(2010) 10 GUJ CK 0166

In the Gujarat High Court

Case No : Letters Patent Appeal No''s. 1760 to 1771 of 2010 in Special Civil Application No. 4068 of 2010

Patel Traders APPELLANT

Vs

Bharat Sanchar Nigam Ltd. and Others RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:
Constitution of India, 1950 — Article 14, 19, 21, 226

Citation : (2010) 10 GUJ CK 0166

Hon'ble Judges : S.J. Mukhopadhaya, C.J;K.M. Thaker, J

Bench : Division Bench

Advocate : Mehul Sharad Shah, for the Appellant; P.J. Davawala, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, C.J.—These appeals have been preferred by the Appellants against the common judgment dated 20.4.2010 passed by the learned Single Judge, whereby the respective writ petitions preferred by the Appellants have been dismissed.

2. The brief facts of the case are that the Appellants (hereinafter referred to as ''the Petitioners'') are doing their business of franchisees as detailed in their respective petitions. In order to strengthen the sales and distribution channel, the Respondent - Bharat Sanchar Nigam Ltd. (''BSNL'' for short) framed the Sales and Distribution Policy - 2004, pursuant to which distributors and dealers were appointed, including the Petitioners, for different telecom circles. The franchisees were required to function in the demarcated Secondary Switching Area (hereinafter referred to as ''SSA'') of a circle. The 2004 policy was replaced by the new policy viz. Sales and Distribution Policy, 2006 with variety of different objects whereby the earlier franchisees/distributors were mostly continued.

3. The grievance of the Petitioners is that the earlier policy has been substituted

by a new policy viz. Franchisee Sales and Distribution Policy - 2009 which compels the Petitioners to vacate the particular territories. Under Clause 4 of the 2009 Policy, the existing franchisees with 1 or 2 territories have been asked to migrate in one new territory, and the franchisees with 3 or 4 territories have been asked to migrate in 2 new territories. It is stipulated therein that the preference for new territories of franchisee will be taken in the order of franchisee performance based on certain parameters and, therefore, they have challenged Clause 4 of the Cover Note to the new Policy and and the process and procedure of selection as mentioned in Clause J of Section 3 of the Franchisee Sales and Distribution Policy - 2009.

4. The learned Counsel appearing on behalf of the Petitioners would submit that the role and responsibility of the Petitioners are selling of BSNL products and service in a well defined geographical areas notified in the franchisee agreement. They are not allowed to sell outside such area and any violation of the same contemplates even the discontinuance and debar of the franchisees. As per the agreement, the franchisees are also to generate the demand for services permitted by BSNL and are also responsible for meeting the target which are often unrealistic as set by the Respondents. The franchisees are also to offer after sales services with host of other duties for expanding and maintaining of business of responsibilities.

5. The learned Counsel for the Petitioners would contend that that Clause 4 in the Cover Note to the new policy and Clause J of Section 3 of the new policy which deals with migration policy for existing franchisees is absolutely arbitrary, unreasonable, discriminatory and violative of Articles 14, 19 and 21 of the Constitution of India. The policy, on the face of it, envisages that the franchisees having high performance have to give up the business and migrate to new territory. Under no circumstances, such removal of high performer can stand to any reason. The selection was on the basis of performance uptill now and the performance has been rated high and having recognized such high performance, compelling such high performers to forgo and leave out of the field itself proves the arbitrary action on the part of the Respondents. He would further contend that the working of the policy turns out to be selective and some are required to forgo one and some are required to forgo two areas which is unreasonable, arbitrary and has no nexus with the object sought to be achieved. It is contradictory and defeats the whole policy and objects.

6. The further case of the Petitioners is that they have already made substantial investments in their respective Secondary Switching Areas and they were always under pressure to achieve the target. Now all of a sudden, they are asked to vacate their respective areas under the new policy, which will affect their fundamental rights guaranteed under Articles 19 and 21 of the Constitution of India.

7. The learned Counsel for the Respondents, per contra, would submit that the Court should not interfere with the policy decision. The proposed object of the

2009 policy is to remove monopoly of the franchisees. She would further contend that it is the only benefit to the franchisees like the Petitioners, failing which they cannot prefer and liable to compete with the others in a bid, their period of agreement having come to an end. She relied on the relevant provisions of the 2006 policy and 2009 policy to suggest that the Petitioners had no right under either of the policies and can claim right only under Clause 4 of the Cover Note read with Clause J of Section 3 of the 2009 policy which is under challenge. She would further submit that the 2009 policy also intends to cover every corner of the country on the basis of the market forces. The policy has been framed taking into consideration the market study conducted by the agency appointed by the BSNL. The policy decision is taken to introduce the present policy after examination various factors. As per the target selling in the new policy, each circle and SSA should set the targets for franchisees for various primary products (consumer mobility related products), before the start of the month. These targets are based on network coverage, wireless potential of territory and historical performance of franchisees. There is a scientific base in introducing such a policy and there is no arbitrariness or illegality as alleged.

8. We have heard the learned Counsel for the parties, perused the record and the relevant provisions of the Franchisee Sales and Distribution Policy.

