
(2003) 05 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 122 of 2003

Bhupinder Minhas

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-05-2003

Acts Referred:

Central Civil Services (Conduct) Rules, 1964 — Rule 4
Constitution of India, 1950 — Article 14

Citation : (2003) 2 ShimLC 228

Hon'ble Judges : V.K. Gupta, C.J;A.K. Goel, J

Bench : Division Bench

Advocate : Ravinder Kumar Thakur, for the Appellant; N.K. Thakur, Sr. Central Government Standing Counsel for Respondents Nos. 1 to 3, for the Respondent

Judgement

V.K. Gupta, C.J.—Even though on 12th May, 2003, we had observed that Mr. Thakur, learned Senior Central Government Standing Counsel shall convey to us his and his clients responses with respect to the impugned disqualification Clause in the Notice Inviting Tender in question (NIT, for short) in the light of the judgment passed by a Division Bench of this Court on 25th July, 1995 in CWP No. 33 of 1995, today when the matter came up for consideration Mr. Thakur submitted that he is not in a position to convey any particular response, either of himself or on behalf of his clients and that the Court may pass the order itself on the merits of the case.

2. Tenders were called by the General Manager Telecom District Solan on behalf of Bharat Sanchar Nigam Ltd. from experienced and financially sound contractors for laying of under-ground optical fibre cable and other associated works in Rampur-Subathu route at an estimated cost of Rs. 5 lacs. The last date for receipt of the tenders was 22nd January, 2003. The Petitioner submitted his tender pursuant to the NIT and in the requisite column, he also made a declaration that his brother was working as J.T.O. (Junior Telecom Officer) in Bharat Sanchar Nigam Ltd. (BSNL) Circle Solan. In the terms and conditions of

contract (Section-II to the NIT), there was a special clause, which stipulated that a company or a firm or any other person was not permitted to tender for works in any BSNL Unit in which his near relative was posted. The relevant extract of this clause reads thus:

Special clause

The company or firm or any other person is not permitted to tender for works in BSNL unit in which his near relative(s) are posted. The unit is defined as SSA/ Circle/Chief Engineer/Chief Architect/ Corporate Office for non executives employees and all SSAs in a Circle including Circle Office/Chief Engineer/Chief Architect/Corporate office for executives employees (including those called as Gazetted Officers at present). The tenderer should give a certificate that none of his/her such near relative is working in the units as defined below where he is going to apply for tender/work. In case of proprietorship firm certificate will be given by the Proprietor, for Partnership firm, certificate will be given by all the partners and in case of limited company, by all the directors of the company. Any breach of these conditions by the company or firm or any other person, the tender/work will be cancelled and earnest money/security deposit will be forfeited at any stage whenever it is so noticed. The department will not pay any damage to the company or firm or the concerned person. The company or firm or the person will also be debarred for further participation in the concerned unit.

The near relatives for this purpose are defined as:

- (a) Members of a Hindu undivided family.
- (b) They are husband and wife.
- (c) The one is related to the other in the manner as father, mother, son(s) and son's wife (Daughter-in-law), Daughter(s) and daughter's husband (son-in-law), brother(s) and brother's wife, sister(s) and sister's husband (brother-in-law).

3. It was on the basis of the aforesaid special clause that the Petitioner's tender was not accepted even for being processed as the Respondents were of the view that because the Petitioner's brother was employed as J.T.O., in view of the aforesaid prohibition the Petitioner was not eligible for being considered as a tenderer for the aforesaid work.

4. In the reply filed to the writ petition, the Respondents have referred to and relied upon a communication bearing No. 151-08/2002-O&M/38 dated 11.9.2002 issued by the Bharat Sanchar Nigam Limited and addressed to all heads of Circles etc. with respect to the subject of participation of near relatives of the BSNL employees in the tendering process or in the execution of works in BSNL units. Clause (ii) of this communication reads thus:

As per Government of India's CCS Conduct Rule 4, no Government servant shall in the discharge of his official duties deal with any matter or sanction any contract to any company or for any other person if any member of his family is

employed in that company or firm or under that person or if he or any member of his family is interested in such matter or contract in any other manner and the Government Servant shall refer every such matter or contract to his official superior. This clause is applicable to all BSNL employees and in view of this as soon as any BSNL employee becomes aware of the above aspect, he must intimate this to the prescribed authority. For non executive employees this authority is SSA Head Circle Head/Chief Engineer/Chief Archt./Corporate office under whom he is posted. For executive employees (at present some of them are called as Gazetted Officers) the prescribed authority for this purpose is Circle Head/Chief Engineer/Chief Archt./Corporate Office under whom he is posted.

