

(2022) 04 KL CK 0087
In the High Court Of Kerala
Case No : Writ Petition (C) No. 3621 Of 2022

George Agencies

APPELLANT

Vs

Chief General Manager, Bharat Sanchar Nigam Ltd

RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Citation : (2022) 04 KL CK 0087

Hon'ble Judges : N.Nagaresh, J

Bench : Single Bench

Advocate : Abraham Vakkanal, Paul Abraham Vakkanal, Vineetha Susan Thomas, Rohith C., Premjit Nagendran

Final Decision : Dismissed

Judgement

N. Nagaresh, J.

1. The petitioner, who is doing business as a franchisee of BSNL, Kerala Circle, prays to quash Ext.P3(a) and order dated 14.01.2022 referred to in Ext.P7 and to declare that the petitioner is entitled to be allotted and issued with the Letter of Intent (LOI) by the official respondents for the franchiseeship of BSNL at Aluva, Ernakulam, petitioner being the selected third successful bidder in pursuance of Ext.P1 EOI.

2. The petitioner states that he commenced his BSNL franchiseeship in Aluva Circle as a proprietary concern in 2011 and continued till 30.09.2021.

3. Ext.P1 notice inviting Expression of Interest (EOI) for BSNL franchiseeship was issued on 07.07.2021. As per Ext.P1, the evaluation of bidders was to be done by a Selection Committee. The selection was to be as per the selection criteria provided in Section 3(1)(a) and shortlisting was to be done. The top three contenders were to be called for interview/presentation. Before the interview, the evaluation and recommendation made by the Selection Committee has to be approved by the Circle Head.

4. Pursuant to Ext.P1, three successful bidders were shortlisted by the Selection Committee. The petitioner was the third selectee. The petitioner was called for interview scheduled on 18.10.2021 as per Ext.P2. The petitioner participated in the interview. As there was no further information regarding the selection, the petitioner made enquiry on 04.01.2022. On 05.01.2022, the 3rd respondent informed the petitioner that the LOI was issued to the first and second successful candidates and since they did not execute agreement, it has been decided to invite fresh EOI.

5. Immediately, the petitioner sent Ext.P3 e-mail pointing out that he being the third selected candidate, he will be automatically eligible for issuance of LOI, when the first and second candidates declined to accept. The petitioner requested the respondents to issue LOI to the petitioner. To the repeated communications of the petitioner, the petitioner was issued with Ext.P7 e-mail stating that the EOI for BSNL Aluva Territory has been cancelled and fresh EOI will be floated.

6. The petitioner states that Ext.P3(a) and Ext.P7 communications are illegal, irrational and arbitrary. The petitioner being the third successful bidder, when the first and second successful bidders declined to execute agreements, the petitioner ought to have been necessarily issued with LOI and permitted to execute agreement.

7. The 3rd respondent does not have the power to cancel Ext.P1 selection proceedings, contended the petitioner. The Circle Head has no power to recall or cancel an EOI after completing the selection process. The cancellation is without any cogent reason and has been done in a whimsical manner. The petitioner alleged that there is an element of bias harboured by the official respondents towards the petitioner. The respondents are therefore compellable to issue LOI to the petitioner and appoint him as franchisee, contended the petitioner.

8. Respondents 1 to 6 resisted the writ petition filing counter affidavit. The respondents stated that the petitioner participated in the EOI proceedings knowing the terms and conditions and the petitioner is now turning around and attacking the terms and conditions of the notification. The petitioner indeed has a legal right to compete in the EOI proceedings, but has no legal right to get it. The right of the petitioner to get the franchisee ship is subject to the decision by the Chief General Manager, BSNL, Kerala Telecom

9. The respondents submitted that in 2018, when the current CM S&D Policy, 2018 was brought in, the petitioner was permitted to migrate to this policy. The agreement with the petitioner expired on 31.12.2020. Once the agreement period expires and a new EOI is not finalised, the respondents have options either to extend the agreement or to give the franchisee ship to another existing franchisee. In the petitioner's case, the BSNL decided to extend the agreement with the petitioner. The performance of the petitioner during the tenure ending on 31.12.2020 was not satisfactory. Nevertheless, the agreement was renewed

as issuance of new notification was to take time.

