petitioners herein being private individuals cannot seek to impose any restrictions on the issuance of Licence or the carrying on of the business or any other restriction which the State

[5] (1992) 1 SCC 168

Legislature has opted not to as it is only the State which can impose reasonable restrictions within the ambit of Article 19(6) of the Constitution. That the Petitioners have no *locus standi* under Article 226 of the Constitution to challenge the issuance of Licence since no right vested on the Petitioners have been infringed. That, in ***Nataraja Agencies*** vs. ***The Secretary, Ministry of Petroleum and Natural Gas, Government of India, New Delhi and Others***[6] the Division Bench of the Madras High Court has categorically stated that a rival businessman cannot file a Writ Petition challenging the setting up of a similar unit by another businessman on the ground that establishing a rival business close to his business place would adversely affect business interest, even if the setting up of the new unit is in violation of law. That, merely because the Petitioners apprehend a shift of allegiance of their customers to rival retail dealers does not mean that public interest will suffer, to the contrary it will benefit the consumers because when there is competition, businessmen are compelled to provide better quality products at reasonable rates. Therefore, the Petition deserves a dismissal.

10. Learned Counsel for the Respondents No.2 and 3, 4 and 5 would submit that they endorse the arguments made by Learned Additional Advocate General. Learned Counsel for Respondent No.2 would add that there are no Rules whatsoever that require the Respondent No.2 to obtain permission from the Animal Husbandry Department for issuance of Licence for sale of meat and fish. That the Respondent No.2 is empowered to issue such Licences after due assessment as per its own Rules. Besides, the Petitioner has failed to show by way of any documentary evidence that either such Rules exists or that has such practice been followed.

11. The submissions put forth by Learned Counsel were heard at length. I have carefully perused and considered the pleadings, the entire documents appended, as well as the Judgments cited at the Bar.

12. The question that arises for determination is whether the Respondents No.3, 4 and 5 can be restrained by the Petitioners from carrying on the business of selling meat in the allotted space in view of the Petitioners assertion that the State-Respondents are estopped from allotting stalls and Licence to the Private Respondents, having promised construction of toilets therein in addition to which such allotment and sale thereof would adversely affect their business.

[6] 2005 (1) Current Tamil Nadu Cases (CTC) 394 : MANU/TN/1588/2004

13. Article 19 of the Constitution lists a group of rights from Clause (a) to Clause (g) which are recognised as fundamental rights. Article 19(1)(g) extends to every citizen the right to practice any profession or to carry on any occupation trade or business. The rights enumerated under Article 19 are recognised as natural rights and although they may have different underlying philosophies, the consistent common thread however is that the State is empowered to impose restrictions to achieve certain objects. In other words, although Article 19 of the Constitution assures citizens of the rights enumerated therein the rights cannot be absolute, uncontrolled or wholly free from restraint, they are indeed subject to reasonable restrictions as may be deemed necessary by the Government as essential for safety, health, peace, decency and order of the community. The Constitution thus seeks to strike a balance between individual liberty and social control. If the restriction imposed is greater than permitted under Clause (2) to Clause (6) of Article 19 of the Constitution the Courts will necessarily declare the same as unconstitutional, as imposition of restrictions limit a persons enjoyment to the rights guaranteed. It may be emphasised that violation of the fundamental rights of one individual by another, without State support is not envisaged in the ambit of Article 19. In this context, we may looked into the observation of the Honble Supreme Court in ***Hans Raj Kehar and Others*** vs. ***The State of U.P. and Others***[7] where it was held that;

> **"8.** The contention that the impugned notification is violative of the rights of the appellants under Article 19(1)(f) or (g) of the Constitution is equally devoid of force. There is nothing in the notification which prevents the appellants from acquiring, holding and disposing of their property or prevents them from practising any profession or from carrying on any occupation, trade or business. **The fact that some others have also been enabled to obtain permits for running buses cannot constitute a violation of the appellants' rights under the above two clauses of Article 19 of the Constitution. The above provisions are not intended to grant a kind of monopoly to a few bus operators to the exclusion of other eligible persons. No right is guaranteed to any private party by Article 19 of the Constitution of**

[7] AIR 1975 SC 389

> **carrying on trade and business without competition from other eligible persons. Clause (g) of Article 19(1) gives a right to all citizens subject to Article 19(6) to practice any profession or to carry on any occupation, trade or business. It is an enabling provision and does not confer a right on those already practising a profession or carrying on any occupation, trade or business to exclude and debar fresh eligible entrants from practising that profession or from carrying on that occupation, trade or business. The said provision is not intended to make any profession, business or trade the exclusive preserve of a few persons. We, therefore, find no valid basis for holding that the impugned provisions are violative of Article 19."**
>
> **[emphasis supplied]**

14. In ***The Nagar Rice and Flour Mills and Others*** vs. ***N. Teekappa Gowda & Bros. and Others***[8] the Supreme Court would observe as follows;

> **"9.** ..... The right to carry on business being a fundamental right under Art.19(1)(g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interest of the general public under Article 19(6)(i)."

15. In ***T. B. Ibrahim, Proprietor, Bus Stand, Tanjore*** vs. ***The Regional Transport Authoirty, Tanjore***[9] the Supreme Court emphasised that reasonable restrictions can be put in place by the government and would elucidate as hereinunder;

> **"13.** The next contention was that the order is repugnant to Art. 19(1)(g) of the Constitution, according to which all citizens must have the right to practise any profession or to carry on any occupation, trade or business. It cannot be denied that the appellant has not been prohibited from

[8] AIR 1971 SC 246
[9] AIR 1953 SC 79

carrying on the business of running a bus-stand. What has been prohibited is that the bus-stand existing on the particular site being unsuitable from the point of view of public convenience, it cannot be used for picking up or setting down passengers from that stand for outstations journeys. But there is certainly no prohibition for the bus-stand being used otherwise for carrying passengers from the stand into the town, and 'viceversa'. The restriction placed upon the use of the busstand for the purpose of picking up or setting down passengers to outward journeys cannot be considered to be an unreasonable restriction.

It may be that the appellant by reason of the shifting of the bus-stand has been deprived of the income he used to enjoy when the bus-stand was used for outward journeys from Tanjore, but that can be no ground for the contention that there has been an infringement of any fundamental right within the meaning of Art. 19(1)(g) of the Constitution. There is no fundamental right in a citizen to carry on business wherever he chooses and his right must be subject to any reasonable restriction imposed by the executive authority in the interest of public convenience. ……..**"**

16. In ***Harman Singh and Others*** vs. ***Regional Transport Authority, Calcutta Region and Others***[10], it was observed that;

"8. The next contention of Mr. Choudhry that the introduction of small taxis in the streets of Calcutta will bring about a total stoppage of the existing motor taxi cab business of large taxi owners in a commercial sense and would thus be an infringement of the fundamental right guaranteed under Article 19(1)(g) of the Constitution is again without force. Article 19(1)(g) declares that all citizens have the right to practise any profession, to carry on any

[10] AIR 1954 SC 190

> occupation, trade or business. Nobody has denied to the appellants the right to carry on their own occupation and to ply their taxis. This article does not guarantee a monopoly to a particular individual or association to carry on any occupation and if other persons are also allowed the right to carry on the same occupation and an element of competition is introduced in the business, that does not, in the absence of any bad faith on the part of the authorities, amount to a violation of the fundamental right guaranteed under Article 19(1)(g) of the Constitution. Under the Motor Vehicles Act it is in the discretion of the Regional Transport Authority to issue permits at different rates of tariff to different classes of vehicles plying in the streets of Calcutta and if that power is exercised in a „bona fide manner by the Regional Transport Authority for the benefit of the citizens of Calcutta, then the mere circumstance that by grant of licence at different tariff rates to holders of different taxis and different classes of vehicles some of the existing licence holders are affected cannot bring the case under Article 19(1)(g) of the Constitution.**"**
>
> **[emphasis supplied]**

17. All the decisions of the Supreme Court extracted hereinabove are indicative of the fact that every person is entitled to practice any profession or to carry on any occupation, trade or business as provided under Article 19(1)(g) of the Constitution and no one can monopolise a business. Merely because one individual apprehends loss of business on the entry of another person into the same business does not clothe him with powers to expect the State to intervene and impose restrictions on the new entrant. It follows that, the exercise of a fundamental right by an individual is equal for all thus one individual cannot infringe or deter another from exercising his exact same right, unless and until reasonable restriction as found essential by the State are in place. The term "reasonable restrictions" has been elucidated in a plethora of decisions of the Honble Supreme Court and connotes that the restriction imposed on the exercise of the right must have reasonable relation to the object which the legislature seeks to achieve and ought not to be in

excess thereof or arbitrary. In ***M/s. Laxmi Khandsari and Others*** vs. ***State of U.P. and Others***[11] it was held that the nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the time should all enter into the judicial verdict.

18. That having been said the sweep of Article 21 of the Constitution would necessarily have to be looked into. This Article mandates that no person shall be deprived of his life and personal liberty except according to procedure established by law. Enjoyment of quality life by a person is the essence of the right guaranteed under Article 21 of the Constitution, which means not merely survival or animal existence, but the right to live with human dignity and thereby includes all issues of life which involve the making of a meaningful and complete life. Obviously these facets of the right can only be achieved by means of a proper livelihood, thus the right to livelihood is an integral part of the right to life under Article 21 and cannot be infringed by withholding the means of livelihood by any process whatsoever. The action of the State is to be based on reasonableness and cannot deprive the basic human rights afforded under the Constitution. It also includes the right of a citizen to carry on business wherever he chooses or at any time subject to ofcourse to reasonable restrictions imposed by the Executive in the interest of public convenience.

19. In ***Olga Tellis and Others*** vs. ***Bombay Municipal Corporation and Others***[12] the Supreme Court while discussing the right to life guaranteed by Article 21 of the Constitution and consequently the right to livelihood held as follows;

> **"32.** As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they

[11] AIR 1981 SC 873
[12] (1985) 3 SCC 545

will be deprived of their livelihood. Upon that assumption, the question which we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. ..... So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas, J. in *Baksey* [347 US 442, 472 : 98 L Ed 829 (1954)] that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in *Munn* v.

Illinois [(1877) 94 US 113] means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh* v. *State of U.P.* [AIR 1963 SC 1295 : (1964) 1 SCR 332 : (1963) 2 Cri LJ 329].

33. …….. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.**"**

[emphasis supplied]

20. The fulcrum of the Petitioners prayer is to ensure that the Private Respondents are not allotted stalls in the Non-Veg. building as also Licence to sell meat therefrom, *inter alia* on grounds that it would affect the Petitioners business. Ofcourse a tangential argument has also been incorporated that the area which was to have been converted into toilet was allotted to the Private Respondents causing inconvenience to the Petitioners herein. It is not the case of the Petitioners that they have been restricted in any manner by the State-Respondents from carrying out their business and occupation. It is also not the case of the Petitioners that the State-Respondents have not made efforts to provide basic facilities and convenience to the Petitioners by constructing accessible toilets for their use be it at a distance of 40–50 metres not necessarily at their doorstep as envisaged. It has been specifically averred and argued by learned Counsel for the State-Respondents that the facilities are for men and women replete with bathing compartments and nothing contrary thereto emerges.

21. The doctrine of legitimate expectation is invoked when a person may have been treated in a certain way by an administrative authority although he has no legal right in private law to receive such treatment. In ***Bannari Amman Sugars Ltd.*** vs. ***Commercial Tax Officer and Others***[13] while explaining this concept the Supreme observed that the expectation may arise either from a representation or promise made by the authority, including an implied representation or from consistent past practice. Legitimate

[13] (2005) 1 SCC 625

expectation can provide sufficient interest to enable one who cannot point to the existence of a substantive right to obtain the leave of the Court to apply for judicial review. It is generally agreed that "legitimate expectation" gives the applicant sufficient *locus standi* for judicial review. The doctrine does not give scope to claim relief straightway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a persons legitimate expectation is not fulfilled by taking of a particular decision, then the decision-maker is to justify the denial of such expectation by showing some overriding public interest. In the same line, we may also look at the doctrine of Promissory Estoppel which is a rule of equity flowing out of fairness, striking on behavior deficient in good faith. While applying this concept, the Court ought to be concerned with the conduct of a party for determination as to whether he can be permitted to take a different stand in a subsequent proceeding. The doctrine is thus premised on conduct of a party making a representation to the other so as to enable him to arrange his affairs in such a manner as if the said representation would be acted upon.

22. In ***M/s. Motilal Padampat Sugar Mills Co. Ltd.*** vs. ***State of Uttar Pradesh and Others***[14] the Supreme Court while considering this concept also discussed the origins of the doctrine as follows;

> **"7.** That takes us to the question whether the assurance given by Respondent 4 on behalf of the State Government that the appellant would be exempt from Sales Tax for a period of three years from the date of commencement of production could be enforced against the State Government by invoking the doctrine of promissory estoppel. Though the origins of the doctrine of promissory estoppel may be found in **Hughes** v. **Metropolitan Railway Co.** [(1877) 2 AC 439 : 36 LT 932] and **Birmingham and District Land Co.** v. **London and North-Western Rail Co.** [(1888) 40 Ch D 268, 286 : 60 LT 527], authorities of old standing decided about a century ago by the House of Lords, it was only recently in 1947 that it was rediscovered by Mr Justice Denning, as he then was, in his

[14] (1979) 2 SCC 409

> celebrated judgment in **Central London Property Trust Ltd.** v. **High Trees House Ltd.** [(1956) 1 All ER 256 : 1947 KB 130] This doctrine has been variously called "promissory estoppel", "equitable estoppel", "quasi estoppel" and "new estoppel". It is a principle evolved by equity to avoid injustice and though commonly named "promissory estoppel", it is, as we shall presently point out, neither in the realm of contract nor in the realm of estoppel. It is interesting to trace the evolution of this doctrine in England and to refer to some of the English decisions in order to appreciate the true scope and ambit of the doctrine particularly because it has been the subject of considerable recent development and is steadily expanding. The basis of this doctrine is the inter-position of equity. Equity has always, true to form, stepped in to mitigate the rigours of strict law. The early cases did not speak of this doctrine as estoppel. They spoke of it as "raising an equity". ……..**"**
>
> **[emphasis supplied]**

Hence, the doctrine of Promissory Estoppel would be applicable in a case where the appellant would suffer a detriment by acting on a representation made by the Government.

23. The documents on record do not indicate any assurance from the Government to the Petitioners for construction of toilet. It is the Petitioners who have submitted the representations, the prayers of which did not materialize. Legitimate expectation would have arisen if assurances had been made to the Petitioners by the Respondents No.1 and 2, nothing emanates in this context. The Petitioners already being in the trade have not acted to their own detriment in any manner whatsoever. Moreover, as pointed out in ***Bannari Amman Sugars Ltd.*** (*supra*) the legitimate expectation is not required to be fulfilled where overriding public interest is to be given priority as in the instant case where the Respondents right to life and as a corollary right to livelihood are involved. Hence, neither of the doctrines are applicable to the Petitioners in the present case.