9. It is not in dispute that the Petitioners reached agreement pursuant to the 2004 policy. The said policy of 2004 stood superseded on introduction of the Sales and Distribution Policy - 2006 and the contract policy came to an end in April, 2009. There is nothing on record to suggest that under the 2006 policy or as per the contract reached between the parties, the Petitioners have any right to claim franchisee of sales and distribution of BSNL. If any of the Petitioners wants to derive advantage of the agreement reached between the parties, it was always open to them to move before the Court of competent jurisdiction for appropriate relief, but not before the High Court under Article 226 of the Constitution of India.

10. Clause 24 of the Sales and Distribution Policy - 2006 stipulated terms and conditions for existing franchisee having more than four franchisee areas; some of the Petitioners having 4 or 5 franchisee areas were guided by them, which reads as follows:

24. Terms and condition for existing franchisee having more than four franchisee areas:

a. The existing franchisees, which are having franchisee ship at more than 4 areas in a circle, they may be allowed to continue till the expiry of the existing contract.

b. They will be allowed to choose and keep four of their choice. But this will in no way confer any right upon them for future franchise agreement.

c. Self declaration from franchisee is to be taken that nor more than four franchisees area in the country is with them. The declaration, if found wrong, will disqualify all franchisee ship areas.

From the aforesaid Clause 24, it will be evident that they were allowed to continue till the expiry of the existing contract and were allowed to choose and keep four of their choice as per the old policy with a clear stipulation that the same in no way confer any right upon them for future franchise agreement.

Those who have more than one, but upto three franchisees, were not covered under Clause 24 aforesaid, but will be bound by the agreement reached between the parties, which does not confer any right for future franchisee agreement after lapse of their respective agreement.

11. The Franchisee Sales and Distribution Policy - 2009 appears to have come into effect in the end of the year 2009. Clause 4, which is under challenge, is not a part of the main Franchisee Sales and Distribution Policy - 2009, but is a part of the ''Cover Note'' wherein it is stated that the provisions of the Sales and Distribution Policy - 2006 will stand cancelled and the 2009 Policy will come into effect from 1.12.2009. In the Cover Note, the procedure to be followed during the next three years, including the monthly target setting and performance measurement, look-after arrangements for all vacant territories, dimensioning and definition of new franchisee territories, and getting initial preference and acceptance from existing franchisees for migration. Under Clause 3 of the Cover Note, dimensioning and definition of new franchisee territories has been mentioned, which reads as follows:

3. Dimensioning and definition of new franchisee territories

Circles/SSAs must ensure that new franchisee territories are dimensioned and defined. Circles/SSAs should consider inputs such as (a) # of franchisees required, (b) # of franchisee territories allowed as per Franchisee Sales and Distribution Policy, 2009, (c) Current and future market potential of the area.

Circles/SSAs may split-up or combine territories as defined n Franchisee Sales and Distribution Policy - 2009. It should be ensured that all territories must be nearly equal in terms of market potential and ease of access.

From the aforesaid provision, it will be evident that current and future market potential area of the SSA may split-up or combine for the purpose of the said provision.

12. Clause 4 of the Cover Note, which is under challenge, relates to getting initial preference and acceptance from existing franchisees for migration, which reads as follows:

4. Getting initial preference and acceptance from existing franchisees for migration.

Existing franchisees with 1 or 2 territories will be allowed to migrate in 1 new territory, while existing franchisees with 3 or 4 territories will be allowed to migrate in 2 new territories. Each existing franchisee must decide and communicate preference for the SSA (1 SSA if the franchisee has 1 or 2 territories in existing set-up and 2 SSAs if the franchise has 3 or 4 territories in existing set-up) where he would like to participate in migration. Franchisee preference should be obtained for territories only in the SSA(s) where they have existing operations.

The preference for new territories for franchisees will be taken in the order of franchisee performance based on following parameters:

(A) Cumulative performance against targets during the past 4 months (August 2009 to November 2009)

Parameter Metric Weightage for overall score calculation 1 Gross Connections (SIM Activations) % target achieved & sale of other Consumer Mobility 60% products 2 Primary Sales (Recharge) 40% (B) If the circle has not set targets on the above parameters for each franchisee during the past 4 months, then the basis for preference should be existing office/show room and area of operation of the franchisee.

(C) In case there are conflicts even after (A) and/or (B), then the SSA must allocate the preference for new territories for franchisees amongst whom the conflict persists.

In case a franchisee has more than 1 territory in a SSA (except look-after territories), Circle/SSA must consider preference for only 1 new franchisee territory within the SSA. Circle/SSA may consider preference for 2 new franchisee territories within the SSA if the total number of new franchisee territories in the SSA is equal to or more than 6.

Circle/SSA must obtain acceptance from existing franchisees to migrate to preferred new territory under the new policy from 10.04.2010, providing BSNL''s concurrence is obtained by 10.04.2010.

The aforesaid work be completed by 28.12.2009.

It will be evident that the instructions under Clause 4 are given in terms with Clause J of Section 3 of the 2009 Policy, which is also under challenge.