10. The respondents stated that the petitioner franchisee failed to perform minimum bench mark of 50% for the last two quarters. The petitioner was given warning letters, Exts.R6(a), R6(b) and R6(c). The petitioner was granted extension till 31.12.2021. Thereafter, no extension was granted since the performance was very poor.

11. The respondents stated that in the EOI proceedings pursuant to Ext.P1, three applicants were shortlisted and the petitioner was the third candidate. The petitioner's application was processed despite the fact that his performance was poor. It was for the said reason that the respondents decided to go for a fresh EOI notification when the candidates ranked at Serial Nos.1 and 2 declined to execute agreement. The respondents have discretion not to award the contract to a successful bidder for good and sufficient reasons. The petitioner has no right to insist that he should be appointed as franchisee.

12. I have heard the learned counsel for the petitioner and the learned Standing Counsel representing the respondents.

13. The petitioner responded to Ext.P1 Notice Inviting Expressions of Interest for appointment as franchisee of BSNL. After a process of selection, the petitioner was assigned rank No.3. The candidates at rank Nos.1 and 2 declined to accept the Letter of Intent and to execute agreement. Thereupon, the respondents informed the petitioner that the EOI for BSNL Aluva Territory has been cancelled and fresh EOI will be floated. The petitioner states that after a due process of selection, when the petitioner was ranked at No.3 and when the candidates at rank Nos.1 and 2 declined to accept the Letter of Intent, the petitioner ought to have been issued with Letter of Intent and appointed as franchisee. According to the petitioner, the Circle Head is the issuing authority of Ext.P1. The cancellation has been effected by the 3rd respondent-Deputy General Manager. It is illegal.

14. The selection process and criteria for appointment as franchisee are contained in Section 3 of the CM-Franchisee Sales and Distribution Policy, 2018. Section 3 reads as follows:

Section 3: Selection process and criteria

A. Expression of Interest Route:

a. In order to induct franchisees, BSNL shall invite Expression of Interest (EOI) from the willing parties. BSNL reserves the right to initiate the process for appointing a In order to induct franchisees, BSNL franchisee even if there is a franchisee currently serving the territory or a part of the territory. Hereafter, any territory, for which EOI is invited, is referred to as 'eligible territory. Eligible territories could include:

- Vacant territories: Territories likely to be vacated in next three months or already vacated due to termination of franchisee, tenure completion of

franchisee, or non-appointment of franchisee in the past. If a notice of termination (with a 30-day deadline for termination of franchisee) has been served to the franchisee, the territory can be considered as vacant territory.

- Redefined territory: BSNL reserves the right to redefine territories for realignment/ balancing of franchisee territories. If there is need proposal with justification will have to be sent to the corporate office and the required change will be effected only after approval from corporate office by Director-CM.

b. EOIs are to be floated and finalized at circle level. The approving authority will be the Head of circle.

c. Circle must invite EOI from willing parties for eligible territories.

d. To evaluate the bidders, a Selection committee comprising of three members will be formed for each SSA. Each selection committee will consist of

SSA head

DGM(Finance)

Sales head of the SSA

The entire evaluation process will be conducted at SSA itself. The interview of the shortlisted bidders will be held at the Circle Office before a committee comprising of

GM(S&M)-CM

SSA Head of the respective SSA

DGM(Finance) Office of CGMT

e. After evaluation by the selection committee, the recommendation of the selection committee shall be approved by circle Head. Lol to successful bidder shall be issued by the EOI issuing authority with the instruction to submit the requisite PBG at the concerned SSA within 15 days time frame for signing the agreement. The contract shall be awarded for a period of three years to the successful bidder(s) as per the terms and conditions stipulated in the EOI and in the sales & distribution policy document.

f. Selection by committee:

If no qualified application is received against any franchisee territory in EOI, measures stated in para-C of section-3 below may also be taken.

g. BSNL reserves the right to revise some sections of Sales & Distribution policy according to change in business environment. SSA shall notify all such changes to franchisees. Franchisee will be assumed to be in agreement with revised norms unless notified to BSNL in three week's time. Any party who wishes to discontinue the agreement can do the same by providing a 60 days notice.