24. Therefore, in the light of the matter at hand in my view it is evident that the Petitioners cannot seek to restrain the private Respondents from also carrying on business for their livelihood and achieving their economic requirements. It is the aim and goal of the Government to enable the society to be an egalitarian one. The Petitioners cannot put hurdles in the path of the private Respondents in the garb of inconvenience caused by nonconstruction of toilets. The documents on record also indicate that infact an estimate of Rs.7,32,600/- (Rupees seven lakhs, thirty two thousand and six hundred) only, had been placed for approval of the authorities by the Engineers concerned but was at no point of time either approved or sanctioned. Contrary to the submissions of the Petitioners that they had made several representations to the authorities the records stand sentinel to the fact that only two representations were made in the year 2016, i.e., on 08-04-2016 and 12-04-2016 and one in the year 2017, i.e., on 03-02-2017. The argument that the Respondent No. 2 ought not to have issued Licenses for selling of meat apart from seeking non-allotment of stalls is in itself an incongruous argument since the statute clothes the State Respondents with powers to make assessments and issue Licences if the requisite criteria thereof stand fulfilled. The Petitioners cannot seek to trample on the fundamental rights of the Private Respondents by way of prayers that are indeed absurd.

25. In conclusion, in view of the entire foregoing discussions, the Writ Petition deserves no consideration and is accordingly dismissed.

26. No order as to costs.

SLR (2018) SIKKIM 1432

(Before Hon'ble Mr. Justice Meenakshi Madan Rai)

W.P. (C) No. 57 of 2016

Bijay Gurung ….. PETITIONER

Versus

State of Sikkim and Others ….. RESPONDENTS

For the Petitioner: Mr. Jorgay Namka, Ms. Panila Theengh, Mr. Karma Sonam Lhendup and Ms. Tashi Doma Sherpa, Advocates.

For Respondent 1 to 3: Mr. J. B. Pradhan, Additional Advocate General, Mr. Karma Thinlay, Senior Government Advocate with Mr. Thinlay Dorjee Bhutia, Government Advocate, Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Government Advocates.

Date of decision: 12th November 2018

A. Constitution of India – Article 226 – In matters of disciplinary proceedings, the High Court exercises a limited power as the grounds for judicial review are limited and would be reluctant to intervene unless the findings are wholly perverse, illegal, untenable or in prejudice of the statutory provisions or principles of natural justice.

(Para 10)

B. Sikkim Police Force (Discipline and Appeal) Rules, 1989 – Rule 7 – Procedure for Imposing Penalties – A bare reading of the afore-stated provisions would obtain that the role and duties cast upon the disciplinary authority extend from Rule 7(2) to Rule 7(6) – When disciplinary proceedings are to be held against a police officer it becomes incumbent upon the disciplinary authority to draw up the details as laid down in Rule 7(3)(i), (ii)(a) and (b). Thereafter, the disciplinary authority is also to ensure delivery of the documents to the delinquent specifying a time

frame within which the delinquent is to file his statement of defence as emanates from Rule 7(4). Written statement is to be received by the disciplinary authority himself and none else as envisaged under Rule 7(5)(a), following which the said authority is to take steps, viz.; where the articles of charge are not admitted then he is to enquire into such of the articles which are not admitted or appoint an inquiry authority under Rule 7(2) for the said purpose. However, where the articles of charge have been admitted by the delinquent the disciplinary authority is clothed with powers to record his findings on each charge after recording evidence as he thinks fit and then take steps as per Rule 7(25) which provides for steps to be taken for imposing penalty instead of inquiring into the matter or causing inquiry.

(Para 20)

Petition partially allowed.

Chronological list of cases cited:

1. Tashi Chopel Bhutia v. The State of Sikkim and Others, MANU/SI/ 0038/2016.
2. Manoj H. Mishra v. Union of India, (2013) 6 SCC 313.
3. Chairman, Life Insurance Corporation of India and Others v. A. Masilamani, (2013) 6 SCC 530.
4. Managing Director, ECIL, Hyderabad and Others v. B. Karunakar and Others, (1993) 4 SCC 727.
5. State of U.P. v. Harendra Arora and Another, (2001) 6 SCC 392.
6. Union of India and Others v. P. Gunasekaran, (2015) 2 SCC 610.
7. State of Andhra Pradesh and Others v. Chitra Venkata Rao, (1975) 2 SCC 557.

JUDGMENT

Meenakshi Madan Rai, J

1. The impugned Office Order bearing No.10/SPE/RDR/ 2004(Vol-II)558/SPIC, dated 09-07-2016 (Annexure P5), of the Respondent No.3, Superintendent of Police, East District, Gangtok, Sikkim, imposed the penalty of compulsory retirement on the Petitioner pursuant to a

departmental enquiry under the Sikkim Police Force (Discipline and Appeal) Rules, 1989 (hereinafter "1989 Rules"). Claiming irregularities and non-compliance of statutory provisions in the departmental enquiry which culminated in the impugned Office Order *supra*, the Petitioner exhorts that his fundamental rights have been abrogated and seeks reprieve.

2. In the year 1996, the Petitioner was recruited in the first batch of the Indian Reserve Battalion (hereinafter "IRB") and posted in Delhi from 1996 to 2011, where, according to him, he served with honesty, integrity and to the best of his ability. In the year 2015, the IRB was merged with the Sikkim Police and the Petitioner transferred to the said Force. Beset with family problems at the relevant time, his performance declined following which he was ordered to undergo Reformatory Course at the Sikkim Armed Police, Pangthang, East Sikkim (hereinafter "SAP") from 19-02-2016 to 20- 03-2016. In compliance thereof, he joined the Course on 19-02-2016, where on 20-02-2016 on an alleged search of his bag, controlled substances comprising of eight bottles of "Khoos Khoos" cough syrup, eight strips of Spasmo Proxyvon containing sixty-four capsules and one strip of Nitrosun 10, containing ten tablets were recovered. That, the allegation being false was consequently not reported to the concerned Police Station despite the mandate of the Sikkim Anti Drugs Act, 2006. Office Order bearing No.010/POL/SPE/RDR/2004(Vol-II)/161, dated 20-02-2016 (Annexure P1), impugned herein, came to be issued by the Respondent No.3 placing the Petitioner under suspension in contemplation of departmental proceedings. The Office Order was allegedly issued on a Complaint received from the Training Officer, SAP, informing the Respondent No.3 of recovery of the aforestated controlled substances. This was followed by Memorandum bearing No.10/POL/SPE/RDR/2004/193, dated 27-02-2016 (Annexure P2), also impugned, issued by the Respondent No.3 proposing to hold an enquiry against the Petitioner and directing him to submit within ten days of the receipt of the Memorandum, a written statement of his defence and whether he desired to be heard in person, duly appending the statement of articles of charge. That the list of documents on the basis of which the articles of charge were to be proved were not made over to the Petitioner. Although Sl. No.2 of the list pertains to a Property Seizure Memo but as no criminal case was registered against the Petitioner the requirement of such a document is questionable. Vide Order of the disciplinary authority, Respondent No.3, bearing No. 10/POL/ SPE/RDR/2004(Vol-II)/213, dated 09-03-2016, (Annexure P3), one Prasad

Dewan, Dy. SP, SDPO, Pakyong was appointed as the Inquiry Officer (hereinafter "I.O.") and PI Bikash Tiwari, SHO, Pakyong P.S., as the Presenting Officer (hereinafter "P.O.") to present the matter on behalf of the disciplinary authority. Both Officers being subordinate to and working under the Respondent No.3 are alleged to be amenable to his directions. Upon his appointment the I.O. issued a letter dated 09-03-2016 (Annexure P4) to the Petitioner directing him to file his written statement of defence, without furnishing the relevant documents, within a period of ten days from the receipt of the said letter revealing thereby his ignorance of the Memorandum dated 27-02-2016 (Annexure P2) *supra*, thereby indicating the ulterior motive of the authorities. That, the records made over to the Petitioner reveal that the Respondent No.3 and the I.O. were evidently at the same place on 09-03-2016 to have issued Annexure P3 (*supra*) and Annexure P4 (*supra*). It is alleged that the Petitioner who was directed to be stationed in the Office of the Respondent No.3 vide Office Order dated 20-02-2016 (Annexure P1) was coerced and intimidated not to assail the abovementioned Office Orders and Memorandum with assurances of leniency in the enquiry. That, the Petitioner till then was neither served with the Office Order dated 20-02-2016 nor a copy of the Memorandum but his signature obtained on blank paper on the pretext that it would be used to mark his attendance. In such hostile circumstances, the Petitioner was compelled to file his written statement without fully comprehending the charges levelled against him sans documents or statement of witnesses. Nevertheless, the Petitioner has denied the charges framed against him in his written defence as false and fabricated. Pursuant thereto, the enquiry was conducted without following the procedure prescribed in Rule 7 of the 1989 Rules and without extending an opportunity to the Petitioner of making any verbal representation or the benefit of examining documents or cross-examining the witnesses. Admittedly he appeared before the I.O. on four occasions but alleges the absence of the P.O. except on one date. Further, that none of the listed witnesses were seen by him at the enquiry, nor was he allowed to take the help of his superiors or legal assistance. On subsequent realisation by the Respondents that the departmental enquiry against the Petitioner would not sustain, the Respondents coerced him to admit and plead guilty to the charges levelled against him, following which, the impugned Order bearing No.10/POL/RDR/2004(Vol-II)558/SPIC, dated 09-07-2016 (Annexure P5), was issued by the Respondent No.3. In the month of August 2016, the Petitioner with false assurances and in the absence of records of the enquiry was persuaded to apologise but his

apology was treated as an Appeal under Rule 11 of the 1989 Rules by the Respondent No.2 before whom he was neither summoned nor proceedings initiated. Office Order dated 22-08-2016 (Annexure P7) instead was served on him confirming the penalty imposed. The Petitioner on legal advice approached the Respondent No.3 seeking the departmental enquiry records on several occasions, but none were forthcoming. Hence, the prayers in the Petition as follows;

(a) to issue a writ/order or direction to quash/set aside Impugned Office Order No.010/POL/SPE/RDR/2004(Vol-II)/161 dated 20.02.2016, Memorandum No.10/POL/SPE/ RDR/2004/193 dated 27.02.2016 and Office Order 10/SPE/ RDR/2004(Vol-II)558/SPIC dated 09.07.2016 issued by Respondent No.3 and Office Order No.169/PHQ/L&O/ 2016 dated 22.08.2016 issued by Respondent No.2;

(b) to issue appropriate Writ/Order or direction to quash all subsequent amendments to the Sikkim Police Force (Discipline & Appeal) Rules, 1989 brought about after 1989;

(c) to pass any other direction/s, relief/s, order/s that may be deemed fit and proper in the circumstances of this case;

(d) to allow the costs of the Writ Petition in favour of the Petitioner.

3. Respondents No.1, 2 and 3 filed a joint Counter-Affidavit disputing and denying the allegations made in the Writ Petition or violation of fundamental rights of the Petitioner. That, on the recommendation of the concerned SDPO on 15-02-2016, the Petitioner along with eight others was sent to SAP, Pangthang, for a Reformatory Course from the Sadar P.S., Gangtok, where they were posted, on failure to perform their duties diligently. During the morning physical training on 20-02-2016 the Petitioners inability to walk/run was noticed following which at around 0730 hours after the morning session a surprise check of the belongings of the Petitioner was conducted by two ASIs and one Head Constable (H/C) stationed at SAP. The search led to recovery of the controlled substances detailed *supra* from a pair of black boots belonging to the Petitioner kept under his bed. The seized items were duly handed over to the Respondent No.3 along with a

Property Seizure Memo prepared by the Training Officer, SAP. Consequently, the Petitioner was placed under suspension vide impugned Office Order dated 20-02-2016 and disciplinary proceedings initiated against him for gross misconduct and negligence in terms of Rule 7 of the 1989 Rules and the Sikkim Police Force (Disciplinary & Appeal) Amendment Rules, 1995 (hereinafter "Amendment Rules 1995"). Pursuant thereto, the Memorandum dated 27-02-2016 (Annexure P2) was issued by the Respondent No.3 to the Petitioner while the I.O. issued correspondence dated 09-03-2016 (Annexure P4). Although on 17-03-2016 when the Petitioner filed his written statement to the articles of charge (Annexure R6) he accepted the charges framed against him contrarily when the I.O. recorded his statement he denied ownership of the articles. On 30-03-2016, the I.O. also recorded the statements of six witnesses in the presence of the P.O. PI Bikash Tiwari. On 28-06-2016, the I.O. recorded the statements of the Training Officer and thereafter afforded an opportunity to the Petitioner to cross-examine the Officer, which he declined. On completion of departmental enquiry on 30-06-2016, the I.O. submitted report to the Respondent No.3, who after taking into consideration the report, imposed the penalty of compulsory retirement on 09-07-2016 with effect from 20-02-2016, the date of suspension of the Petitioner. On 01-08-2016, the Petitioner filed an Appeal before the appellate authority requesting grant of pardon who on 22-08-2016 after hearing the Petitioner upheld the Orders of the disciplinary authority. As per the Respondents the Writ Petition is liable to be dismissed as it is neither maintainable in law or facts and suffers from delay and laches as penalty imposed was confirmed on 22-08-2016 but the Writ Petition has been filed only on 21-11-2016.

4. In Rejoinder, the Petitioner while denying recovery of the controlled substances from his possession would also reiterate the facts put forth in the averments made in his Petition which for brevity are not reiterated herein. It was also averred that the State-Respondents in its Counter-Affidavit did not deliberately file certain records, viz.; the letter dated 01-04-2017 which was the letter of the Petitioner through his Counsel being Annexure P9. (Pausing here for a minute, Learned Counsel was unable to establish that the alleged Annexure P9 was filed by the Petitioner before this Court or that it existed in the records of the instant matter, despite walking this Court through the documents filed.) That, the State-Respondents however made available letter dated 20-04-2017, Office Orders dated 07-02-2017 and 14-02-2017. Both these Office Orders pertain to the second delinquent LNK/960197

Karma Bhutia (hereinafter "second delinquent") against whom common proceedings with the Petitioner was undertaken. It was also reiterated that in view of the submissions made in the Writ Petition and the Rejoinder Affidavit the prayers of the Petitioner be allowed.

5. Mr. Jorgay Namka, Learned Counsel advancing his arguments for the Petitioner drew the attention of this Court to Rule 7 of the 1989 Rules and contended that the provisions elucidated therein have been grossly violated by the Respondents No.2 and 3 inasmuch as although at Sl. No.1 of Annexure III of the Memorandum (Annexure P2) issued by the Respondent No.3 details a report submitted by the Training Officer of SAP, this alleged report was not made available to the Petitioner nor does it find place in the records of the case which reveals that the matter was an endeavour to frame the Petitioner without any basis. The Rules mandate supply of documents to the Petitioner not only to prove the charges against him but to enable his defence, however no such documents were made available to him. The controlled substances were seized not from the person of the Petitioner but admittedly recovered from the pair of boots kept under the bed of the Petitioner without verification as to whether the boots actually belonged to the Petitioner. That, seizure of any Article could be resorted to only in the event of criminal proceedings against the Petitioner but records reveal that no criminal case was ever registered against the Petitioner as the allegations were false. The appointments of I.O. and the P.O. are against the tenets of equity and fair play as both Officers work directly under the Respondent No.3 and would therefore be acquiescent to his directions in regard to the action to be taken against the Petitioner. That, anomalies arise also in the orders of appointment of the I.O. since Annexure P3 would indicate that the I.O. was appointed on 09-03-2016 but the I.O. has signed on Annexure R4 after receiving the departmental enquiry File in respect of the Petitioner on 03-03-2016 itself, which concludes that the File was received by the I.O. on 03-03-2016, prior to his appointment, on 09-03-2016. Further, Annexure R9 would indicate that the statement of the Training Officer was allegedly recorded on 28-06-2016, but his statement is bereft of any report given against the Petitioner contrary to what has been stated in the impugned Office Order dated 20-02-2016. Besides, the entire statement of the Training Officer is computer generated but the sentences *Opportunity has been given to both the delinquent for cross examination of the witness but they declined to do so* is handwritten indicating its insertion as an afterthought without actually affording the

Petitioner such opportunity. That, the disciplinary proceedings were initiated not only against the Petitioner but also against second delinquent where although the memorandum of charge was prepared individually, the statement of the Training Officer pertains to both the delinquents which is therefore irregular and deserves to be set aside. That the statement of H/C Bhagat Thapa was recorded by the I.O. on 28-06-2016 where both the Petitioner and the other delinquent have signed whereas there ought to be different statements for each of the alleged delinquents and their signatures obtained separately to indicate that both had understood the statement and sufficient opportunity had not been offered to them to cross-examine the witnesses. Despite both the Petitioner and the second delinquent being tried together during the departmental enquiry, the case of the second delinquent was taken into consideration by the Director General of Police (DGP) and his order of compulsory retirement revised to voluntary retirement, by stating that prescribed procedure for awarding punishment was not followed. The case of the Petitioner however was not taken into consideration thereby establishing a bias against him. In view of the joint enquiry of both delinquents the consideration given to the second delinquent is also applicable to the Petitioner. That the letter dated "8-16", Annexure P6 (clarified to be of 01-08-2018), was a request for pardon and relaxation but was instead treated as an Appeal contrary to Rule 11 of the 1989 Rules and decided and disposed of by the IGP. That, the enquiry being vitiated, the reliefs prayed for be granted. To fortify his submissions, reliance was placed on decision of this Court in ***Tashi Chopel Bhutia*** vs. ***The State of Sikkim and Others***[1].