5. What has been contained in the impugned Special Clause, which we quoted in the earlier part of this order appears to have been linked directly with the stipulations contained in sub-clause (a) of clause (iii) of the aforesaid communication dated 11.9.2002, which for ready reference, we reproduce herein below:

(iii)(a) The company or firm or any other person is not permitted to tender for works in BSNL Unit in which his near relative(s)(are) posted. The unit is defined as SSA/Circle/Chief Engineer/ Chief Archt./Corporate office for non executive employees and all SSA in a circle including circle office/Chief Eng./Chief Archt./ Corporate office for executive employees (including those called as Gazetted Officers at present). Therefore, it has been decided by the competent authority that a clause must be added in the tender and other related documents that the tenderer should give a certificate that none of his/her such near relative is working in the units as defined above where he is going to apply for tender/work. In case of proprietorship firm certificate will be given by the proprietor, for partnership firm certificate will be given by all the partners and in case of limited company by all the Directors of the company.

6. A Division Bench of this Court (as noted in the very beginning) in the case of Narind Kumar Sangar v. Union of India and Anr. CWP No. 33 of 1995, had the occasion to deal with a similar impugned stipulation in an advertisement issued for inviting applications for the enlistment of contractors. The impugned clause in that advertisement read as under:

If his/her close relative is employed in any capacity in the SSA where registration is sought.

7. By the aforesaid impugned clause in the advertisement in question, all such persons were barred from applying for enlistment as contractors, if any one of their close relatives, were employed in any capacity in the SSA (a unit of BSNL) where they had sought registration. Dealing with the illegality, validity and the correctness of the aforesaid impugned clause, the Division Bench observed as under:

The above Sub-clause (a) of clause 6 of the guideline is not only void, but also has no nexus to the object sought to be achieved. This is arbitrary inasmuch as a

person who is holding a post of Class-III or Class-IV category, if he is related to a person, will not be able to influence the high level authority in awarding the contracts.

8. After making the aforesaid observations, the Division Bench clearly held that the aforesaid impugned Clause being arbitrary deserved to be quashed and accordingly the clause was quashed. A very pertinent observation was made in the aforesaid judgment to the effect that the quashing of the aforesaid clause would not mean that the authority competent to call for tenders for the award of contracts would have no right or discretion to reject any tender, if it was found that the authority competent to award the contract was being influenced by any employee of the Department.

9. The aforesaid judgment of the Division Bench has assumed finality as, we are told, the Respondents did not file any appeal against this judgment in the Supreme Court. Apart from the aforesaid judgment having assumed finality and the declaration of law made therein, which has binding effect upon the Respondents, we once again take this opportunity of reiterating that indeed a prospective tenderer cannot be barred at the very threshold from participation in a tendering process, if he is otherwise fully eligible on all counts merely on the ground that someone or the other related to him is employed in one capacity or the other in a particular BSNL Unit, which had called the tenders. Disqualifying or barring of such prospective tenderer per se only on this ground, in our considered opinion, is a highly arbitrary act, without there being any nexus with the object sought to be achieved. What is sought to be explained in the reply filed on behalf of the Respondents and what is also possibly discernible from a reading of the communication dated 11th September, 2002 does appear to be a laudable objective and that is to ensure that the process of tendering is kept clean and untampered by any corrupt or extraneous consideration but that does appear to have been fully taken care of, appropriately guarded and properly protected in clause (ii)(supra), whereby it does appear that any Government servant, based on CCS (Conduct) Rule 4 is not permitted to deal with any matter, which may come before him in the course of discharge of his official duties where any relative or other person interested is directly or indirectly involved and it is accordingly enjoined upon every such Government servant to report such a matter to his superior. In the face of this protection and safeguard, debarring any prospective tenderer from participating in the tendering process only on the ground of some of his relatives or the other, being employed in one capacity or the other runs counter to the aforesaid stipulation and in any case has no nexus with the object sought to be achieved. There can be instances galore where a relative of a prospective tenderer is employed either in a very very inferior post, say a Class IV or Class III post in a large organisation and without any consequence whatsoever and even in such a situation, the prospective tenderer has been debarred from participation in the tendering process. By a sweeping process of debarring, all such prospective tenders cannot be disqualified from participation in the tendering process. Of course, each case can be viewed and

dealt with on its own merits.

10. Not only the aforesaid, whenever a tendering process gets underway and decision is taken by the competent authority, whether to award or not to award the work to a tenderer, such decision is taken at the highest level. Each case would depend on its merits to find out whether in such a decision taking process that particular employee who might have been related to the tenderer had any influencing role to play in the decision making process. As each case would depend on its own merits, each such case can be dealt with properly, but right from the threshold barring a prospective tenderer only on the ground of his relative being employed would be patently in violation of Article 14 of the Constitution, the same being a wholly arbitrary exercise of administrative power.

11. For the aforesaid reasons, therefore, we have no hesitation in holding and declaring the impugned clause to be unconstitutional and ultra vires of Article 14 of the Constitution. The writ petition is accordingly allowed and the impugned clause is quashed for the aforesaid reasons. No order as to costs.

C.M.P. No. 217 of 2003

In view of the disposal of the writ petition, the present application shall stand disposed of and interim order, if any, shall stand vacated.