(2022) 04 KL CK 0089

In the High Court Of Kerala

Case No : Writ Petition (C) No. 8370 Of 2022

Rajesh Babu	APPELLANT
Vs	
Chairman And Managing Director, Bharat Sanchar Nigam Ltd	RESPONDENT

Date of Decision : 13-04-2022

Acts Referred:

Citation : (2022) 04 KL CK 0089

Hon'ble Judges : N.Nagaresh, J

Bench : Single Bench

Advocate : Abraham Vakkanal, Paul Abraham Vakkanal, Rohith C., Vineetha Susan Thomas, K.Ramakumar, T.Ramprasad Unni

Final Decision : Dismissed

Judgement

N.Nagaresh, J

1. The petitioners, who are existing franchisees of the Bharat Sanchar Nigam Ltd. (BSNL), seek to quash Exts.P2, P3 and P4 Expressions of Interest (EOI) and to declare that Section 2B(g) as contained in Exts.P2, P3 and P4 Notices inviting EOIs is bad in law and unenforceable as the said Section has been added/ incorporated illegally.

2. The petitioners state that they are franchisees for sale of BSNL products and services. In Ext.P2 Notification inviting EOIs, the BSNL has made a stipulation that the existing BSNL franchisees have to get minimum average 50% score for the last two quarters of operation as franchisees preceding the EOI floating quarter. This has been made an eligibility requirement in the year 2022. Earlier, such a requirement did not exist. The new condition has been imposed only in Kerala, by the Circle Head.

3. The petitioners would contend that the new criteria introduced as Section 2B(g) of Ext.P2, has been introduced unilaterally by the Circle Head in Kerala in the rules governing franchiseeship “the CM – Franchisee Sales and Distribution Policy – 2018”. The Circle Head cannot change the said Sales and Distribution

Policy. Though the respondents have received ex-post facto sanction for the said change made in Ext.P2, it will not cure the illegality committed. Ex-post facto approval is impermissible, contend the petitioners.

4. Exts.P2 to P4 were floated with the newly added Section 2B(g) without approval of the competent authority. Those EOIs were issued on 22.02.2022 and 23.02.2022. The competent authority granted approval only on 25.02.2022 as per Ext.P5. The said ex-post facto approval cannot inject life into the otherwise desolate EOIs. Section 2B(g) on the face of it goes against the terms and conditions contained in the EOI which is based on the CM Franchisee Sales and Distribution Policy, 2018. Section 3A(g) requires that the BSNL SSA shall notify all changes or revisions made to it to the 2018 Policy to the franchisees. The franchisees have a right to object. Section 3A(g) is made a casualty by the introduction of section 2B(g).

5. The petitioners submit that section 2B(g) is detrimental to the interests of BSNL. The BSNL franchisees who are with the BSNL for long, have gained ample experience and grounds in the market. Such experienced franchisees, if excluded from consideration, it will adversely affect BSNL. The modifications to the Policy is at the instance of the Kerala Circle alone. A post-facto approval cannot legalise an otherwise illegal EOI. As per the new addition, the existing franchisees who have displayed 50% average in one territory and 49% in another territory, will not be eligible to apply. At the same time, a raw bidder without any experience would be able to apply and is placed in an advantageous position, contended the petitioners.

6. The respondents resisted the writ petition. The respondents submitted that the petitioners were aware of the conditions of tender which was published on 22.02.2022. The petitioners filed their objections only on 11.03.2022 and moved this Court on the same day. As per the customer scheme involved in the tender conditions, a Circle Office is empowered to make appropriate changes. The changes effected are perfectly within the jurisdiction of the Kerala Circle of BSNL.

7. The respondents submitted that a policy decision of the BSNL is not open to challenge before this Court in view of the Division Bench judgment of this Court reported in Pushkarraj Constructions Pvt. Ltd.(M/s.) and others v. Silppi Constructions and Contractors and others [2019 (3) KHC 566]. If this Court intervene in the proceedings at this stage, the legal right of eligible tenderers who are not parties to these proceedings will be adversely affected resulting in injustice, urged the respondents.

8. Heard the learned Senior Counsel assisted by the counsel for the petitioners and the Senior Counsel assisted by the Standing Counsel for the respondents.