6. Resisting the arguments Mr. J. B. Pradhan, Learned Additional Advocate General would canvass the contention that no grounds exist for setting aside the Office Order dated 09-07-2016 (Annexure P5) which is compliant to all provisions laid down in the 1989 Rules. That, the enquiry report has infact not been challenged, in such circumstances, the report is valid and hence, the penalty and the orders issued on the appeal of the Petitioner also follow suit. That, the appeal filed by the Petitioner dated 01-08-2016 before the IGP was duly considered by the concerned authority and the orders of the disciplinary authority upheld. He would further contend that the records clearly reveal that the Petitioner has admitted to the offences charged with. That, Rule 7(4) of the 1989 Rules provides that the disciplinary authority shall deliver or cause to be delivered

[1] MANU/SI/0038/2016

to the police officer a copy of the articles of charge, the statement of the imputations of misconduct and misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained. The provision also requires the police officer to submit within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person. Annexure R5, Memo bearing no.71/SDPO/ Pakyong dated 09-03-2016 made over to the Petitioner by the I.O. indicates compliance of the said Rules. That, the written statement of the Petitioner submitted to the I.O. reveals in unequivocal terms that the controlled substances were recovered by the Police personnel from a bag and admittedly were for the Petitioners use. Being contrite, he sought excuse for the act and assured its non-repetition thereby clearly confessing his guilt. Learned Additional Advocate General would rely on the decision of ***Manoj H. Mishra*** vs. ***Union of India***[2] to contend that where the Petitioner had once admitted his guilt in his written statement he cannot resile from his statement at a later stage and that the penalty imposed on the Petitioner is proportionate to the gravity of the offence. That, in the event this Court reaches a finding that there has been non-compliance of the mandatory requirements and the principles of natural justice violated, then the Court while setting aside the order of punishment can remit the matter to the disciplinary authority to enable it to take a fresh decision from the stage that it stood vitiated. Reliance was placed on the decisions of ***Chairman, Life Insurance Corporation of India and Others*** vs. ***A. Masilamani***[3] and ***Managing Director, ECIL, Hyderabad and Others*** vs. ***B. Karunakar and Others***[4]. It was urged that the Court cannot go into the decision made by the concerned authorities but would only consider the irregularities in the decision-making process. Conceding to the fact that Rule 7(16) of the 1989 Rules was not complied with, Learned Additional Advocate General would hold that the said provision requires that when the case for the disciplinary authority is closed, the police officer shall be required to state his defence, orally or in writing, as he may prefer. If the defence is made orally, it shall be recorded and the police officer shall be required to sign the record. In either case, a copy of the statement of defence shall be given to the P.O., if any, appointed. No copy of such statement was made over to the P.O. However, the other provisions of Rule 7 of 1989 Rules have been complied to the letter. Further, he would contend that although the delinquent asserts

[2] (2013) 6 SCC 313
[3] (2013) 6 SCC 530
[4] (1993) 4 SCC 727

that cross-examination was not conducted, the documents on record would prove otherwise. That should the Petitioner allege prejudice on account of irregularity in following procedure the burden to establish prejudice would be upon him. Strength on this count was garnered from the ratio in ***State of U.P.*** vs. ***Harendra Arora and***[5]. He would further argue that infraction of every statutory provision does not make the procedure invalid buttressing his arguments with the decision in ***Union of India and Others*** vs. ***P. Gunasekaran***[6].

7. Careful and anxious consideration has been given to the submissions made at the Bar, the documents which Learned Counsel have walked this Court through during the hearing have also been carefully perused and considered as also the Judgments relied on.

8. The question for consideration is whether there were procedural defects in the departmental enquiry, if so, whether it was in breach of principles of natural justice or violation of any rules to the prejudice of the Petitioner?

9. Before embarking on a discussion of the merits of the matter, we may refer to the decision of the Supreme Court in ***State of Andhra Pradesh and Others*** vs. ***Chitra Venkata Rao***[7]. While discussing the scope of Article 226 of the Constitution in dealing with departmental enquiries, the Supreme Court would hold as follows;

> **21.** The scope of Article 226 in dealing with departmental inquiries has come up before this Court. Two propositions were laid down by this Court in *State of A.P.* v. *S. Sree Rama Rao* [AIR 1963 SC 1723 : (1964) 3 SCR 25 : (1964) 2 LLJ 150]. First, there is no warrant for the view that in considering whether a public officer is guilty of misconduct charged against him, the rule followed in criminal trials that an offence is not established unless proved by evidence beyond reasonable doubt to the satisfaction of the Court must be applied. If that rule be not applied by a domestic tribunal of inquiry the High Court in a petition under Article 226 of the Constitution is not competent to declare the order of

[5] (2001) 6 SCC 392
[6] (2015) 2 SCC 610
[7] (1975) 2 SCC 557

the authorities holding a departmental enquiry invalid. The High Court is not a court of appeal under Article 226 over the decision of the authorities holding a departmental enquiry against a public servant. The Court is concerned to determine whether the enquiry is held by an authority competent in that behalf and according to the procedure prescribed in that behalf, and whether the rules of natural justice are not violated. Second, where there is some evidence which the authority entrusted with the duty to hold the enquiry has accepted and which evidence may reasonably support the conclusion that the delinquent officer is guilty of the charge, it is not the function of the High Court to review the evidence and to arrive at an independent finding on the evidence. The High Court may interfere where the departmental authorities have held the proceedings against the delinquent in a manner inconsistent with the rules of natural justice or in violation of the statutory rules prescribing the mode of enquiry or where the authorities have disabled themselves from reaching a fair decision by some considerations extraneous to the evidence and the merits of the case or by allowing themselves to be influenced by irrelevant considerations or where the conclusion on the very face of it is so wholly arbitrary and capricious that no reasonable person could ever have arrived at that conclusion. The departmental authorities are, if the enquiry is otherwise properly held, the sole judges of facts and if there is some legal evidence on which their findings can be based, the adequacy or reliability of that evidence is not a matter which can be permitted to be canvassed before the High Court in a proceeding for a writ under Article 226.

22. Again, this Court in *Railway Board, representing the Union of India, New Delhi* v. *Niranjan Singh* [(1969) 1 SCC 502 : (1969) 3

> SCR 548] said that the High Court does not interfere with the conclusion of the disciplinary authority unless the finding is not supported by any evidence or it can be said that no reasonable person could have reached such a finding. ……..
>
> **[emphasis supplied]**

10. The Judgment with clarity elucidates the stance that can be adopted by the High Court in matters under Article 226 of the Constitution of India in relation to departmental enquiries. It is also now settled by a plethora of other Judgments that in matters of disciplinary proceedings the High Court exercises a limited power as the grounds for judicial review are limited and would be reluctant to intervene unless the findings are wholly perverse, illegal, untenable or in prejudice of the statutory provisions or principles of natural justice.

11. It would now be appropriate to examine whether the procedure prescribed was followed in the instant matter for which consideration may be taken of the following provisions.

12. Rule 7 of the 1989 Rules is the provision that deals with procedure for imposing penalties specified in Clauses (xi) to (xv) of Rule 3. By an amendment vide Notification bearing No.183/GEN/DOP on 12-08-2009 the above clauses are under the marginal heading of "Major penalties". The said provisions are extracted below;

> **3. Penalties.—** Without prejudice to the provision of any law, or any special orders for the time being in force, the following penalties may, for good and sufficient reasons, be imposed on any police officer, namely:-
>
> .....
>
> **Major penalties**
>
> (xi) Reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or

not the police officer will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;

(xii) Reduction to a lower time-scale of pay, grade, post or Service which shall ordinarily be a to promotion of the police officer to the time scale of pay, grade, post or Service from which he was reduced, with or without further directions regarding conditions of restoration to the grade or post or Service from which the police officer was reduced and his seniority and pay on such restoration to that grade, post or Service;

(xiii) Compulsory retirement;

(xiv) Removal from service which shall not be a disqualification for future employment under the Government;

(xv) Dismissal from service which shall ordinarily be a disqualification for future employment under the Government.

.....

[emphasis supplied]

13. In the instant matter, the penalty imposed on the Petitioner is in terms of Rule 3(xiii), i.e., compulsory retirement. Rule 7(1) provides that no order imposing any of the penalties specified in Clauses (xi) to (xv) of Rule 3, which also includes compulsory retirement at Clause (xiii), shall be made except after an enquiry is held, in the manner as provided in the Rule. The disciplinary authority for the purposes of the instant matter is the Senior Superintendent of Police, Respondent No.3, he is also the appointing

authority, while the appellate authority is the Deputy Inspector General of Police/ Inspector General of Police in terms of Notification No.81/GEN/ DOP dated 23-11-1998. The argument of Learned Counsel for the Petitioner that Respondent No.3 is not the appointing authority is not tenable as the Notification No.62/GEN/DOP dated 29-13-1995 clarifies the position and confirms that he is indeed the appointing authority. Rule 7(2) lays down that if the disciplinary authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a police officer, the disciplinary authority can either inquire into the imputation himself or appoint an authority for the matter. In the instant case, the disciplinary authority vide its Order bearing No.10/POL/SPE/RDR/ 2004(Vol-II)/213, dated 09-03-2016, has appointed Deputy Superintendent of Police (Dy.SP) Prasad Dewan, the SDPO as the I.O.

14. Rule 7(3) pertains to proposal to hold an inquiry against a police officer, in such a situation the disciplinary authority shall draw up or cause to be drawn up (i) the substance of the imputations of misconduct or misbehaviour into definite and distinct articles of charge; (ii) a statement of the imputations of misconduct or misbehaviour in support of each article of charge, which shall contain (a) a statement of all relevant facts including any admission or confession made by the police officer; and (b) a list of documents by which and a list of witnesses by whom, the articles of charge are proposed to be sustained. In this context, we may examine whether this provision has been complied with in the instant matter. The disciplinary authority has prepared Memorandum bearing No. 10/POL/SPE/RDR/2004/ 193, dated 27-02-2016. The Memorandum includes at Annexure I the Statement of articles of charge framed against the Petitioner, Annexure II the Statement of imputation of misconduct or misbehaviour in support of the articles of charge framed against the Petitioner, Annexure III is the list of documents as required under Rule 7(3)(b) and Annexure IV is the list of witnesses also furnished as per Rule 7(3)(b) of the 1989 Rules. No admission or confession of the delinquent finds mention in the Memorandum in terms of Rule 7(3)(a), evidently as none existed at that point in time. Hence, there is compliance of Rule 7(3) of the 1989 Rules.

15. Rule 7(4) of 1989 Rules reads as follows;

> "(4) The disciplinary authority shall deliver or cause to be delivered to the police officer a copy of

the articles of charge, the statement of the imputations of misconduct or misbehaviour and a list of documents and witnesses by which each article of charge is proposed to be sustained and shall require the police officer to submit, within such time as may be specified, a written statement of his defence and to state whether he desires to be heard in person.

16. An examination of Annexure R3 relied on by the Respondents which is the Memorandum dated 27-02-2016 issued by the disciplinary authority, reveal at Sl. Nos.1, 2 and 6 as follows;

.....

MEMORANDUM

1. The undersigned proposes to hold an inquiry against Nk.960208 Bijay Gurung of Sadar P.S., East District under Rule 7 of the Sikkim Police Force (Discipline & Appeal) Rules, 1989. **The substance of the imputations of misconduct or misbehaviour in respect of which the inquiry is proposed to be held is set out in the enclosed statement of articles of charge (Annexure – I). A statement of the imputation of misconduct or misbehaviour in support of each article of charge is enclosed (Annexure-II). A list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be sustained are also enclosed (Annexure III and IV).**

2. Nk.960208 Bijay Gurung is directed to submit within 10 days of the receipt of this memorandum, a written statement of his defense (sic) and also to state whether he desires to be heard in person.

.....

> 6. Receipt of this Memorandum may be acknowledged by Nk.960208 Bijay Gurung of Sadar P.S., East District.
>
> …….
>
> **[emphasis supplied]**

Copy of the document Annexure R3 bears the signature of the Petitioner, thereby acknowledging and indicating receipt of all the documents as listed in the Memorandum, hence establishing compliance of the aforestated Rules. It is clear from the above that steps envisaged by Rule 7(3) and Rule 7(4) have met with compliance.

17. Rule 7(5)(a), (b) and (c) is extracted hereinbelow;

> "(5) (a) On receipt of the written statement of defence **the disciplinary authority may itself inquire into such of the articles of charge as are not admitted, or, if it considers it necessary so to do, appoint under sub-rule 2 an inquiry authority for the purpose, and where all the articles of charge have been admitted by the police officer in his written statement of defence, the disciplinary authority shall record its findings on each charge after taking such evidence as it may think fit and shall act in the manner laid down inunder sub-rule 25**.
>
> (b) If no written statement of defence is submitted by the police officer, the disciplinary authority may itself inquire into the articles of charge or may, if it considers it necessary so to do, appoint sub-rule 2 an inquiring authority for the purpose.
>
> (c) Where the disciplinary authority itself inquires into any article of charge or appoints an inquiring authority for holding an inquiry into such charge, it may, by an order, appoint a police officer or a legal practitioner, to be known as the Presenting Officer to present on its behalf the case in support of the article of charge."
>
> **[emphasis supplied]**

18. What Rule 5(a) envisages is that pursuant to the documents listed at Rule 7(3) being made over to the delinquent, he shall file his written statement before the disciplinary authority, who, on receipt of the written statement has the option of inquiring into the articles of charge himself when the charges have 'not' been admitted by the delinquent. In other words, where the delinquent has not pleaded guilty to any of the charges the disciplinary authority can inquire into these charges. The provision als empowers the disciplinary authority to appoint inquiring authority if he so requires, for this purpose. The second leg of this Rule provides that when all the articles of charge have been "admitted" by the delinquent in his written statement, the disciplinary authority 'shall' record his findings on each charge, take evidence, followed with action in the manner provided in Rule 7(25) which reads as follows;

> (25) If the disciplinary authority having regard to its findings on all or any of the articles of charge is of the opinion that any of the penalties specified in clause (xi) to clause (xv) of rule 3 should be imposed on the police officer, **it shall not be necessary to give the police officer any opportunity of making representation to the penalty proposed to be imposed**:
>
> **[emphasis supplied]**

It is relevant to state here that the proviso to the Rule has been deleted vide amendment notified on 29-03-1995, Notification bearing No.62/GEN/DOP.

