

(2021) 01 KL CK 0099

In the High Court Of Kerala

Case No : Writ Petition (C) No. 26760, 27132 Of 2020

K.R Distribution

APPELLANT

Vs

Assistant General Manager (Eb And Mktg) And Ors

RESPONDENT

Date of Decision : 05-01-2021

Acts Referred:

Citation : (2021) 01 KL CK 0099

Hon'ble Judges : N. Nagaresh, J

Bench : Single Bench

Advocate : S. Sujin, K. Ramakumar, E.V. Moly

Final Decision : Dismissed

Judgement

1. Petitioners in these writ petitions, who are Franchisees of the BSNL, are challenging the action of the BSNL in inviting Expression of Interest for dealerships in their respective areas.

2. The petitioner in W.P.(C) No.26760 of 2020 is a Franchisee of BSNL. The petitioner states that the petitioner was selected as Class-C Franchisee. The petitioner executed agreement as Class-C Franchisee. When the petitioner started the business, the petitioner could easily achieve the targets fixed for Class-C Franchisees. However, the respondents re-categorised the petitioner's territory as Class-A. The petitioner's area of business is in a remote place and the business target fixed for Class-A, is difficult to achieve. However, the petitioner executed Ext.P2 agreement.

3. The petitioner contended that speed of network is an important attraction for subscribers of telecom. There was no 4G coverage in the petitioner's area. The petitioner submitted Ext.P4 representation, which was not positively responded to. In spite of the low network coverage in the area, the petitioner achieved the quarterly targets except in the last quarter of 2020.

4. The petitioner was issued with Ext.P6 communication from the 1st respondent

informing that the petitioner has failed to achieve the target and their average achievement is 49.5% instead of 50%. Without any further intimation, the 1st respondent issued Ext.P7 notice inviting Expression of Interest (EOI) on 20.11.2020 for fresh EOI for Vadakkancherry area allotted to the petitioner. It is the petitioner's case that the BSNL Headquarters has issued Ext.P8 general order to extend the existing Franchisees' contractual period for one year more in view of the prevailing Covid-19 pandemic. In the circumstances, the petitioner prays to direct the respondents to permit the petitioner to continue as Franchisee of BSNL for Vadakkencherry area in the light of Ext.P8.

5. W.P.(C) No.27132 of 2020 has been filed by six petitioners who are all Franchisees of the BSNL, for similar relief. The petitioners stated that monthly sales targets are communicated by the BSNL in the last week of the previous quarter and failure to achieve the target will attract the termination clause. In spite of adverse circumstances, the petitioners achieved the target except in the lock down period as evidenced by Ext.P3. While so, the petitioners were served with the communications of the respondents to the effect that their performance is below the benchmark. The petitioners would submit that all the petitioners have achieved 50% marks or above in the previous years and there was no difficulty to get similar achievements during the current year also. The 1st respondent, who is an office bearer of the organisation of Franchisees, submitted Ext.P7 representation to consider the pandemic situation prevailing while assessing the achievement of target.

6. The petitioners submit that under the EOI and the agreements entered pursuant thereto, the respondents are bound to inform the petitioners the performance of previous years. This was not done. Even for termination of Franchiseeship, one month notice is necessary. No notice was issued to the petitioners. To the surprise and predicament of the petitioners, the respondents issued Ext.P8 notification dated 25.11.2020 inviting EOI for franchiseeship in the areas served by the petitioners. The petitioners therefore challenged Exts.P8 to P11 and sought for a direction to the respondents to permit the petitioners to continue as Franchisees of BSNL in the light of Ext.P12 letter of the DGM(Sales and Marketing)-CM which provided for extension of agreement of all Franchisees, who were migrated for the period of three years and whose agreements are to expire on 31.12. 2020 or thereafter.

7. The respondents resisted W.P.(C) No.26760 of 2020, filing reply statement. The respondents stated that extension has to be considered as per para 'L' of the CM Sales and Distribution Policy-2018 (S&D Policy-2018). It is discretionary on the part of the Circle Head to decide whether agreement is to be approved for extension or not. Such extension can be granted only in the interest of the BSNL. The BSNL Head Office has issued communication dated 17.11.2020 directing that extension of agreement may be done only in accordance with para 'L' of S&D Policy-2018 subject to satisfactory performance in accordance with Clause 4.2 of Section 4 of the Policy.