- h. Interested party must submit bid security declaration (Annexure B)
- i. BSNL reserves the right to reject any application of franchisee for any reason, without liability, the information provided by the franchisee/ gathered by BSNL shall become BSNL's property even if application is rejected and can be used by BSNL in any manner it deems fit.
- j. The decision of BSNL will be final and binding.

It is therefore evident that the EOIs are invited by the Circle Office. It is a Selection Committee as provided under Section 3A(d) which makes the evaluation. After evaluation by the Selection Committee, the recommendations will have to be approved by the Circle Head.

15. In the selection process pursuant to Ext.P1, the petitioner was invited for interview. After the evaluation process, the petitioner was ranked at No.3 among the three shortlisted candidates. Those who were ranked at Nos.1 and 2 declined to accept the Letter of Intent. The respondents did not issue a Letter of Intent to the petitioner who was assigned rank No.3 and instead, proceeded to re-notify the EOI.

16. Ordinarily, when a select list of three candidates is drawn after a selection process and the results at rank Nos.1 and 2 declined to accept the offer, the respondents are expected to make the offer to the candidate at rank No.3. The respondents would state that the petitioner was an existing franchisee of the BSNL and his past performance was not up to the mark so as to qualify him for appointment. The petitioner was issued warning letters at least three times pointing out that the performance of the petitioner for the past quarters was poor and the petitioner failed to achieve the minimum benchmark for the last two quarters. This statement made by the respondents is not denied by the petitioner. The respondents will therefore be justified in not offering the franchiseeship to the petitioner.

17. The mere fact that the petitioner was ranked at No.3 will not give a right to the petitioner to get appointment or to get an offer of appointment, when candidates at rank Nos.1 and 2 declined to accept the offer. Nowhere in Ext.P1 there is a commitment that if the first successful bidder is not willing, it will be given to the second bidder. The respondents will be perfectly justified in not making the offer to the petitioner who is ranked at No.3, based on his past performance. Section 3A(i) of Ext.P1 provides that BSNL reserves the right to reject any application of franchisee for any reason, without liability.

18. The learned counsel for the petitioner would submit that the term "application of franchisee" appearing in Section 3A(i) should be read as to mean any application made by a franchisee after being appointed as a franchisee and hence the said clause cannot govern the applicants for a franchiseeship. This Court is unable to accept the said proposition for the reason that Section 3 deals with selection process and criteria. Therefore, when Section 3A(i) of Ext.P1 refers

to “any application of franchisee”, it would only mean any application submitted for franchiseeship.

19. The further argument of the petitioner is that the 1st respondent-Circle Head is the authority who has issued Ext.P1 Notice Inviting EOI and therefore only the 1st respondent has the power to go for a fresh notification. Here, the said power is exercised by the 3rd respondent. A reading of Ext.P7 would show that the decision to cancel Ext.P1 EOI was taken by the office of the Chief General Manager, Kerala Circle. The fact that the communication was sent by the 3rd respondent will not give any cause of action to the petitioner.

20. The BSNL though is an instrumentality of the State is engaged in a commercial activity in a very competitive field. The scope of judicial review in matters relating to contracts is very limited. The petitioner, though ranked at No.3 in the select list was not offered Letter of Intent, based on past performance. There is no element of arbitrariness, irrationality or perversity in the action of the respondents.

Though the petitioner has alleged bias against the respondents, the petitioner has not proved bias producing sufficient materials.

In the facts and circumstances of the case, this Court find no reason to interfere with the decision taken by the respondents. The writ petition fails and it is consequently dismissed.