19. Rule 7(5)(b) *supra*, gives the disciplinary authority the option of inquiring into the matter himself if no written statement is submitted by the delinquent officer. The disciplinary authority is also clothed with the option of appointing an inquiring authority under Rule 7(2) if he considers it necessary. Rule 7(5)(c) requires appointment of a police officer or legal practitioner as a Presenting Officer to present the case on behalf of the disciplinary authority, irrespective of the fact that the inquiry may be conducted by the disciplinary authority himself or by the inquiring authority. Rule 7(6) provides that if the disciplinary authority does not take up the inquiry, he shall forward to the inquiring authority the documents listed therein. The provision is extracted hereinbelow for convenience.

"(6) The disciplinary authority shall, where it is not the inquiring authority, forward to the inquiring authority -

(i) a copy of the articles of charge and the statement of the imputations of misconduct or behaviour;

(ii) a copy of the written statement of defence, if any, submitted by. the police officer;

(iii) a copy of the statement of witnesses, if any, referred to in sub-rule 3;

(iv) evidence proving the delivery of documents referred to in sub-rule 3 to the police officer; and

(v) a copy of the order appointing the Presenting Officer."

20. A bare reading of the aforestated provisions would obtain that the role and duties cast upon the disciplinary authority extend from Rule 7(2) to Rule 7(6). It may be elucidated herein that when disciplinary proceedings are to be held against a police officer it becomes incumbent upon the disciplinary authority to draw up the details as laid down in Rule 7(3)(i), (ii)(a) and (b). Thereafter, the disciplinary authority is also to ensure delivery of the documents to the delinquent specifying a time frame within which the delinquent is to file his statement of defence as emanates from Rule 7(4). The written statement is to be received by the disciplinary authority himself and none else as envisaged under Rule 7(5)(a), following which the said authority is to take steps, viz.; where the articles of charge are not admitted then he is to enquire into such of the articles which are not admitted or appoint an inquiry authority under Rule 7(2) for the said purpose. However, where the articles of charge have been admitted by the delinquent the disciplinary authority is clothed with powers to record his findings on each charge after recording evidence as he thinks fit and then take steps as per Rule 7(25) which provides for steps to be taken for imposing penalty instead of inquiring into the matter or causing inquiry. The disciplinary

authority has therefore to take steps in terms of rule 7(25) which he overlooked.

21. In the instant matter, the disciplinary authority before receipt of written statement of the Petitioner proceeded to appoint the I.O. on 09-03-2016, thereby putting the cart before the horse, whereas the written statement was submitted by the Petitioner only on 17-03-2016. To obfuscate the above is the letter dated 09-03- 2016 issued by the I.O. requiring the delinquent to submit his reply over and above the time given in the Memorandum issued by the disciplinary authority. It may be noted that the role of the I.O. kicks into place only on completion of the provisions of Rule 7(2) to Rule 7(6). Before completion of the steps envisaged under the aforestated Rules the inquiring authority has no role to play.

22. This would concomitantly take us to the argument of Learned Additional Advocate General which was to the effect that the enquiry stood vitiated from the stage of Rule 7(16), while disagreeing with this contention, in my considered opinion, there was no necessity of reaching the aforestated stage, nevertheless for the sake of argument, we may look into Rule 7(16) of 1989 Rules which provides as follows;

> "(16) When the case for the disciplinary authority is closed, the police officer shall be required to state his defence, orally or in writing as he may prefer. If the defence is made orally, it shall be recorded and the police officer shall be required to sign the record. In either case, a copy of the statement of defence shall be given to the Presenting Officer, if any, appointed."

23. Learned Additional Advocate General contends that copies of the statement of defence was not made over to the P.O. Even on a cursory look at Rule 7 and its Sub-Rules, it is noticed that the disciplinary authority was to have proceeded in terms of Rule 7(25) in view of the admission of guilt of the Petitioner as revealed by Annexure R6 written statement of the Petitioner and as laid down in Rule 7(5)(a) which he failed to do. Therefore the argument of the Learned Additional Advocate General pertaining to Rule 7(16) is indeed not tenable. Once the written statement of the Petitioner was received admitting to the charges, the Rules provides necessary steps

as emanates from Rule 7(5)(a). It is from this stage that the enquiry stood vitiated, since on admission of guilt firstly it was not necessary to have put the delinquent officer through the process of enquiry as the disciplinary authority was clothed with sufficient powers to record evidence and follow it up with imposition of penalty.

24. The discussions which have ensued hereinabove reveal that the Petitioner was aware of the imputations and charges against him having acknowledged receipt of the Memorandum and its Annexures and he has filed his response admitting his guilt contrary to the argument of his Learned Counsel that he had denied the charges framed against him. No prejudice was evidently caused to the Petitioner at that stage since as established, he was in receipt of all relevant documents with sufficient opportunity afforded to rebut the allegations.

25. The instant case is distinguishable from the ratio in ***Tashi Chopel Bhutia*** (*supra*) relied on for Learned Counsel for the Petitioner inasmuch as in the case *supra* there was absolute non-compliance of the statutory procedure which had prejudiced the Petitioner and he was denied an opportunity of proving his innocence ambiguous notice having been issued to the Petitioner therein and insufficient time to resist the charges. He was afforded no opportunity of crossexamining the witnesses or to examine himself or his witnesses and above all the relevant documents had not been made over to the Petitioner to enable him to put up a defence. The circumstances in the instant matter clearly differ as would be evident from the discussions *supra*.

26. In the light of the facts and circumstances discussed hereinabove and in consideration of the ratio extracted *supra*, the following impugned Orders are hereby set aside;

(i) Order No.10/POL/SPE/RDR/2004(Vol-II)/213, dated 09-03-2016;

(ii) Office Order No.10/SPE/RDR/2004(Vol-II)558/SPIC dated 09-07-2016 issued by Respondent No.3; and

(ii) Office Order No.169/PHQ/L&O/2016 dated 22-08-2016 issued by Respondent No.2.

27. In ***Chairman, Life Insurance Corporation of India*** (*supra*) it was enunciated that it is settled legal proposition that once the Court sets aside an order of punishment, on the ground that the enquiry was not properly conducted, it must remit the case concerned to the disciplinary authority for it to conduct the enquiry from the point that it stood vitiated and conclude the same. At Paragraph 21, it was held as follows;

> **"21.** After hearing the counsel for the parties, we are of the view that the impugned judgment and order dated 10-1-2011, in *LIC* v. *A. Masilamani* [*LIC* v. *A. Masilamani*, Writ Appeal No. 7 of 2011, decided on 10-1-2011 (Mad)], as well as the order of the learned Single Judge dated 17-2-2010, passed in *A. Masilamani* v. *LIC* [*A. Masilamani*v. *LIC*, Writ Petition No. 11152 of 2002, decided on 17-2-2010 (Mad)], cannot be sustained in the eye of the law and are therefore hereby set aside. The present appeal is allowed. The matter is remitted to the disciplinary authority to enable it to take a fresh decision, taking into consideration the gravity of the charges involved, as with respect to whether it may still be required to hold a de novo enquiry from the stage that it stood vitiated i.e. after issuance of the charge-sheet.
> ……."

28. Consequently the disciplinary proceedings shall commence from the stage it stood vitiated as discussed and clarified above.

29. The disciplinary authority while taking a decision in the matter may take into consideration that the concerned authorities in the first instance failed to lodge a complaint against the Petitioner under the provisions of the Sikkim Anti Drugs Act, 2006, when he was allegedly found to be in possession of controlled substances. Secondly, the disciplinary authority may also take into consideration that the Director General of Police in his Office Order bearing No.13/PHQ/2017, dated 07-02-2017 (Annexure P11) has while considering the representation filed by the second delinquent LNK/ 960197 Karma Bhutia for conversion of his compulsory retirement to voluntary retirement following the departmental enquiry, recorded that, on

going through the departmental enquiry proceedings it was found that the proper procedure for awarding punishment under Clauses (xi) to (xv) of Rule 3 of the 1989 Rules was not followed. Accordingly, he had revised the order of compulsory retirement of the delinquent and allowed him voluntary retirement as requested by the second delinquent.

30. Under the facts and circumstances, the Writ Petition stands disposed of with the above directions.

31. No order as to costs.

SLR (2018) SIKKIM 1454

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

Bail Appln. No. 03 of 2018

Nabin Manger ….. **APPLICANT**

Versus

State of Sikkim ….. **RESPONDENT**

For the Applicant: Mr. William Tamang, Ms. Sushmita Dong and Mr. Girmey Bhutia, Advocates.

For the Respondents: Mr. J.B. Pradhan, Public Prosecutor with Mr. Karma Thinlay and Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutors and Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Public Prosecutors.

Date of decision: 15th November 2018

A. Sikkim Anti Drugs Act, 2006 – Bail – Consideration – While considering an application for bail, it becomes imperative on the Court to consider the seriousness of the offence apart from the interests of the society at large. It is no secret that the law enforcement agencies in Sikkim are battling with the sale of controlled substances which are brought into the State and sold by unscrupulous people to the young and impressionable. The consumers of controlled substances, it is now widely accepted, are in fact victims but it is essential that the Courts deal with an iron hand with the sellers who encourage addiction and dependence by the consumers on the controlled substances – The interest of the society ought to be treated with priority in the instant matter considering the gravity of the offence in the context of this State.

(Para 9)

Application dismissed.

ORDER

Meenakshi Madan Rai, J

1. The Applicant was arrested in connection with Rangpo Police Station Case No. 45 of 2018 dated 05.09.2018 under Sections 7(a)(b)/9/ 14 of the Sikkim Anti Drugs Act, 2006 *('SADA, 2006' for short)* read with Sections 9(1)(c)/4 of the Sikkim Anti Drugs (Amendment) Act, 2017.

2. The FIR lodged by S.I. Pradeep Chettri informed that on 05.09.2018, he received a WT signal from Constable Chewang Dorjee Bhutia deployed at Rangpo Check Post to the effect that while checking incoming vehicles at Rangpo Check Post, he intercepted a truck bearing Registration No. SK-01-D-2311 with a load of cement. The vehicle was driven by one Birta Tamang of West Bengal and the Applicant was the sole occupant therein. They were suspected to be in possession of controlled substances. Accordingly, a Rangpo Police Station Case was registered on the same date under the above Sections of law and consequent to his arrest, the Applicant was produced before the learned Judicial Magistrate, East District at Gangtok, East Sikkim who remanded the Applicant to judicial custody. On 13.09.2018, the Applicant filed an application for bail before the Court of the learned Special Judge, SADA, 2006, East District at Gangtok, East Sikkim which was rejected. A second bail application was filed on 06.10.2018 which was also rejected vide order of the said learned Special Judge, SADA, 2006 on 08.10.2018. Hence, the Applicant is languishing in judicial custody for 54 days till the date of filing the instant application having been arrested on 05.09.2018.

3. According to learned Counsel for the Applicant, thecontrolled substances were not recovered from the person of the Applicant but was found to have been concealed in the second seat of the truck which was accessible only to the driver of the vehicle. That, in fact, the Applicant had no knowledge whatsoever of concealment and carriage of the controlled substances. That the Applicant is aged about 35 years, a resident of Rangpo, Sikkim with no criminal antecedents and is the only bread winner of his family comprising of his parents, wife and two minor children. That, in such circumstances, there is no question of the Applicant tampering with evidence or absconding and since he is neither charged with offences punishable with death or life imprisonment, it is prayed that he be enlarged on bail.

4. Objecting to the application, learned Additional Public Prosecutor, Mr. Karma Thinlay contended that during the course of investigation, the statements of the Applicant and the driver of the truck were recorded and both have admitted that they were consumers of the controlled substances as well as selling the controlled substances at exorbitant rates in Sikkim. That, in fact, the controlled substances in the truck were also concealed by both of them after having made a discussion to purchase the articles on 04.09.2018. That the statements of both the accused persons corroborate each other and in view of the menace that is created by the sale of controlled substances in the State, releasing the Applicant on bail, at this stage, would not only be conceived to be an encouragement of the act but likelihood of the Applicant absconding. Hence, it is prayed the application for bail be rejected.

5. The arguments of learned Counsel for both parties have been heard at length and given careful consideration.

6. Section 7(a) and (b) of the SADA, 2006 reads as follows;

> *"7. No person shall -*
>
> *(a) sale (sic), stock for sale or trade in any controlled substances; or*
>
> *(b) transport either inter-State or intra-State any controlled substance,*
>
> *Without a valid license under the Drugs and Cosmetics Act, 1940 or Sikkim Trade License Act. ..."*

7. Section 9 of the SADA, 2006 reads as follows;

> *"9. Whoever, contravenes any provision of this Act or any rule or any order made thereunder shall be punishable -*
>
> *(a) where the contravention is by the licensed dealers, with suspension or cancellation of the license, or with imprisonment for a term*

which may extend to six months, or with fine which may extend to twenty thousand rupees, or with all;

(b) where the contravention involves use or consumption of the controlled substances, without valid medical prescription, by any means/route of intake, in any chemical form, such person shall undergo with compulsory detoxification, and to be followed by rehabilitation and also will remain under observation/probation, and such person shall also be liable to pay a fine which may extend to ten thousand rupees, if the user is young, unmarried or unemployed;

(c) where the contravention involves a person who is a State Government employee, or an employee in an Organisation or Undertaking under the State Government, such person shall be liable to imprisonment which may extend to six months, and also liable to pay a fine which may extend to twenty thousand rupees. Further, such person shall also be liable to dismissal from service;

(d) where the contravention involves a person using a mode of transport or any other form of conveyance, either inter-State or intra-State, such person shall be liable to imprisonment for a term which may extend to five years or with fine which may extend to one lakh rupees, or with both, and the vehicle as used, shall be liable to be seized and confiscated, which may be released on payment of twenty thousand rupees;

(e) where the contravention involves the manufacturer of controlled substances, such person shall be liable to imprisonment which may extend to three years or with fine which may extend to fifty thousand rupees, or with both;

(f)where a person who has been convicted for an offence under this Act and if such person is unemployed, such conviction shall be a disqualification for employment under the State Government."

8. Section 9(1)(c) and Section 4 of the Sikkim Anti Drugs (Amendment) Act, 2017 reads;

"9. (1) Whoever, in contravention of any provision of this Act or any rule or order made thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses,-

(a).....

(b).....

(c) where the contravention involves commercial quantity, with rigorous imprisonment which shall not be less than ten years but may extend to fourteen years and shall also be liable to pay fine which shall not be less than one lakh rupees but may extend to two lakh rupees."

"4. (1) Without prejudice to the provisions of subsection (3) of Section 3, the Government shall appoint an officer not below the rank of Deputy Secretary or equivalent as the Programme Director and may also apppoint such other officers with such designation as it thinks fit for the purposes of this Act.

(2) The Programme Director shall, either by himself or through officers subordinate to him, exercise all powers or perform all functions entrusted to him by the Government."

9. While considering an application for bail, it becomes imperative on the Court to consider the seriousness of the offence apart from the interests

of the society at large. It is no secret that the law enforcement agencies in Sikkim are battling with the sale of controlled substances which are brought into the State and sold by unscrupulous people to the young and impressionable. The consumers of controlled substances, it is now widely accepted, are in fact victims but it is essential that the Courts deal with an iron hand with the sellers who encourage addiction and dependence by the consumers on the controlled substances. In the matter at hand, the controlled substances were allegedly recovered from the truck which was being driven by one Birta Tamang said to be the co-accused and the Applicant who was the lone occupant therein. In view of the facts and circumstances placed before me, I am of the considered opinion that the interest of the society ought to be treated with priority in the instant matter considering the gravity of the offence in the context of this State. There is no guarantee that there will not be a repetition of the offence should the Applicant be enlarged on bail. Hence, I am not inclined to consider the application.