13. Section 3 of the 2009 policy deals with the selection process and criteria. Therein, eligible territories have been shown to include:

Vacant territories: Territories likely to be vacated 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: Territories created due to redefinition of territory boundaries by competent authority in the circle. BSNL reserves the right to redefine territories for realignment/balancing of franchisee territories or in cases where existing franchise has not met the performance criteria (defined in this policy) for a period of more than three months.

Therefore, it will be evident that for the territories which are already vacated due to termination of franchisee, tenure completion of franchisee or non-appointment of franchisee in the past or likely to be vacated and the territories created due to redefinition of territory boundaries or new territories, criteria has been made for selection process.

14. u/s 3H, the terms and conditions with EOI has been laid down. Under Sub-clause (a) of Clause H, each franchisee can sign maximum of one franchisee agreement in each SSA and a maximum of two franchisee agreements in a circle. Franchisee can sign two franchisee agreements in a SSA if the total number of new Franchisee territories in the SSA is equal to or more than 6. Such provision being not under challenge, none of the Petitioners can sign more than one franchisee agreement in each SSA nor can sign more than two franchisee agreements in a circle. Only with regard to new franchisee territories in the SSA, if it is equal to or more than 6, franchisee agreement can be signed in the SSA. Therefore, even if Clause J is declared as ultra vires, the Petitioners cannot be allowed to sign more than one agreements for each SSA/circle, as mentioned in Section 3H.

15. In migration policy for existing franchisees under Clause J of Section 3 in fact amounts to giving weightage to the existing franchisee. In absence of Clause J of Section 3, the existing franchisees have no right either under the 2006 policy or under the agreement to claim any preference or advantage or reservation for one or other SSCA. Under Clause J of Section 3, by allowing the existing franchisees to migrate in other territory, weightage has been given over those who have applied pursuant to the 2009 policy. The existing franchisees, without competing with others, through a tender process can claim automatic right under Clause J of Section 3 for allotment of one or other different territories, as evident from the said provision as quoted hereunder:

Section 3: Selection process and criteria

J. Migration policy for existing franchisees:

a. Existing franchises who demonstrate good performance may be migrated to an eligible franchisee territory in April, 2010.

b. Existing franchisees with 1 or 2 territories will be allowed to automatically migrate in 1 new territory, while existing franchisees with 3 or 4 territories will be allowed to automatically migrate in 2 new territories. Each existing franchisee must decide and communicate preference for the SSA (1 SSA if the franchisee has 1 or 2 territories in existing set-up and 2 SSAs if the franchisee has 3 or 4 territories in existing set-up) where he would like to participate in migration. Franchisee preference should be obtained for territories only in the SSA(s) where they have existing operations.

c. The preference for new territories for franchisees will be taken in the order of franchisee performance based on the following parameters:

(A) Cumulative performance against targets during the August 2009 - November 2009

Parameter Metric Weightage for overall score calculation 1 Gross Connections (SIM Activations) % target achieved & sale of other Consumer Mobility 60% products 2 Primary Sales (Recharge) 40% (B) If the circle has not set targets on the above parameters for each franchisee during August 2009 - November 2009, then the basis for preference should be existing office/showroom and area of operation of the franchisee.

(C) In case there are conflicts even after (A) and/or (B) above, then the SSA must allocate the preference for new territories for franchisees amongst whom the conflict persists.

d. In case a franchisee has more than 1 territory in a SSA (except look-after territories), Circle/SSA must consider preference for only 1 new franchisee territory within the SSA. Circle/SSA may consider preference for 2 new franchisee territories within the SSA if the total number of new franchisee territories in the SSA is equal to or more than 6.

e. Circle/SSA must obtain acceptance from existing franchisees to migrate to preferred new territory under the new policy from April, 2010, provided BSNL''s concurrence is obtained by April, 2010.

16. We have noticed that the Petitioners had no right to claim franchisee for sales and distribution, on completion of their terms of agreement either in terms of their agreement or the 2006 policy. It is only by virtue of Clause J of Section 3, they have a right to claim one or other territories than the existing territory. Therefore, Clause J of Section 3 in no manner take away the fundamental right of the Petitioners guaranteed either under Article 19 or Article 21 of the Constitution of India.

17. Those who have not given option to obtain all the territories in which existing franchisees can opt to migrate, one can understand if they allege arbitrariness on the part of the authorities in making some sort of reservation of territories for the existing franchisees, but those who are beneficiaries of the same, including the Petitioners, can claim only right under Clause J of Section 3, and they cannot challenge the same as arbitrary nor the provisions can be held as illegal and ultra vires at their instance. If the Petitioners do not want to derive the advantage of Clause J of Section 3, they may not claim such advantage, but that will not render Clause J of Section 3 as ultra vires Article 14 of the Constitution of India.

18. The learned Single Judge having noticed the facts and refused to interfere with the policy in the larger public interest, no interference can be called for and

there is nothing on record to declare the 2009 policy as unreasonable or arbitrary. In absence of any merit, all the appeals are dismissed, but there shall be no order as to costs.