9. The provisions of CM Franchisee Sales and Distribution Policy, 2018 as contained in Ext.P1 EOI dated 07.07.2021 make the Eligibility Requirement of BSNL Franchiseeship for each franchisee territory, as follows:

a. Number of territories permissible to a franchisee in a circle is restricted to normally three through EOI/Migration.

b. However one more of franchisee territory may be allowed in the second round of EOI at circle level.

c. Maximum 33% of SSA territories shall be allotted within the SSA to a franchisee. However, CGMS of the circle are empowered to increase this maximum limit by up to 50% of SSA territories within the SSA. In case of migration 50% of SSA territories are allowed.

d. Balance franchisee territories i.e.,(4 terr – 33% of SSA) shall be adjoining to his existing territories in adjacent SSA.

e. In case of migration, non-adjacent territories are allowed and additional new territories shall be adjoining to SSA in which he has more number of territories.

f. Category of franchisee territories shall be reclassified based on C-top up revenue. Reclassification of franchisee territories shall be carried out as one time activity before EOI/enter in into fresh agreement as per criteria given below:-

Sub-section (g) has been added to the said Eligibility Requirements, in Ext.P2 EOI, which is as follows:

g. Existing BSNL franchisee has to get a minimum average 50% score for the last two quarters of operation as a franchisee preceding the EOI Floating quarter. Bidders with multiple territories have to get minimum 50% score for each territory during the period as stated above. The scoring will be as per the S&D policy under which the franchisee is currently operating. Look on areas performance will not be included. Separate performance certificates from respective BA for each territory (as per Annexure K) of operation as a franchisee has to be submitted as part of the experience certificate. Only such of those franchisee (existing and/or terminated) and not debarred should apply.

A minimum average 50% score has been prescribed in Ext.P2, which is a new addition.

10. The maximum marks for eligible bidders in selection criteria is as follows:

I

Experience of Firm

10 marks

II

Turnover

10 marks

III

Place

10 marks

IV

Showroom

10 marks

V

Qualification

5 marks

VI

Interview/Presentation

5 marks

The selection criteria remain the same in Exts.P1 and P2 Notices inviting EOIs.

11. The contention of the petitioners is that the Eligibility requirements have been amended in Ext.P2 adding Sub section (g) to Section 2B, which is without prior approval of the BSNL Head Quarters and hence the same is illegal. This amendment has been brought into, only in Kerala and hence it is discriminatory. The learned Senior Counsel representing the the petitioners state that in section 3A(a) of Ext.P2 it has been stated that if there is need for change, the proposal with a 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. A perusal of Section 3A would show that such approval from Corporate Office is required in respect of redefining territory of franchiseeship. In the present case, the change is in the eligibility requirements for BSNL franchiseeship and it is not related to redefining territory. There is nothing in Ext.P2 which would indicate that for making changes in eligibility requirements depending upon the requirements of a Circle, Area or Territory, a prior approval from BSNL headquarters is warranted.

12. The learned counsel would point out that in section 3A(g), the BSNL has reserved the right to revise some selections of Sales & Distribution Policy according to change in business environment and that SSA shall notify all such changes to the franchisees. The present change has been effected without such notice and therefore is illegal and unsustainable. As pointed out by the learned Senior Counsel representing the BSNL, from a reading of section 3A(g) it is evident that the changes which are to be notified to the franchisees are the changes being made post – appointment of the franchisees. Section 3A(g) will not apply to the changes being made in the eligibility requirements for appointment of franchisees. The prospective applicants do not have a right to dictate the eligibility requirements, which is exclusively for the BSNL to decide.

Even the existing franchisees will not have such right.

13. It is true that Ext.P8 CM Franchisee Sales and Distribution Policy, 2018 States that the BSNL reserves the right to modify sections/annexure of the Policy and discount/margin structure at any point of time with the approval of Director (Consumer Mobility). But, the said provision cannot be read as one requiring prior approval from the BSNL Headquarters. In this case admittedly the BSNL Headquarters has given covering approval of competent authority for amending Section 2B(g) of the notice inviting EOI as per Ext.P5. Therefore, the amendments brought about cannot be said to be without the approval of BSNL Headquarters and therefore illegal.

