(2008) 03 AHC CK 0190

In the Allahabad High Court

Rama Communication APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 28-03-2008

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2008) 03 AHC CK 0190

Hon'ble Judges : Sabhajeet Yadav, J;R.K. Agrawal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

R.K. Agrawal, J.—As in both the writ petitions, the counter affidavits and rejoinder affidavits have been exchanged between the parties and similar controversy is involved therein, with the consent of the learned Counsel for the parties, the writ petition has been finally heard and is being decided by this common judgment at the admission stage itself in accordance with the Rules of Court.

Facts of Civil Misc. Writ Petition No. 41555 of 2007:

By means of this writ petition filed under Article 226 of the Constitution of India, the petitioner, M/s Rama Communication through its proprietor, Atul Rastogi, seeks the following reliefs:

(a) To issue a writ, order or direction in the nature of certiorari quashing the entire process of selection of franchisee held on the basis of tender notice dated 27.4.2007.

(b) To issue a writ order or direction in the nature of mandamus commanding the respondents authorities not to finalise the selection of Franchisee, which has taken place in view of the tender notice dated 27.4.2007 issued by the office of respondent No. 4.

(c) To issue a writ, order or direction in the nature of mandamus commanding the respondents to produce the entire record of the said proceedings of the tender notice dated 27.4.2007.

(d) To issue a suitable writ, order or direction which this Hon''ble Court may deem fit and proper under the facts and circumstances of the case.

(e) To award cost of the petition to the petitioner.

2. Briefly stated, the facts giving rise to the present petition are as follows:

According to the petitioner, on 27.4.2007 the Telecom District Manager, Bharat Sanchar Nigam Limited, Banda, respondent No. 4, invited tenders for expression of interest in BSNL Franchisee for sale of BSNL services and products at Karvi, District Chitrakoot in SSA, Banda. As the petitioner fulfilled the eligibility criteria, it submitted its tender in time. Under the eligibility clause, the person should be a graduate and should have the turnover of Rs. 50/- lacs as per admitted profit and loss account for the financial year 2005-06 for each zone. The applicants were also required to have experience of dealing in telecom or Fast Moving Consumer Goods or electronic/electrical goods for last 2 years in each zone and a space of 150 sq. ft. for each zone located on ground floor on the main road or clearly visible from the main road. Space was to be ensured within 7 days of letter of intent for award of Franchisee. Layout and location was also to be submitted with the tender. The following persons also submitted their bid:

(i) Kamad Giri Communication

(ii) Kusum Communication

(iii) Mahavir Sambad

(iv) Suman Photocopier

(v) Rajendra Kumar Narendra Kumar

(vi) B.P. Electronics.

3. According to the petitioner, the envelope submitted by Kamad Giri Communication was not properly sealed and, therefore, its tender was not opened. The tenders submitted by Kusum Communication, Mahavir Sambad and Suman Photocopier did not accompany the original purchase receipt and were out-rightly rejected. The selection criteria, as specified in condition No. 6 of the tender form, was as under:

i. The selection criteria for selection of franchisees having the minimum eligibility conditions fulfilled may be as follows:

i. Experience 30 marks ii. Carpet area and Location of the 25 marks showroom iii. Turnover 15 marks iv. Place 15 marks v. Interview/Presentation 15 marks

ii. Shortlisting will be done on the basis of point number (i) to (iv) and top two should be called for interview. Based on combined marks final selection will be done.

iii. The location of showrooms can only be in predefined places as decided by BSNL. The detailed breakup is given in Annexure ''A''.