10. Admittedly, the charge-sheet has been filed. In such circumstances, the learned Special Judge, SADA, 2006, East District at Gangtok, East Sikkim shall expedite trial and complete it by the last week of February, 2019.

11. Bail Application stands rejected and disposed of accordingly.

12. A copy of this order be sent to the learned Special Judge, SADA, 2006, East District at Gangtok, East Sikkim, for information and compliance of the direction *supra.*

13. Certified copies be made available to the parties, as per Rules.

SLR (2018) SIKKIM 1460

(Before Hon'ble the Chief Justice)

W.P. (C) No. 15 of 2018

Shri Deepesh Chandra Sharma ….. PETITIONER

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioner: Dr. Doma T. Bhutia, Advocate with Mr. Shakil Karki and Mr. Ratan Gurung, Advocates.

For the Respondents: Mr. J.B. Pradhan, Additional Advocate General with Mr. S.K. Chettri, Mrs. Pollin Rai, Asst. Govt. Advocates and Mrs. Neera Thapa, Advocate (HC, HS & FW Department).

Date of decision: 20th November 2018

A. Constitution of India – Article 226 – It is settled law that in a matter of transfer of a Government employee, scope of judicial review is limited and the High Court should not interfere with the order of transfer lightly, be it at interim stage or final stage. This is so because the Courts do not substitute their own decision in the matter of transfer. It is also settled position of law that an order of transfer is a part of the service conditions of an employee which should not be interfered in exercise of its discretional jurisdiction under Article 226 of the Constitution of India – Government servant has no vested right to remain in a particular place of posting for a long period. He can also not insist that he must be posted at a particular place because the people of that area want him to continue at the place of posting. Transfer order can be set aside when transfer order is vitiated by violation of some statutory provisions or suffers from *mala fide*. Transfer order can be set aside when same is passed by an authority who is not competent to pass such orders. It can also be set aside when by such order the person is sent to a lower post – The allegations of *mala fide* should not be accepted lightly by the Court.

(Paras 11 and 12)

B. Transfer Policy for Government Employees – The State Government has neither made Transfer Act nor any Rules have been framed in this regard. Even guidelines have also not been framed by the State Government – For proper functioning of Government Departments, at least some guidelines regarding transfer of its employees should be framed by the Government – State Government requested to either frame Guidelines or Rules or Act regarding transfer of its employees at the earliest.

(Para 20)

Petition dismissed.

Chronological list of cases cited:

1. G. Babu v. C.E. (PS & GL) and Others, (1990) ILL J 202 Ker.
2. Registrar General, High Court of Judicature of Madras v. R. Perachi & Others, (2011) 12 SCC 137,
3. N.K. Singh v. Union of India and Others, (1994) 6 SCC 98.
4. Rajendra Singh and Others v. State of U.P and Others, (2009) 15 SCC 178.
5. Mohd. Masood Ahmad v. State of U.P and Others, (2007) 8 SCC 150.
6. State of U.P. and Others v. Gobardhan Laal with D.B. Singh v. D.K. Shukla and Others, (2004) 11 SCC 402.
7. State of U.P. and Others v. Ashok Kumar Saxena and Another, (1998) 3 SCC 303.
8. Govt. of Andhra Pradesh v. G. Venkata Ratnam, (2008) 9 SCC 345.
9. Rajendra Roy v. Union of India and Another, (1993) 1 SCC 148.
10. Airports Authority of India v. Rajeev Ratan Pandey and Others, (2009) 8 SCC 337.
11. Ratnagiri Gas and Power Private Limited v. RDS Projects Limited and Others, (2013) 1 SCC 524.
12. G. Jayalal vs. Union of India and Others, (2013) 7 SCC 150.

JUDGMENT

Vijai Kumar Bist, CJ

1. Petitioner was appointed on compassionate ground as Male Ward Attendant in the year 2005 in the Health Care, Human Services & Family Welfare Department, Government of Sikkim, vide Order dated 20.09.2005. On being appointed, he was posted at Gyalshing District Hospital w.e.f. 20.09.2005. Thereafter, on 01.08.2013, the petitioner was transferred to Namchi District Hospital. On 03.09.2014, the petitioner was again transferred to Shipsu PHC under District Hospital Singtam. On 01.05.2015, he was posted at Shipsu Health Post. On 28.12.2015, he was sent back to District Hospital Singtam and then on 01.05.2016 again transferred to Shipsu PHC, East. In the year 2017, the petitioner moved a joint application for mutual transfer. His prayer for mutual transfer was accepted and order was passed on 25.04.2017 transferring him from Sipchu to Rimbik. On 03.03.2018, a transfer order was passed again and the petitioner was transferred from Rimbik to STNM Hospital, Gangtok. There were some technical mistakes in the transfer Order dated 03.03.2018 which were corrected by another order dated 07.04.2018. Aggrieved by the transfer order, present writ petition is filed.

2. The case of the petitioner is that the order impugned has been passed with a *mala fide* intention to harass the petitioner. It is submitted that the petitioner has let out one flat on rent to run the office of the opposition party „Sikkim Krantikari Morcha (SKM) on monthly rent of Rs.5000/- (Rupees five thousand) only. The petitioner was pressurized and asked to get the office of the SKM vacated from his rental premises but the petitioner could not do so without following due process of law i.e. by filing eviction suit and the petitioner had no money to proceed for eviction suit. Due to this reason, the petitioner was harassed and he has been frequently transferred to all the odd places despite resistance from public. It is submitted that the petitioner has performed his duty very sincerely and diligently. It is submitted that most of the Primary Health Sub Centers (PHSCs) are dependent on the health attendant for minor ailment and to provide services to public and most of the villagers cannot travel far flung, as such their basic needs are dependent upon PHSCs. The villagers of Rimbik area approached the Chief Medical Officer (CMO) for retaining the petitioner at Rimbik. The concerned CMO told the villagers that transfer of

petitioner has been done as per the order of the higher authority. The villagers also approached the concerned area MLA. He also categorically stated that transfer of the petitioner cannot be stopped because he has let out his house on rent to run the office of opposition party SKM. The case of the petitioner is that the transfer of the petitioner is not done for professed purposes, such as in normal course or in public interest or administrative interest or in exigencies of service but for other purpose with a *mala fide* intention at the instance of outside or extra-legal authority to harass him. Same is a punitive transfer.

3. Dr. Doma T. Bhuta, learned Counsel for the petitioner submitted that the transfer order is arbitrary and unreasonable. The petitioner is a Class-IV employee and none of the other employees has been transferred from one place of posting to another and the petitioner alone was picked up for transfer. It is also contended that even the petitioner has not been paid any travelling allowances whereas it was the duty of the respondents to pay the travelling allowances. It is also contended that the transfer order is against the public interest which is clear from the fact that public of the area also made a representation for retaining the petitioner at his place of posting. She submitted that by keeping the petitioner at Rimbik, the villagers will be benefitted. It is also contended that the transfer order is also against the Indian Public Health Standards (IPHS) norms.

4. Learned counsel for the petitioner further submitted that the transfer order is in violation of Article 14 and 15 of the Constitution of India, as it is not only arbitrary but discriminatory also. It is submitted by learned counsel for the petitioner that it is a rarest of the rare cases where transfer order has been passed with mala fide intention and the Court should interfere with the same. Learned counsel also submitted that the place from where the petitioner has been transferred, no one has been posted there and people of that area are suffering. Learned counsel for the petitioner submitted that the petitioner has already joined his place of posting at STNM Gangtok. Learned counsel also submits that the petitioner is ill, his wife is illiterate, he has two minor children and his place of present posting i.e. Gangtok, costing him a lot as Gangtok is a costly city. Therefore, it is not possible for the petitioner to maintain himself. It is submitted that the petitioner could be sent back to his previous place of posting at Rimbik. Learned counsel submitted that the petitioner was transferred from east to west and west to east. It is submitted that the transfer order is full of mala fide which is clear

from the fact that only after the petitioner gave accommodation to the opposition political party, he was transferred several times. It is reiterated by the counsel for the petitioner that the transfer order has been passed at the behest of the present ruling party and the same deserves to be set aside.

5. In support of her arguments, Dr. Doma T. Bhuta, learned counsel for the petitioner referred to paragraphs 8, 11, 13, 16 of the judgment passed by Kerala High Court in ***G. Babu vs. C.E. (PS & GL) and Others : (1990) ILL J 202 Ker***, which are reproduced below:

> "8. On the first question, I am reasonably certain that the power of transfer also shall be exercised only for bona fide purposes and any such order is liable to be reviewed on grounds of absence of good faith or abuse of power. There is certainly an area of discretion in the Authority in such matters. But that discretion may have to be tested on the touch-stone of reasonableness when it is challenged on grounds of arbitrariness or unreasonableness, absence of good faith or abuse of power. It is elementary that all wielding of power shall be bona fide and reasonable and shall not amount to abuse of power. In *E.P. Royappa v. State of Tamil Nadu* [A.I.R. 1974 SC 555] the question was considered with specific reference to transfer of a Senior Civil Servant. The following observations are relevant in this context:
>
> > "… Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant, but is extraneous and outside the

> area of permissible considerations, it would amount to mala fide exercise of power and that is hit by Articles 14 and 16..."

Almost to the same effect are the observations of the Supreme Court in *Venkataraman S.R. (Smt.) v. Union of India* [1978-IIL L.M. 479]. The Court held at page 481:

> "It is, however, not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C. J., in Pilling v. Abergele Urban District Council (1950) 1 KB 636, where a duty to determine a question is conferred on an authority which state their reasons for the decision,
>
> > '… and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the Court to which an appeal lies can and ought to adjudicate on the matter."

Reliance was placed on the observations of Lord Goddard, C.J. in Pilling v. Abergele Urban District Council, (1950) 1 KB 636 and Lord Esher M.R. in The Queen on the Prosecution of Richard Westbrook v. The Vestry of St. Pancras [1890 (23) Q.B.D. 371]. The same position is covered by the decisions of Lord Greens in Associated Provincial Picture Houses v. Wednesbury Corporation [1947 (2) All ER 680] of Lord Parker C.J. in Taylor v. Munrow

[1960 (1) All ER 455] and Lord Macnaghtan in Kennedy v. Birmingham Licensing Planning Committee [1972 (2) All ER 305]. Decisions in this regard are a legion. I do not propose to multiply authority on this point. It is, sufficient for me to follow E.R. Royappa case (AIR 1974 S.C. 555] (vide supra). I am therefore of the opinion that the claim of the Authority that it shall not subject itself to any guideline, any principle, any standard, in the matter of ordering transfer of its employees cannot be accepted.

.....

11. The Supreme Court had occasion to consider the effect of the recital of such statutory formula on the scope of judicial review of administrative action in *Narayan v. State of Maharashtra* [A.I.R. 1977 S.C. 183]. The Court held:

> "32. It is also clear that, even a technically correct recital in an order or notification stating that the conditions precedent to the exercise of a power have been fulfilled may not debar the Court in a given case from considering the question whether, in fact, those conditions have been fulfilled. And, a *fortiori*, the Court may consider and decide whether the authority concerned has applied its mind to really relevant facts of a case with a view to determining that a condition precedent to the exercise of power has been fulfilled. If it appears, upon an examination of the totality of facts in the case, that the power conferred has been exercised for an extraneous or irrelevant purpose or that the mind has not been applied at all to the real object or purpose of a power, so that the result is that

> the exercise of power could only serve some other or collateral object, the Court will interfere."

13. The same question was considered by this Court and the Supreme Court in a number of decisions. Perhaps one of the earliest among the decisions of this Court is by K.K. Mathew, J., as he then was, in *Abdul Khader v. R.D.D. Ernakulam* [1967-K.L.T. 354]. It was clearly laid down that the power of transfer shall be used only in a reasonable manner even in the exigencies of service, and shall not be used for collateral purposes or as an instrument of harassment or for punishing an employee.

.....

16. Recent decisions of the Supreme Court have put the position regarding the scope of review of orders of transfer of government employees beyond controversy. In Varadha Rao (B.) v. State of Karnataka [1986-II L.L.N. 753], the Court observed in Paras. 5 and 6, pages 755 and 756:

> ". . . It is no doubt true that if the power of transfer is abused, the exercise of the power is vitiated".
>
> x x x
>
> One cannot but deprecate that frequent, unscheduled and unreasonable transfers can uproot a family, cause irreparable harm to a Government servant and drive him to desperation. It disrupts the education of his children and leads to numerous other complications and problems and results in hardship and demoralisation. *It should be reasonable and fair and should apply to*

everybody equally. But, at the same time, it cannot be forgotten that so far as superior or more responsible posts are concerned, continued posting at one station or in one department of the Government is not conducive to good administration. It creates vested interest and therefore we find that even from the British times the general policy has been to restrict the period of posting for a definite period. . . "

(emphasis supplied)

Gujarat Electricity Board v. Atmaram Sungomal Poshani [1989-II L.L. N. 299], dealt with a case of discharge from service of an employee who refused to comply with an order of transfer. The Gujarat High Court held, that the discharge was violative of the principles of natural justice. Relying on clause 113 of the Service Regulations, which provided for summary discharge from service without the necessity of disciplinary proceedings under the relevant rules, the 'Supreme Court allowed the appeal filed by the employee. In that context the Court made the following observations in Para. 4, at page 303:

> "Transfer of a Government servant appointed to a particular cadre of transferable posts from one place to the other is an incident of service. No Government servant or employee of Public Undertaking has legal right for being posted at any particular place. Transfer from one place to other is generally a condition of service and the employee has no choice in the

> matter. Transfer from one place to other is necessary in public interest and efficiency in the public administration. Whenever a public servant is transferred he must comply with the order, but if there be any genuine difficulty in proceeding on transfer, it is open to him to make representation to the competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules, as has happened in the instant case. The respondent lost his service as he refused to comply with the order of his transfer from one place to the other."

> Counsel for the third respondent sought to rely on the above observations to contend that orders of transfer cannot be challenged in proceedings under Article 226 of the Constitution of India."

6. *Per contra*, case of the Respondent is that the petitioners appointment order clearly provided that the appointment carries with it the

liability to serve in any part of the state. Therefore, now the petitioner cannot be permitted to challenge the transfer order. It is also the case of the respondent that the petitioner never objected to any of his transfer orders except the present one. In fact, he himself requested for mutual transfer in the year 2017. On his request, mutual transfer order was passed and he was given posting of his choice. The allegation of mala fide has no leg to stand. It is also the case of the respondents that the transfer order has been passed in routine manner. The same has neither been passed on administrative ground nor on any disciplinary ground.

7. Mr. J. B. Pradhan, learned Additional Advocate General, submitted that the allegation made by the petitioner is absolutely incorrect. It is submitted by him that accommodation was given by the petitioner on rent to run the office of the opposition party in the year 2013. He was transferred thereafter but he had not made any complaint against the transfer orders. In the year 2017, the petitioner made a request for mutual transfer, which was accepted by the authority. This clearly shows that there was no element of bias against the petitioner. He submitted that petitioner has not been subjected to discrimination as other employees have also been transferred which is clear from Annexure P-5, which shows that other similarly placed persons were also transferred. He submitted that transfer is an incident of service career and authority is competent enough to transfer its employee in public interest or interest of work. He submitted that scope of judicial review in the transfer matter is very limited and High Court should not interfere in such matter unless it is proved that power is exercised by the authority in total arbitrary manner with mala fide intention, which is not found in the present case.

