

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

DATED : **29.11.2018**

SINGLE BENCH : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

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

Petitioners : M/s Summit Online Trade Solutions (Pvt.)
Ltd., and Anr.

versus

Respondents : The State of Sikkim & Another

**An application under Article 226
of the Constitution of India**

Appearance:

Mr. Surajit Dutta, Ms. Rachhitta Rai and Ms. Bhawana Chettri, Advocates.

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.

J U D G M E N T

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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.

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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 expozited 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 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

¹ (1979) 2 Supreme Court Cases 409

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

(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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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.

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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 aforesaid invitation for bids put forth by the Respondent No. 2. Although letter dated 17.08.2018 came to

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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***

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

Leaves Co. and Others v. State of Bihar and others², 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;

"... "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

² (1981) 1 SCC 537

³ 50 (2011) 10 SCC 420

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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 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 petitioner's 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.

.....

⁴ (1996) 6 SCC 22

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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 aforesaid 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

M/s Summit Online Trade Solution (Pvt.) Ltd. and Anr.
Vs. The State of Sikkim and Anr.

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.

(Meenakshi Madan Rai)
Judge
29.11.2018

Approved for reporting: **Yes**
Internet: **Yes**

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