4. According to the petitioner, Annexure ''A'' gave the following details regarding the criteria for allocation of marks for selection of franchisee:

A. Experience: (Total Marks = 30) Marks Allotment --- a Fulfillment of Minimum Criteria and upto 1 year in excess 05 --- b Greater than 1 year in excess but less than 2 years in excess 10 --- c Greater than 2 years in excess 15 --- d Franchisee/Dealer/Distributor experience in BSNL for 1 05 year or less --- e Franchisee/Dealer/Distributor experience in BSNL for 1-2 10 years --- F Franchisee/Dealer/Distributor experience in BSNL for more 15 than 2 years --- The company''s track record of growth should take into account. FMCG means wide distribution network through retailers selling packaged, branded products. Companies selling wines/liquor, petrol/kerosene is excluded.

B. Size and Location of showroom (Total Marks = 25) Marks Allotment --- a Fulfillment of Minimum Criteria upto 10 percent in excess 10 --- b Greater than 10 percent but less than 20 percent excess 13 --- c Greater than 20 percent in excess 15 --- d Prime Location 10 ---C. Turnover (Total Marks =15) Marks Allotment --- a Fulfillment of Minimum Criteria upto 20 percent in excess 10 --- b Greater than 20 percent but less than 30 percent jn excess 13 --- c Greater than 30 percent in excess 15 ---D. Place (Total Marks =15) Marks Allotment --- a Franchisee belongs to same SDCA 15

-- b
Franchisee belongs to same SSA 10
-- c
Franchisee belongs to same Circle 05
--E.
Interview/presentation before the 15 selection committee by the proprietor

5. The petitioner was informed on phone about the interview to be held on 8.8.2007 but the same was cancelled later on. In respect of size and location of show room it was entitled to 25 marks as the area was more than 350 sq. ft. and was located in prime location of commercial place. Regarding turnover, it was entitled to 15 marks as its turnover was more than 30% of the required turnover of Rs. 50 lacs in the financial year 2005-06. Since it was carrying on franchisee business for the last 5 years in the same circle, it was entitled to only 5 marks. Thus, the total marks come to 75 but on account of manipulation and foul play of the selection committee and other bidders, namely Rajendra Kumar Narendra Kumar and B.P. Electronics, it has not been selected. It has been averred that B.P. Electronics was a partnership firm though the tender was submitted showing it to be a proprietorship and the tender was signed by one of the partner, which was not permissible, and as such the tender was liable to be rejected. The place shown by B.P.Electronics was located at a distance of 500 meters from the Karvi Bus Stand, where a tractor agency was carrying on its business and was not vacant. Regarding the turnover of Rajendra Kumar Narendra Kumar, there was complaint but the respondents without verifying it went on to finalise the tenders in favour of two firms. The petitioner was fully entitled to be called for interview but was ousted though he was selected earlier in two top firms. It came to know of the interview to be held on 28.8.2007, a holiday. On 28.8.2007 interview took place though all the members of the selection committee were not present, hence the interview/selection was illegal.

6. In the counter affidavit filed by Sri Raghu Raj Singh, Divisional Engineer (Planning)/(Admn.), it was admitted that only M/s Narendra Kumar Rajendra Prasad, M/s B.P. Electronics and M/s Rama Communication were completing minimum requirements as per tender. It has been stated that, vide letter dated 23.7.2007, the petitioner was required to get his location/place inspected otherwise action would be taken for cancellation of its tender. On 7.8.2007 the Committee inspected the two sites/places pointed out by the petitioner but found that they were not suitable for want of parking space and were not spacious in comparison to other two remaining bidders. The letter for interview on 8.8.2007 was issued under some wrong impression and as such it was cancelled. The Committee scrutinised the tenders of remaining two bidders and as M/s Narendra Kumar Rajendra Prasad scored highest mark, it was allotted franchisee and deed was executed on 30.8.2007. It has further been stated that the petitioner has an alternative forum for arbitration under Clause 30 of the tender notice.

7. In the supplementary affidavit the petitioner has tried to demonstrate that M/s

Narendra Kumar Rajendra Prasad too did not have more parking space than the petitioner and thus the marks allotted was arbitrary and illegal.