8. Learned Additional Advocate General also referred to Rule 9 of the Sikkim Government Service Rules, 1974, which provides that government employee can be transferred from one post to another. Learned Additional Advocate General further submitted that it was and is open for the petitioner to raise his grievances before the authority concerned. And such grievances will be dealt with in accordance with law.

9. Learned Additional Advocate General in support of his arguments placed reliance on various judgments passed by the Honble Supreme Court in ***Registrar General, High Court of Judicature of Madras vs. R. Perachi & Ors : (2011) 12 SCC 137, N.K. Singh vs. Union of India***

and Others : (1994) 6 SCC 98, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178, Mohd. Masood Ahmad vs. State of U.P. and Others : (2007) 8 SCC 150, State of U.P. and Others vs. Gobardhan Laal with D.B. Singh vs. D.K. Shukla and Others : (2004) 11 SCC 402, State of U.P. and Others vs. Ashok Kumar Saxena and Another : (1998) 3 SCC 303, Govt. of Andhra Pradesh vs. G. Venkata Ratnam : (2008) 9 SCC 345, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178, Rajendra Roy vs. Union of India and Another : (1993) 1 SCC 148, Airports Authority of India vs. Rajeev Ratan Pandey and Others : (2009) 8 SCC 337, Ratnagiri Gas and Power Private Limited vs. RDS Projects Limited and Others : (2013) 1 SCC 524 and ***G. Jayalal vs. Union of India and Others : (2013) 7 SCC 150.***

10. I have considered the submissions of learned counsel for the parties.

11. It is settled law that in a matter of transfer of a government employee, scope of judicial review is limited and the High Court should not interfere with the order of transfer lightly, be it at interim stage or final stage. This is so because the courts do not substitute their own decision in the matter of transfer. It is also settled position of law that an order of transfer is a part of the service conditions of an employee which should not be interfered in exercise of its discretional jurisdiction under article 226 of the Constitution of India. The government servant has no vested right to remain in a particular place of posting for a long period. He can also not insist that he must be posted at a particular place because the people of that area want him to continue at the place of posting. Transfer order can be set aside when transfer order is vitiated by violation of some statutory provisions or suffers from mala fides. Transfer order can also be set aside when same is passed by an authority who is not competent to pass such orders. It can also be set aside when by such order the person is sent to a lower post. [***Mohd. Masood Ahmad vs. State of U.P. and Others : (2007) 8 SCC 150, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178, Rajendra Singh and Others vs. State of Uttar Pradesh and Others : (2009) 15 SCC 178].***

12. This Court is conscious of the fact that the allegations of mala fide should not be accepted lightly by the court. The Honble Supreme Court in

the case of ***State of U.P. and Others vs. Govardhan Lal*** (*supra*), observed that allegations of mala fides must inspire confidence of the court and ought not to be entertained on the mere asking of it or on consideration borne out of conjectures and surmises and except for strong and convincing reasons, no interference could ordinarily be made with an order of transfer. The burden of proving mala fide is on a person leveling such allegations and the burden is heavy, admits of no legal ambiguity. Mere assertion or bald statement is not enough to discharge the heavy burden that the law imposes upon the person leveling allegations of mala fides, it must be supported by requisite materials.

13. In ***Ratnagiri Gas and Power Private Limited vs. RDS Projects Limited and Others*** (*supra*), similar view was taken by the Honble Supreme Court. The Honble Supreme Court observed that as and when allegations of mala fides are made, the persons against whom the same are leveled need to be impleaded as parties to the proceedings to enable them to answer the charge. In the absence of the person concerned as a party in his/her individual capacity it will neither be fair nor proper to record a finding that malice in fact had vitiated the action taken by the authority concerned. It is important to remember that a judicial pronouncement declaring an action to be mala fide a serious indictment of the person concerned that can lead to adverse civil consequences against him. Courts have therefore, to be slow in drawing conclusions when it comes to holding allegations of mala fides to be proved and only in cases where based on the material placed before the court or facts that are admitted leading to inevitable inferences supporting the charge of mala fides that the court should record a finding in the process ensuring that while it does so, it also hears the person who was likely to be affected by such a finding.

14. The main argument advanced by counsel for the petitioner is that the transfer order is bad in law as same has been passed by the authority with mala fide intention. It is contended that the petitioner rented out one flat to run the office of the opposition party „SKM on a monthly rent of Rs.5000/- (Rupees five thousand) only. The ruling party got annoyed by this action of the petitioner and pressurized the office of the petitioner to transfer him from that place. It is contended by learned counsel for the petitioner that transfer order was passed under pressure. In the present case, this Court finds that only general allegations has been leveled that due to the fact that since the petitioner rented out his flat to run office of the opposition party „SKM, the

petitioner has been transferred. Nothing more has been said. That sentence in itself is not sufficient to prove that transfer order vitiates from mala fides. Nothing is said that in what manner the authority was influenced by the ruling party. Neither allegation has been made against a particular person nor has any person been impleaded as a respondent. Therefore, this Court is of the view that the petitioner has not been able to substantiate that the impugned order of transfer was passed with mala fide intention him.

15. Next argument of learned counsel for the Petitioner is that the petitioner has been transferred several times from one place to another, only to harass him. It is also contended that authorities should not be permitted to transfer a government employee frequently. No doubt, a government employee should not be transferred frequently, as frequent transfers cause unnecessary hardships not only to such government employee but also to his family members and his children who are pursuing their studies. It is true that before 2017, the petitioner was transferred from one place to another but the petitioner never raised that issue. In 2017, he himself made a representation for mutual transfer which was accepted by the authority concerned. Therefore, the petitioner should not have any grievances, so far, transfer orders passed before 2017 are concerned. The petitioner has now been transferred from Rimbik to Gangtok, which is admittedly a better place. The learned Additional Advocate General referred to Rule 9 of the Sikkim Government Service Rule, 1974, and submitted that it was and it is always open for the petitioner to raise his grievances before the authority concerned. He is fair enough to suggest that in case such grievances are made by the petitioner before the authority concerned, the same will be dealt in accordance with law.

16. Learned counsel for the petitioner then submitted that the petitioner has been transferred from one place to another but he has not been paid travelling allowance which should have been paid to him as per law. She submitted that non-payment is deliberate and to harass the petitioner. On this, learned Additional Advocate General submitted that in fact, the petitioner himself did not submit any travelling bills in time, therefore, the amount was not paid to him. (This fact was again denied by learned counsel for the petitioner.) Learned Additional Advocate General fairly submitted that in case the petitioner submits his travelling bills, those bills will be processed and the petitioner will be paid the travelling allowance as per law. This statement of learned Additional Advocate General is recorded and it is

expected that payment of travelling allowance will be made to the petitioner at the earliest.

17. Case law cited by learned counsel for the petitioner, also does not support the case of the petitioner.

18. In view of all of the above, I am of the view that the impugned transfer order cannot be set aside. His prayer for quashing the transfer order is rejected.

19. However, considering the fact that the petitioner is a Class-IV employee and also considering the fact that he has some personal problems, this Court permits the petitioner to move before the competent authority by filing a representation. In case, such a representation is moved on or before 31st December, 2018, the authority concerned is directed to decide the same within a period of three months from the date of filing of the representation.

20. During the course of hearing, it came to the notice of this Court that the State Government has neither made Transfer Act nor any Rules have been framed in this regard. Even Guidelines have also not been framed by the State Government. In fact, for proper functioning of government departments, at least some guidelines regarding transfer of its employees should be framed by the Government. The State-Government is requested to look into the matter and to either frame Guidelines or Rules or Act regarding transfer of its employees, at the earliest.

21. Accordingly, the Writ Petition stands disposed of with the above directions.

22. No order as to costs.

23. Let a copy of this judgment be sent to the Chief Secretary of the State.

SLR (2018) SIKKIM 1475

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (C) No. 50 of 2018

M/s Summit Online Trade Solutions (Pvt.) Ltd. and Another ….. PETITIONERS

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioners: Mr. Surajit Dutta, Ms. Rachhitta Rai and Ms. Bhawana Chettri, Advocates.

For the Respondents: Mr. J.B. Pradhan, Additional Advocate General with Mr. Karma Thinlay, Senior Government Advocate, Mr. Thinlay Dorjee Bhutia, Government Advocate and Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Government Advocates.

Date of decision: 29th November 2018

A. Promissory Estoppel – Doctrine – The doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it.

(Para 18)

Petition dismissed.

Chronological list of cases cited:

1. M/s Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others, (1979) 2 SCC 409.
2. New Bihar Biri Leaves Co. and Others v. State of Bihar and Others, (1981) 1 SCC 537.

3. Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd., (2011) 10 SCC 420

4. State of U.P. and Others v. Bridge & Roof Company (India) Ltd., (1996) 6 SCC 22.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioners are before this Court praying that the letter dated 27.10.2018 issued by the Respondent No. 2 as well as the invitation for Expression of Interest/Tender dated 29.10.2018 be set aside and the Respondents be directed to abide by the correspondence dated 18.08.2017 and the letter dated 24.09.2018 with the revised revenue. The Petitioners be permitted to continue as Marketing Agents for the Sikkim State Online Lotteries for 3 (three) years or till notification of the amended Lottery Rules by the Ministry of Home Affairs, Government of India *(„MHA, GOI for short hereinafter respectively)* whichever is earlier.

2. On the prayers of learned Counsel for the Petitioners that the matter be heard urgently in view of the date of opening of three Invitations for Expression of Interest/Tender for appointment of Marketing Agent for marketing and sale of the following;

(i) **5 (five) Online Weekly Lotteries per day (Part A)**

Technical Bid on 30.11.2018 and Financial Bid on 05.12.2018,

(ii) **6 (six) Online Weekly Lotteries per day (Part B)**

Technical Bid on 03.12.2018 and Financial Bid on 05.12.2018,

(iii) **5 (five) Online Weekly Lotteries per day (Part C)**

Technical Bid on 04.12.2018 and Financial Bid on 05.12.2018,

the instant matter was taken up for hearing along with I.A. No. 01 of 2018 which is an application seeking stay of the impugned letter dated 27.10.2018 and the invitation of Expression of Interest/Tender issued by the Respondent No. 1 dated 29.10.2018.

3. The Petitioners' case is that they are an existing Marketing Agency for 8 (eight) Online Lottery draws being conducted by the State of Sikkim pursuant to an Agreement entered into in the year 2012. Prior to the expiry of the contract on 27.08.2017 by virtue of letter dated 18.08.2017 (Annexure P-14) the Respondent No. 2 extended the contract for the reasons that the Expression of Interest for appointment of Marketing Agents/ Distributors for the 8 (eight) Online Lotteries could not fructify due to implementation of the GST and the likelihood of amendments to the Lotteries (Regulation) Act, 2016 by the MHA, GOI. The extension of the contract was to be till such time that the MHA, GOI notified the amendment in the Lotteries (Regulation) Act, 2016. The terms in the letter was accepted by the Petitioners. During the subsistence of the contract with the Petitioners, the Respondent No. 2 on 09.07.2018 floated Online Tenders for appointment of Marketing Agents for 8 (eight) Weekly Online Lotteries per day (Part A). On 17.07.2018 another Tender was floated for appointment of Marketing Agents for 8 (eight) Weekly Online Lotteries per day (Part B). The Petitioners vide their letter dated 17.08.2018 while bringing it to the notice of the Respondent No. 2 that they had come to learn of the Tenders floated against the spirit of the letter dated 18.08.2017, requested the Respondent No. 2 to allow them to continue the sale of 8 (eight) draws of Online Lotteries allotted to them till the MHA, GOI notified the amendments in the Lotteries Rules apart from which they stated that considerable amount had been incurred by them in creating infrastructure and publicizing the Sikkim Lotteries. The matter was duly examined by the Respondent No. 2 and the Tenders floated on 09.07.2018 and 17.07.2018 were cancelled vide Notification dated 18.08.2018. On 24.09.2018 a letter was issued by the Respondent No. 2 conveying to the Petitioners the decision to allow them to continue the distributorship for 5 (five) draws per day out of the 8 (eight) draws earlier allotted to the Petitioners. This was with 5% incremental increase per annum and the Minimum Assured Revenue was placed at Rs.52,000/- (Rupees fifty two thousand) only, per draw. This was accepted by the Petitioners vide letter dated 08.10.2018. However, following this circumstance, the Respondent No. 2 issued letter dated 27.10.2018 intimating the Petitioners that the State Government had decided to invite Expression of Interest through open tenders for selection of Marketing Agents for a total of 16 (sixteen) Online Weekly Lotteries. Further the distributorship of the Petitioners for 8 (eight) Online Lotteries per day would be an interim arrangement till such time the appointment of a new marketing agent would be finalized. The Petitioners were required to

send a confirmation letter if the terms were accepted failing which the distributorship would be terminated summarily. The Petitioners responded on 01.11.2018 accepting the conditions laid down by the Respondent No. 2 in the impugned communication dated 27.10.2018 but at the same time requested the Government to review their decision and allow continuation of their distributorship as per the letter of the Respondent No. 2 dated 24.09.2018. Subsequently on 12.11.2018, the Petitioners submitted a representation to the Respondents seeking continuation of Online Lotteries till the amendment in the Lotteries (Regulation) Act/Rules in terms of the letters dated 18.08.2017 and 24.09.2018 to which no response was received, hence the instant petition and I.A. with the prayers as reflected hereinabove.

4. Learned Counsel for the Petitioners, reiterating the facts averred in the petition, drew the attention of this Court to the correspondence that ensued between the Respondent No. 2 and the Petitioners. That vide correspondence dated 18.08.2017, Respondent No. 2 had extended the contract of the Petitioners of the distributorship of 8 (eight) online lotteries which was otherwise to expire on 27.08.2017. The Petitioner Company accepted the terms duly endorsing it with the signature of Naresh Mangal, a Director of the Company, on the body of the letter. Attention of the Court was also drawn to the correspondence addressed to the Respondent No. 2 dated 17.08.2018 by the Petitioners submitting therein that despite the proposal made in the letter dated 18.08.2017 and the acceptance of the Petitioners, the Respondent No. 2 had invited tenders for the Lotteries being marketed by the Petitioners contrary to the spirit of the said letter. Learned Counsel contended that pursuant to the extension of contract considerable amount had been spent on creating infrastructure and publicizing the Sikkim State Lotteries, hence the principles of promissory estoppel would, therefore, apply in the instant matter. To fortify this submission, learned Counsel sought to garner strength from the decision in ***M/s Motilal Padampat Sugar Mills Co. Ltd. v. State of Uttar Pradesh and Others***[1].