14. The learned Senior Counsel appearing at the instance of the petitioners further argued that in view of the Note under Section C(c) of Ext.P2, the BSNL Headquarters has reserved certain rights. A reading of the Note would make it clear that the Note under Section C(c) is intended to apply when there is tiebreaker between two or more franchisees. The said Note also will not be of any avail to the petitioners in the matter of eligibility requirements.

15. It was argued on behalf of the petitioners that as per the new addition, the existing franchisees who have displayed the 50% average in one territory and 49% in another territory will not be eligible to apply for EOI floated either of these territories. In contrast, a new applicant who does not have any kind of experience, a new applicant who is not an existing applicant but was a franchisee earlier who did not satisfy the requirement of 50% and new franchisees who were associated with any other service providers and did not satisfy the required average performance, will qualify.

16. It is to be noted that BSNL is a Company incorporated for running a commercial venture where there are large number of competing contenders. Therefore, the BSNL even if an instrumentality of the State, should have sufficient freedom to decide the qualifications required for its franchisees. By Section 2B(g), the respondents are excluding those franchisees who have not performed well in the immediate past quarter. When an existing franchisee has failed to perform up to the minimum level, the BSNL will be at liberty to experiment with a new franchisee even if the franchisee has no previous experience. If the BSNL appoints a new franchisee or an earlier franchisee who is not an existing franchisee or a franchisee with another Company, that will not amount to discrimination.

17. The petitioners relied on the judgment in Pramod Kumar v. U.P. Secondary Education Services Commission and others [(2008) 7 SCC 153] to urge that if the essential educational qualification is not satisfied, the same cannot be condoned and such an act cannot be rectified. In this regard it is to be noted that the judgment in Pramod Kumar (supra) was delivered in the context of appointment of a candidate to teaching post and the ratio laid down therein cannot be extended to a commercial transaction.

18. The petitioners also relied on the judgment in The Marathwada University v. Seshrao Balwant Rao Chavan [AIR 1989 SC 1582] to urge that when the act prescribes a particular body to exercise power, it must be exercised only by that body and it cannot be exercised by others unless it is delegated. In the said case also the issue was relating to appointments in an institution and what was violated was a statutory requirement. In the present case, the violation is in respect of criteria stipulated in a notification/policy, for inviting applications for franchisee ship. For the same reasons, the judgment in the Marathwada University (supra) cannot be applied to the facts of the present case.

19. The petitioners further relied on the judgment of the Apex Court in Farid Ahmed Abdul Samad and another v. The Municipal Corporation of the City of Ahmedabad and another [AIR 1976 SCC 2095] to contend that if the order is at inception invalid, its in validity cannot be cured by its approval of the standing committee or its confirmation by the State Government. The said judgment was dealing with a violation of statutory provision under the Bombay Provincial Municipal Corporations Act and hence would not apply to the facts of the case put forth by the petitioners.

20. The learned counsel for the petitioner relied on the judgment in V.C. Banaras Hindu University and others v. Srikanth [(2006) 11 SCC 42] to urge that the law is capable of being rectified by judicial review and reasonableness in the order and fairness in the procedure indisputably can also be gone into by the writ court. The said judgment was delivered by the Hon'ble Apex court in respect of termination of service of an employee of Banaras Hindu University. The observations made by the Hon'ble Apex Court in that context cannot be applied as such in the present case. The Judgment of the Hon'ble Apex Court in Common cause v. Union of India and others [(2017) 9 SCC 499] relating to illegal mining, also will not be of any avail for the same reason.

21. The issue involved in this case relates to appointment of franchisees by calling Expressions of Interest. It cannot be said that the procedure followed by the respondents is unfair or unreasonable. When deciding the rationality of the amendment effected by the respondents in the Notification Inviting Expressions of Interest, this Court cannot substitute its views for that of the authority. It is the tendering authority who will be the best person to understand and appreciate its requirements. Even if there is a procedural lacuna, if the decision taken by the authority is bona fide and in public interest, the Court should refrain from interfering.

For all the above reasons, this Court find no merit in the writ petition and the writ petition is consequently dismissed.