8. The respondents stated that as per the revised S&D Policy, the area served by the petitioner was re-classified from Class-C to Class-A. The petitioner agreed to the terms and conditions of the new policy and submitted a bank guarantee of ₹ 3 lakhs. The petitioner executed a new agreement also. There was no compulsion from the BSNL for migrating from Class-C to Class-A. The business of the BSNL in the petitioner's area became continuously below benchmark. The petitioner was advised to improve the business.

9. As per the S&D Policy-2018, Franchisees who could not achieve even 50% of the pre-assigned target are under-achievers. The petitioner was one of the lowest performer in the year 2019-'20 in Kerala Circle. The previous Franchisee in the area could achieve a revenue of around ₹ 1 Crore in almost all months during the years 2016-2017. The petitioner's revenue has been only around ₹ 20-25 lakhs for the two years. The petitioner was graded low based on their performance in the year ending March, 2020. Covid-19 had only minuscule impact on the business of the financial year.

10. Counter affidavit was filed by the respondents in W.P.(C) No.27132 of 2020 also, resisting the writ petition. The respondents stated that migration of the petitioners to higher grades were as per the S&D Policy of the respondents. The petitioners have accepted all the conditions in the S&D Policy-2018 and executed agreements accordingly. Therefore, the petitioners cannot claim any reliefs.

11. I have heard the learned Senior Counsel assisted by the counsel for the petitioners and the learned Senior Counsel assisted by the Standing Counsel appearing for the respondents.

12. The argument of the petitioners that they were forced to migrate to Class-A cannot be accepted. In the BSNL S&D Policy revised in the year 2018, there was an option for migration to higher classes. Accordingly, the petitioners were reclassified. The reclassification was informed to the petitioners. The petitioners accordingly provided bank guarantee and executed new agreements. After providing bank guarantee and after entering into new agreements, the petitioners cannot be heard to contend that they were upgraded unilaterally.

13. A perusal of Section 2D (Eligibility criteria) of the Sales and Distribution Policy-2018 of the BSNL would show that for Class-A Franchisees, the monthly SIM-top up average sales in the last financial year should be more than 50,00,000. The average weighted score of the petitioner in W.P.(C) No.26760 of 2020 for the financial year 2019-'20 was only 49.5%. As regards the petitioners in W.P.(C) No.27132 of 2020, Ext.P4 communication would show that the weighted score of every month of the first petitioner was below benchmark of 50%. As regards the second petitioner, the SIM achievement till 21.10.2020 is only 146 as against a target of 1259 which comes to 11.59% of the monthly target. Even according to the petitioners, they have achieved 50% marks or above only in the previous years. Therefore, the respondents were justified in not extending the franchiseeship of the petitioners.

14. The contention of the petitioners is that the Covid-19 pandemic had affected their business. However, the assessment of the business of the petitioners was made based on the quarter ending March, 2020. Lock down consequent to Covid-19 was declared only on 24.03.2020. Therefore, impact of lock down would be only minimal, confined to the month March, 2020 and it cannot have any significant impact at all on the sales of previous months.

15. Clauses 8 and 9 of the Tri-party Rural Distributorship Agreement would show that extension of franchisees should be based on performance and will be on year to year basis for a period of two years. The decision of BSNL shall be final in regard to grant of extension. When extension of an agreement is to be on mutuality, the petitioners cannot insist that agreement should be extended since they so desire.

16. In the case of the petitioner in W.P.(C) No.26760 of 2020, Ext.P6 communication would show that the weightage achieved by the petitioner during the fourth quarter was 45.1 and the yearly average was 49.5. Ext.P7 produced in W.P.(C) No.27132 of 2020 would show that the first petitioner could achieve only 48.53% from the targeted revenue sales in the month of March, 2020 in Kottayam area and 49.57% in Changanassery area.

17. It is true that the Corporate Office of the BSNL has issued a letter dated 17.11.2020 to Chief General Managers of all Telecom Circles stating that extension of agreement of all Franchisees, who were migrated for the period of three years and whose agreements are going to expire on 31.12.2020, may be extended for one year. However, Ext.P8 itself makes it clear that it should be done as per the provisions contained in S&D Policy-2018. The respondents have acted only in accordance with the S&D Policy.

18. It is evident that the termination of the arrangement between the petitioners and the BSNL is as a result of expiry of tenure covered by the agreements/ contracts concerned. The petitioners cannot as of right claim that their tenure should be extended. Extension of the period of existing Franchisees is purely on the discretion of the respondents. Admittedly, the respondents have refused to allow extension based on the performance of the petitioners.

In the facts and circumstances of the case, no interference is called for in the action of the BSNL in inviting fresh Expressions of Interest. The writ petitions fail and they are consequently dismissed.