5. It was also exposited by learned Counsel for the Petitioners that on 24.09.2018, the Respondent No. 2 informed the Petitioners that the tenders floated in respect of total 16 (sixteen) Online Lotteries dated 09.07.2018 and 17.07.2018 had been cancelled vide Notification of the Department dated 18.08.2018. Consequent thereto the Government offered continuation

[1] (1979) 2 Supreme Court Cases 409

of distributorship of 5 (five) out of the 8 (eight) Online Lotteries for a period of 3 (three) years or till notification of the amended Lottery Rules by the MHA, GOI, whichever was earlier. This was duly accepted by the Petitioners on 08.10.2018. In contra thereto, during the period of such subsistence, the Respondent No. 2 on 27.10.2018 issued the impugned letter wherein the Petitioners were informed that the Government had now decided to invite Expression of Interest for selection of Marketing Agents for 16 (sixteen) Online Lotteries. However, in the interim till such time the appointment of a new Marketing Agent was finalized, the Petitioners were to continue distributorship of the Online Lotteries allotted to them. Due to apprehension that they would lose their distributorship, under duress the Petitioners vide their letter dated 12.11.2018 accepted the terms set out in the impugned letter dated 27.10.2018. That the contract between the parties can be rescinded only if all the terms as detailed in Clause 19.4 of the agreement dated 09.11.2012 between the Petitioners and the Respondents are fulfilled *viz.;*

> *"(a) Fraudulent conduct in sale of lottery tickets by the Marketing Agent;*
>
> *(b) Any act of misconduct or malfeasance on the part of Marketing Agent;*
>
> *(c) Erratic running of lottery without any sufficient cause;*
>
> *(d) The conviction of the Marketing Agent."*

That none of the above conditions have ensued to rescind the contract. In any event, even if such conditions are fulfilled which is not so in the instant matter, 15 (fifteen) days notice are to be issued to the concerned party by the Respondents.

6. It is urged that there is no revocation of the communication dated 18.08.2017 and the offer letter dated 24.09.2018 or termination of the agreement entered into between the Petitioners and the Governor of Sikkim, hence, the impugned Tenders could not have been floated. That in the absence of amendment of the Lotteries (Regulation) Act/Rules, the invitation for bids during the subsistence of Agreement between the Petitioners and the Respondents is irrational, arbitrary and violates the fundamental rights of the Petitioners. Moreover, the extension letter dated 18.08.2017 and offer for

continuation of distributorship of lotteries with revised rates dated 24.09.2018 is in the nature of an agreement between the parties and binding on the Respondents and the sudden floating of tenders have seriously prejudiced the rights and interests of the Petitioners. That the facts and circumstances establish that the Petitioners are entitled to the reliefs claimed.

7. The Respondents No. 1 and 2 appeared on advance notice and waived formal notice.

8. Mr. J.B. Pradhan, Additional Advocate General, making submissions for the Respondents No. 1 and 2 argued that in the first instance, the question of promissory estoppel would not apply as the Petitioners had been distributors and Marketing Agents of lotteries since the year 2005 and have all required infrastructure in place and would thereby not have incurred any added expenditure. That an earlier agreement between the parties dated 09.05.2005 was extended on 09.11.2012 vide which the term was extended for a further period of 5 (five) years and 110 (one hundred and ten) days w.e.f. 09.05.2012 to 26.08.2017 for marketing and sale of 8 (eight) Online Lottery Schemes as approved by the Government from time to time. Admittedly, the letter dated 18.08.2017 was issued by the Respondent No. 2 extending the contract of the Petitioners till the MHA notified amendment in the Lotteries Act, however pursuant to this letter, the letter dated 27.10.2018 came to be issued to the Petitioners by the Respondent No. 2. The letter specified that the Petitioners were to continue distributorship of 8 (eight) Online Lotteries as an *"interim arrangement"* till such time the appointment of a new Marketing Agent was finalized. The letter also specified that in the event of acceptance of the terms, a confirmation letter was to be sent by the Petitioners on or before 01.11.2018 (4 p.m.) failing which continuation of the distributorship would be terminated summarily. The Petitioners, vide response dated 01.11.2018 categorically accepted the terms by stating *inter alia* that they accept the offer of the Respondents for continuation of 8 (eight) Weekly Online Lotteries as an *interim arrangement* till such time the appointment of a new Marketing Agent is finalized. This fact is also evident from the contents of the letter dated 12.11.2018 addressed to the Respondents where the Petitioners have stated that they have given their acceptance for continuation of distributorship of draws in protest with a request to review the same for continuation of distributorship in terms of the letters dated 18.08.2017 and 24.09.2018. In light of such awareness and acceptance of terms of the

Respondent No. 2, the Petitioners cannot now turn back and state that the decision of the Respondents was arbitrary or irrational. That despite the Petitioners' awareness of Tenders being floated on 09.07.2018 and 17.07.2018, no protest was put forth by them at the relevant time or at any subsequent time. The Respondent No. 2 was constrained to withdraw the said Tenders when certain contingencies arose and offered the Petitioners continuity of distributorship but this in no manner tantamounts to allowing the Petitioners to continue in perpetuity.

9. Learned Additional Advocate General would further canvass that nothing prevented the Petitioners from participating in the bids dated 09.07.2018 and 17.07.2018 when the Tenders were floated as admittedly they had purchased Tender Forms thereby indicating intention to participate in the said bids. That the Tenders have been floated in larger public interest as there cannot be a loss of public revenue. Hence, in view of the facts and circumstances brought to the notice of this Court, it is apparent that the petition is a chance petition. Moreover as the Petitioners contend that the contract between the parties have been violated no remedy obtains to them under Article 226 of the Constitution. It is prayed that the petition deserves no consideration and be dismissed with exemplary costs.

10. I have heard at length and considered carefully the submissions put forth by the parties. Documents relied on by the Petitioners have been meticulously examined by me.

11. Admittedly, the contract of the Petitioners for distributing/marketing 8 (eight) Online Lotteries pursuant to an Agreement entered into in the year 2012 was extended by the Respondent No. 2 by virtue of letter dated 18.08.2017 (Annexure P-14) till such time the MHA notified the amendment in the Lotteries (Regulation) Act, 2016. It is urged that communication dated 18.08.2017 was not revoked. On this aspect, it is pertinent to notice that the last but one paragraph of the letter reads as follows;

> *"…Further, Govt. of Sikkim will invite fresh Expression of Interest as soon as MHA notifies the amendment in the Lotteries (Regulation) Act. The State Govt. also reserve* (sic) ***to discontinue this Agreement at any time without assigning any reason thereof****."*

In other words, the Respondent No. 2 has unequivocally by the correspondence stated with clarity that the State Government reserves its right to discontinue the existing agreement with the Petitioners at any time without assigning any reason thereof, thereby indicating to the Petitioners the stand of the Respondents to which evidently no attention was afforded by the Petitioners. During the subsistence of the agreement *supra* admittedly Online Tenders were invited for appointment of Marketing Agents for the Weekly Online Lotteries as detailed in the Tender bids dated 09.07.2018 and 17.07.2018. It is not the case of the Petitioners that they were unaware of the aforestated invitation for bids put forth by the Respondent No. 2. Although letter dated 17.08.2018 came to be issued by the Petitioners the contents thereof appear to be a whimper and does not voice the alleged protest of the Petitioners. The relevant portion reads as follows;

> *"...Recently, it has come to our notice that the Directorate of State lotteries has invited tenders for online lotteries which is against the spirit of the above said letter. Kindly note that we have spent a considerable amount in creating infrastructure and publicizing the Sikkim State lotteries and sudden announcement of inviting tenders has come to us as a shock. Therefore, you are requested to kindly continue to allow eight draws of online lotteries allotted to us till the MHA notifies the amendment in the Lotteries (Regulation) Rules so there will be no loss of revenue to the State exchequer."*

The Petitioners have only expressed shock at the floating of the tenders and thereafter requested continuation of their distributorship. Evidently no protest has been voiced. The Petitioners, as pointed out by the learned Additional Advocate General, failed to lodge a protest with the Respondent No. 2 although at the relevant time, the agreement between the Petitioners and the Respondents was subsisting. On the inability of the Respondent No. 2 to carry out the Tender bids to its logical end, the said Tenders floated came to be cancelled vide notification dated 18.08.2018. It is evident that till 18.08.2018 or for that matter even till 24.09.2018 when another letter came to be issued by the Respondent No. 2 offering the Petitioners continuance of the distributorship by setting out new terms and

conditions, no protest was lodged by the Petitioners before the Respondent No. 2. The letter dated 24.09.2018 offered the Petitioners continuation of distributorship of 5 (five) instead of the 8 (eight) Online Lotteries per day setting out new terms and conditions *viz.* the Minimum Assured Revenue was to be Rs.52,000/- (Rupees fifty two thousand) only per draw with 5% incremental increase per annum.

12. The impugned letter dated 27.10.2018 specifically states as follows;

> *"... In regard to this, it is to inform you that the State Government has now decided to invite Expression of Interest through Open tenders for selection of Marketing Agents for a total of 16 (Sixteen) Online Weekly Lotteries per day in the ratio of 6:5:5 in view of the observation made by the State Law Commission.*
>
> *Further, the State Government has also approved for continuation of distributorship of the 08 (Eight) weekly Online Lotteries per day at the revised rate of 52,000/- per draw and draw expenses of 3,000/- per draw, as an interim arrangement, till such time the appointment of a new Marketing Agent is finalized.*
>
> ***In view of this, you are directed to continue marketing and sale 08 (Eight) weekly online lotteries of the Sikkim State at the revised rate of 52,000/- per draw and 3,000/- per draw which will deem to have come into effect from 11.10.2018 till such time the appointment of a new Marketing Agent is finalised.***
>
> *In the event of acceptance, a confirmation letter may be sent on or before 01.11.2018 (4.00 PM) failing which continuation of the distributorship shall be terminated summarily. ..."*

13. In response thereto, the Petitioners submitted the letter dated 01.11.2018 wherein they have *inter alia* stated;

> *"We are in receipt of your letter No.789/ FIN/DSSL/III/2018-19/358 dated 27.10.2018 regarding continuation of distributorship of the 08 (eight) weekly online lotteries per day at the revised rate of Rs.52,000/- per draw and draw expenses of Rs.3,000/- per draw, as an interim arrangement till such time the appointment of a new Marketing Agent is finalized and the Government has further decided to come out with the Expression of Interest for 16 online weekly lotteries in the ratio of 6:5:5.*
>
> ***We hereby accept your offer for continuation of distributorship for 08 (eight) weekly online lotteries.***
>
> *We further would like to state that we are associated with the Government of Sikkim since 2005 and successfully marketing Sikkim State lotteries* ***and request you to kindly review your decision and continue our distributorship as per your letter No.789/FIN/DSSL/III/2018-19/325 dated 24.09.2018****."*

This letter speaks for itself, lucidly indicating the willingness of the Petitioners to continue distributorship of 8 (eight) Weekly Online Lotteries as an interim arrangement. A request follows for review of the decision.

14. The averments of the Petitioners as also the submissions put forth by learned Counsel for the Petitioners would also indicate that although the Petitioners were appalled to discover that the Respondents had vide the impugned letter dated 27.10.2018 sought the response of the Petitioners on or before 01.11.2018, the Respondents made an interim arrangement with the Petitioners *viz.* that the Petitioners would continue their distributorship till such time the appointment of a new Marketing Agent was finalized. The Petitioners admittedly apprehending discontinuation of lotteries and termination of the agreement submitted their acceptance vide letter dated 01.11.2018 although requesting the Government to review the decision allowing them to continue as distributors in terms of the letter dated 24.09.2018.

15. What emerges, therefore, from the entire gamut of the facts and circumstances placed before this Court is that although the contract between the Petitioners and the Respondents was renewed up to 26.08.2017, in the interim Tenders were floated for 16 (sixteen) Online Lotteries on 09.07.2018 and 17.07.2018 of which distributorship of 8 (eight) had earlier been given to the Petitioners and was subsequently reduced to 5 (five) vide letter dated 24.09.2018. When these Tenders were floated, no protest was made. Vide letter dated 18.08.2018, the Tenders so floated were cancelled on account of the contingencies enumerated in the correspondence. This afforded the Petitioners sufficient time to protest against the actions of the Respondents but they were evidently rendered immobile for reasons best to them. In any event, the understatement is that admittedly the conditions mentioned in the impugned letter dated 27.10.2018 allowing the Petitioners to operate as distributors as an interim arrangement till finalization of a Marketing Agent was accepted by the Petitioners. They cannot therefore having accepted the condition once now claim that it was on apprehension of losing their distributorship. In ***New Bihar Biri Leaves Co. and Others v. State of Bihar and others***[2], the Hon'ble Supreme Court held that;

> *"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbat non reprobate (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction. ..."*

16. In ***Cauvery Coffee Traders v. Hornor Resources (International) Co. Ltd.***[3], the Hon'ble Supreme Court would hold that;

[2] (1981) 1 SCC 537
[3] 50 (2011) 10 SCC 420

> *"..."34. A party cannot be permitted to „blow hot and cold, „fast and loose or „approbate and reprobate. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. ...*
>
> *35. ... The doctrine of estoppels by election is one of the species of estoppels in pais (or equitable estoppels), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had."..."*

The Petitioners cannot therefore approbate and reprobate on this issue. That apart, the impugned letter was issued on 27.10.2018 affording the Petitioners sufficient time thereby to take steps. They have filed a response to the impugned letter of the Respondent No. 2 on 01.11.2018 and another letter on 12.11.2018 besides which they were well aware of the dates when the tender bids were to be opened and cannot claim urgency belatedly. Added to this is the admission that tender forms were purchased by them and nothing prevented the Petitioners from competing in the bids.

17. So far as the question of rescinding the contract between the parties is concerned, in ***State of U.P. and Others v. Bridge & Roof Company (India) Ltd.***[4], the Hon'ble Supreme Court pronounced as follows;

> *"16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be*

[4] (1996) 6 SCC 22

> *agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioners bill(s) was not a prayer which could be granted by the high Court under Article 226. Indeed, the High Court has not granted the said prayer.*
>
> .....
>
> *18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. ..."*

The ratio is self-explanatory.

18. On the question of promissory estoppel raised by the Petitioners, the doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it. As earlier pointed out, the Government has set out unequivocally in its letter dated 18.08.2017 that it could discontinue the agreement at any time without assigning any reason. It is asserted that the Petitioners have been in the business since 2005 hence it can safely be assumed that logistics were in place and any additional expenditure incurred subsequently cannot be termed as loss making or inequitable. What looms

large of course is the fact of acceptance of conditions by the Petitioners as laid down by the Respondent No. 2 in the impugned letter dated 27.10.2018.

19. In view of the aforestated facts and circumstances that have emerged and also bearing in mind the well-established principles of law governing the grant of stay, I am of the opinion that no case is made out for stay of the impugned letter dated 27.10.2018. No grounds also emanate for setting aside the letter dated 27.10.2018 and the invitation for Expression of Interest/Tender dated 29.10.2018 and in view of the acceptance of the terms and conditions set forth in the impugned letter dated 27.10.2018, the question of directing the Respondents to abide by the correspondence dated 18.08.2017 and letter dated 24.09.2018 does not arise. Hence, the Petitioners are not entitled to any of the reliefs claimed.

20. The petition hereby stands rejected and W.P. (C) No. 50 of 2018 disposed of accordingly as also the I.A. No. 01 of 2018.

21. Certified copies be made available to the parties, as per Rules.

SLR (2018) SIKKIM 1489

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

W.P. (C) No. 51 of 2018

M/s Pan India Network Limited and Another ….. PETITIONERS

Versus

State of Sikkim and Another ….. RESPONDENTS

For the Petitioners: Mr. Zangpo Sherpa, Mr. Passang T. Bhutia and Mr. Sushant Subba, Advocates.

For the Respondents: Mr. J.B. Pradhan, Additional Advocate General with Mr. Karma Thinlay, Senior Government Advocate, Mr. Thinlay Dorjee Bhutia, Government Advocate and Mr. S.K. Chettri and Ms. Pollin Rai, Assistant Government Advocates.

Date of decision: 29th November 2018

A. Promissory Estoppel – Doctrine – The doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it.

(Para 14)

Petition dismissed.

Chronological list of cases cited:

1. Shyam Telelink Ltd. Vs. Union of India, (2010) 10 SCC 165.
2. City Montessori School v. State of U.P and Others, (2009) 14 SCC 253.

3. State of U.P and Others v. Bridge & Roof Company (India) Ltd., (1996) 6 SCC 22.

JUDGMENT

Meenakshi Madan Rai, J

1. The Petitioners are before this Court praying that the letter dated 27.10.2018 issued by the Respondent No. 2 as well as the invitation for Expression of Interest/Tender dated 29.10.2018 be set aside and the Respondents be directed to abide by the correspondence dated 12.10.2017 and the letter dated 24.09.2018 with the revised revenue. The Petitioners, in terms thereof, be permitted to continue as Marketing Agents for the Sikkim State Online Lotteries for 3 (three) years or till notification of the amended Lottery Rules by the Ministry of Home Affairs, Government of India *(„MHA, GOI for short hereinafter respectively)* whichever is earlier.

2. Learned Counsel for the Petitioners requested for urgent hearing of the matter in view of the date of opening of Invitation for Expression of Interest/Tender (Annexure-3) for marketing and sale of 5 (five) Online Weekly Lotteries per day (Part A) being 30.11.2018 for Technical Bid and 05.12.2018 for the Financial Bid. Thus, the instant matter was taken up for hearing on 28.11.2018 along with I.A. No. 01 of 2018 which is an application seeking stay of the impugned letter dated 27.10.2018 and the invitation for Expression of Interest/Tender issued by the Respondent No. 2 dated 29.10.2018.

3. The Petitioners being Marketing Agents for 8 (eight) Online Lotteries of the State Respondents vide the extension letter of the Respondent No. 2 dated 12.10.2017 are aggrieved by the invitation for Expression of Interest/ Tender (Part A) floated by the Respondent No. 2, on 29.10.2018. The Petitioners contend that subsequent to the correspondence of the Respondent No. 2 dated 12.10.2017 another correspondence was issued on 24.09.2018 vide which the Respondent No. 2 offered continuation of distributorship of 5 (five) out of the 8 (eight) Online Lotteries per day allotted to them, for another period of 3 (three) years or till notification of the amended Lottery Rules by the MHA, GOI. The Petitioners vide their letter dated 05.10.2018 accepted the offer of the Respondent No. 2. Following this correspondence, a letter dated 27.10.2018 was issued by the

Respondent No. 2 stating that the State Government had approved for continuation of distributorship of the Petitioners for 8 (eight) *(sic)* weekly Online Lotteries per day at the revised draw rate of Rs.52,000/- (Rupees fifty two thousand) only, and draw expenses of Rs.3,000/- (Rupees three thousand) only, per draw, as interim arrangement till such time a new Marketing Agent was finalized. That, in the event of the Petitioners accepting the terms set out in the letter dated 27.10.2018 they were to send a confirmation letter to the Respondent No. 2. On 30.10.2018 the Petitioners apprehending discontinuation of their agency confirmed acceptance of the terms and conditions laid out in the letter *supra* dated 27.10.2018. Meanwhile on 29.10.2018, invitation for Expression of Interest/Tender (Part A) for marketing and sale of 5 (five) Online Weekly Lotteries per day was floated by Respondent No. 2. Vide letter dated 02.11.2018 the Respondent No. 2 confirmed the acceptance of the Petitioners as the Marketing Agent as agreed in the Petitioners' letter dated 30.10.2018, till the appointment of a new Marketing Agent was finalized. On 12.11.2018, the Petitioners made a representation to the Respondents submitting that they were aggrieved by the issuance of Tender as the Respondent No. 2 had already extended their distributorship for 5 (five) Online Lotteries. The Petitioners also requested the Respondent No. 2 to consider their request for extension at the revised revenue or till notification of the amended Lottery Rules. As there was no response to this correspondence the Petitioners are before this Court with the prayers as aforestated.

4. The Respondents No. 1 and 2 appeared on advance notice and waived formal notice.

5. Learned Counsel for the Petitioners would urge in the first instance that there was no revocation of the communication dated 12.10.2017 and the offer letter dated 24.09.2018 or termination of the agreement entered into between the Petitioners and the Respondent No. 2. In such a circumstance, the Respondents ought not to have floated the impugned invitation for Expression of Interest dated 29.10.2018 for bids of Online Lotteries, contrary to the terms in the letter dated 24.09.2018. The Respondents cannot be permitted to resile from their own correspondence which is in the nature of extension of contract as neither has 3 (three) years elapsed from the date of extension of the contract being 12.10.2017 nor has the MHA, GOI notified amendments of the Lottery Rules. That creation of infrastructure for distributorship and marketing has involved substantial

expenditure and the sudden announcement of inviting Tenders has seriously prejudiced the rights and interests of the Petitioners which is not only violative of Article 14, Article 19 (1)(g), Article 300 (A) and Articles 301 to 304 of the Constitution of India but also is completely contrary to the specific contract entered into between the parties hence the prayers in the instant petition and the I.A. be granted.

6. Mr. J.B. Pradhan, Additional Advocate General, making submissions for the Respondents No. 1 and 2 argued that admittedly the letter dated 27.10.2018 specified that the Petitioners were to continue distributorship of 8 (eight) weekly Online Lotteries as an "*interim arrangement*" till such time the appointment of a new Marketing Agent was finalized. The letter also specified that in the event of acceptance of the terms, a confirmation letter was to be sent by the Petitioners on or before 01.11.2018 (4 p.m.) failing which continuation of the distributorship would be terminated summarily. The Petitioners, vide response dated 30.10.2018 categorically accepted the terms by stating *inter alia* that they accept the offer of the Respondents for continuation of 8 (eight) Weekly Online Lotteries and accepted all terms and procedures mentioned in the communication thereby in categorical terms accepted the *interim arrangement* as spelt out by the Respondent No. 2 till such time the appointment of a new Marketing Agent is finalized. This fact is also evident from the contents of the letter dated 12.11.2018 addressed to the Respondent No. 2 where the Petitioners have stated that they have given their acceptance for continuation of distributorship of draws with a request to review the same for continuation of distributorship in terms of the letter dated 24.09.2018. In light of such awareness and acceptance of terms of the Respondent No. 2, the Petitioners cannot now turn back and state that the decision of the Respondents was arbitrary or irrational or claim violation of their fundamental rights. That despite the Petitioners' awareness of Tenders being floated on 09.07.2018 and 17.07.2018, no protest was put forth by them at the relevant time or at any subsequent time thereto. The Respondent No. 2 was constrained to withdraw the said Tenders when certain contingencies arose and admittedly offered the Petitioners continuity of agency but this in no manner tantamounts to allowing the Petitioners to continue in perpetuity.

7. Learned Additional Advocate General would further canvass that nothing prevented the Petitioners from participating in the bids dated 09.07.2018 and 17.07.2018 when the Tenders were floated as admittedly

they had purchased Tender Forms thereby indicating intention to participate in the said bids. That, the Tenders have been floated in larger public interest as there cannot be a loss of public revenue and the distributorship cannot be granted by extension of agreement. Hence, in view of the facts and circumstances brought to the notice of this Court, it is apparent that the petition is a chance petition. Moreover as the Petitioners contend that the contract between the parties have been violated no remedy obtains to them under Article 226 of the Constitution. It is prayed that the petition deserves no consideration and be dismissed with exemplary costs.

8. I have heard at length and considered carefully the submissions put forth by the parties. Documents relied on by the Petitioners have been meticulously examined by me.

9. The genesis of this petition is an agreement dated 07.11.2012 whereby the Petitioners were appointed as Marketing Agent for distributing and marketing 8 (eight) Online Lottery Schemes for 5 (five) years till 06.11.2017. Prior to the expiry of the said agreement vide communication dated 12.10.2017, the Respondent No. 2 intimated to the Petitioners its decision to extend the distributorship of the Petitioners on grounds that the proposal to invite Expression of Interest for appointment of Marketing Agents/ Distributors failed to fructify due to imposition of the code of conduct for Panchayat Election and the likelihood of amendment to the Lotteries (Regulation) Act, 2016 by the MHA, GOI. The extension vide the said letter is clearly upto 06.02.2018. On 27.10.2018, the Respondents issued the impugned letter to the Petitioners stating that their distributorship was an *interim arrangement* till such time a new Marketing Agent was appointed and finalized. The Petitioners were required to submit their acceptance to the terms specified in the letter on or before 01.11.2018 (4 p.m.) failing which the distributorship would be terminated summarily. Apprehending such termination, the Petitioners vide their communication dated 30.10.2018 accepted the offer while at the same time requesting the Government to review their decision and continue their distributorship in terms of the letter of the Respondent No. 2 dated 24.09.2018. The Petitioners despite having accepted the terms as set out in the letter dated 27.10.2018 are now crying foul as the agreement between the Petitioners and the Respondents was subsisting when the impugned Tender was floated. It would be apposite at this stage to refer to the relevant portion of the letter of the Respondent No. 2 dated 27.10.2018. The correspondence states as follows;

> *"...Further, the State Government has also approved for continuation of distributorship of the 08 (Eight) weekly Online Lotteries per day at the revised rate of 52,000/- per draw and draw expenses of 3,000/- per draw, as an interim arrangement, till such time the appointment of a new Marketing Agent is finalized. ..."*

In response thereto, it is admitted that the Petitioners accepted the terms, vide communication dated 30.10.2018 as follows;

> *"...Reference: Your Letter dated 24/10/2018*(sic 27.10.2018) *bearing Letter No:789/FIN/DSSL/III/2018-19/359.*
>
> .....
>
> .....
>
> *We here by confirm the acceptance all the terms & procedures mentioned in this communication. We request you to please issue us a letter for extension of 08 (Eight) online weekly lotteries on receipt of this acceptance letter. ..."*

10. In my considered opinion it is understandably an open and shut case. Once the Petitioners have accepted the terms and conditions as specifically reflected in the correspondence dated 30.10.2018 are they in a position to now reprobate and state that it was due to apprehension of their distributorship being discontinued that they responded in the manner as stated above. The reply would obviously have to be in the negative. In ***Shyam Telelink Ltd. Vs. Union of India (UOI)***[1] the Hon'ble Supreme Court while deciding a matter under the Telecom Regulatory Authority of India Act, 1997 considered the question as to whether the Appellant was entitled to question the terms of the Migration Package after unconditionally accepting and acting upon the same and held as follows;

> *"...13. The unconditional acceptance of the terms of the package and the benefit which the appellant derived under the same will estop the appellant from challenging the recovery of the dues under the package or the process of its determination.*
>
> .....

[1] (2010) 10 SCC 165

Allowing the appellant at this stage to question the demand raised under the Migration Package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate. The maxim qui approbat non reprobat (one who approbates cannot reprobate) is firmly embodied in English Common Law and often applied by Courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. ..."

11. In ***City Montessori School v. State of Uttar Pradesh and Ors.***[2] the Hon'ble Supreme Court observed that it is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which prove advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. Thus when a person knowingly accepts the benefits of a contract he is estopped from denying the validity or binding effect on him of such contract. In the instant case, the Petitioners have accepted the terms and procedures mentioned in the impugned letter dated 27.10.2018 in categorical terms as extracted hereinabove. It is not the Petitioners case that the Expression of Interest was issued behind their back and caught them unawares, they were indeed seized of the fact of the Tender floated not only vide the impugned Expression of Interest dated 29.10.2018 but also of the earlier Expressions of Interest dated 09.07.2018 and 17.07.2018. It is relevant to note at this point that vide letter dated 12.10.2017 the marketing and sale of 8 (eight) Online Lotteries to the Petitioners was in fact extended by 3 (three) months upto 06.02.2018. It was the specific argument of the Counsel for the Petitioners that there was no revocation of the extension letter dated 12.10.2017. On this count it is worth noticing that vide letter dated 12.10.2017 the extension for marketing

[2] (2009) 14 SCC 253

lotteries was upto 06.02.2018. From 06.02.2018 upto 23.09.2018 as per documents relied on by the Petitioners before this Court evidently no communication ensued from the Respondent No. 2 extending the contract of the Petitioners from 06.02.2018 thereby indicating that the Petitioners were functioning in limbo without any renewal of contract from the said date. Strangely enough again on 24.09.2018 the Respondent No. 2 offered continuation of distributorship of 5 (five) out of the 8 (eight) Online Lotteries per day for 3 (three) years or till notification of the amended Lottery Rules by the MHA, GOI whichever is earlier. It is relevant to point out that this fact was not raised by the Respondents but is being highlighted herein to indicate the apparent carelessness in the functioning of the Department as also the tangential magnanimity meted out to the Petitioners. So far as revocation of the communication dated 24.09.2018 is concerned whereby the Petitioners were offered continuation of distributorship, the contents of this letter is obviously overruled by the contents of the letter dated 27.10.2018 the terms of which were accepted unequivocally by the Petitioners.

12. While adverting to the communication dated 12.10.2018 the relevant portion of the contents is extracted hereinbelow for easy reference;

> *"...The State Government also reserves the right to discontinue this arrangement at any time without assigning any reason thereof. ..."*

The categorical intention of the Respondent No. 2 has been spelt out in the correspondence and no protest rears its head from the Petitioners on this specific count.

13. Although it was vehemently argued by learned Counsel for the Petitioners that there was an existing contract between the Respondents and the Petitioners which therefore cannot be breached, in this context we may refer to the ratiocination in ***State of U.P. and Others v. Bridge & Roof Company (India) Ltd.***[3] wherein the Hon'ble Supreme Court pronounced as follows;

> *"...16. Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract. It is governed by*

[3] (1996) 6 SCC 22

the provisions of the Contract Act or, maybe, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the civil court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz., to restrain the Government from deducting a particular amount from the writ petitioners bill(s) was not a prayer which could be granted by the high Court under Article 226. Indeed, the High Court has not granted the said prayer.

.....

18. Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of mandamus restraining the Government from deducting or withholding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived and was not maintainable in law. ..."

The ratio lucidly explains the legal position and requires no elucidation.

14. On the question of promissory estoppel raised by the Petitioners, the doctrine is an equitable doctrine evolved by equity in order to prevent injustice when a promise is made by a person knowing that it would be acted on by the person to whom it was made and in fact has so acted on it. It would in such a circumstance be inequitable to allow the party making the promise to go back upon it. As earlier pointed out, the Government has

set out unequivocally in its letter dated 12.10.2017 that it could discontinue the agreement at any time without assigning any reason. It is asserted that the Petitioners have been in the business since 2012 hence it can safely be assumed that logistics were in place and any additional expenditure incurred subsequently cannot be termed as loss making or inequitable. What looms large of course is the fact of acceptance of conditions by the Petitioners as laid down by the Respondent No. 2 in the impugned letter dated 27.10.2018.

15. In view of the aforestated facts and circumstances that have emerged and also bearing in mind the well-established principles of law governing the grant of stay, I am of the opinion that no case is made out for stay of the impugned letter dated 27.10.2018. No grounds also emanate for setting aside the letter dated 27.10.2018 and the invitation for Expression of Interest/Tender dated 29.10.2018 and in view of the acceptance of the terms and conditions set forth in the impugned letter dated 27.10.2018, the question of directing the Respondents to abide by the correspondence dated 24.09.2018 does not arise. While the contents of the letter dated 12.10.2017 extracted hereinabove empowers the Respondents to discontinue the arrangement at any time without assigning reasons, hence the Petitioners are not entitled to any of the reliefs claimed.

16. The petition hereby stands rejected and W.P. (C) No. 51 of 2018 is disposed of accordingly as also the I.A. No. 01 of 2018.

17. Certified copies be made available to the parties, as per Rules.

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