8. In the rejoinder affidavit, the petitioner asserted that shortlisting was to be done on the basis of marks under various heads and top two was to be called for interview and the respondents have failed to give the details of the marks awarded.

Facts of Civil Misc. Writ Petition No. 42631 of 2007:

9. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioner, Dinesh Kumar Agarwal, proprietor of B.P. Electronics, seeks the following reliefs:

(a) issue a writ, order or direction in the nature of mandamus commanding the respondents No. 1 and 2 not to execute any contract agreement in favour of respondent No. 3 or the respondent No. 3 may be restrained to start any B.S.N.L. Franchisee business of Karvi, Chitrakoot contract of tender No. 207/16 dated 27.4.2007.

(b) issue any other writ, order or direction in favour of the petitioner, which this Hon''ble Court may deem fit and proper under the facts and circumstances of the case.

(c) award the costs of petition to the petitioner.

10. Briefly stated, the facts giving rise to the present petition are as follows:

According to the petitioner, he submitted his tender on 2.5.2007. Out of 7 tenders, 4 were rejected and that of the petitioner, respondent No. 3, Rajendra Prasad, and M/s Rama Communication were declared eligible. The petitioner was a graduate in Science and was having the space of 325 sq. ft. and sufficient place for parking was available and his turnover in the financial year 2005-06 was Rs. 1,19,96,459.76, which was more than the criteria fixed. The petitioner had 18 years of experience in telecom business. The interview was scheduled for 8.8.2007, which was cancelled. On TO.8.2007 the petitioner and the respondent No. 3 was asked to submit four years'' audited account for the financial years 2003-04 to 2006-07 with supporting documents, which the petitioner submitted the same day. The petitioner requested the respondent No. 1 to verify the documents submitted by the respondent No. 3 from the Income Tax and Trade Tax departments. The respondent No. 3 failed to prove that his turnover was more than Rs. 50 lacs in the last 5 years. On 20.8.2007 the petitioner was present before the Selection Committee but the respondent No. 3 was not present and on 21.8.2007 the Divisional Engineer (Planning) sent letter for interview on 28.8.2007 to the petitioner at his Allahabad address. On 28.8.2007 the petitioner appeared before the selection committee and filed copy of the certificates issued by the Deputy Commissioner (Kar Nirdharan), Trade Tax, Karvi, Chitrakoot to the effect that the respondent No. 3 was a registered firm since 4.7.2003 dealing in telecom electronic goods and the respondent No. 3 had not carried any sale/purchase during financial years 2004-05, 2005-06 and 2006-07 and, therefore, the respondent No. 3 did not have turnover of Rs. 50 lacs as prescribed and was not eligible for the franchisee. However, the respondent No. 3 has been granted the franchisee.

11. In the short counter affidavit sworn by Sri Raghu Raj Singh, Divisional Engineer (Planning/Admin), filed on behalf of the respondent Nos. 1 and 2, it has been stated that the petitioner had 306 sq. ft. for the showroom and 222 sq.ft. for parking place whereas the respondent No. 3 had 395.35 sq. ft. space for the showroom and 1200 sq. ft. for the parking place. The respondent No. 3 got 73.5 marks whereas the petitioner got only 61 marks and, therefore, the franchisee was awarded to the respondent No. 3 and agreement had been executed on 30.8.2007 and he has started working the franchisee. It has further been stated that the petitioner had an alternative remedy of arbitration under Clause 30 of the tender notice.

12. In the counter affidavit sworn by aforesaid person, the submission of certificate by the petitioner has been denied. With regard to the information sought by the petitioner, the Deputy Commissioner (Assessment) Trade Tax, Karvi, Chitrakoot had issued a notice to the petitioner in Dainik Jagran and Amar Ujala newspaper to appear before him on 12.9.2007. The said certificate had no relevance as the matter had already been finalised.

13. No rejoinder affidavit to the short counter affidavit and the counter affidavit, has been filed by the petitioner.

14. In the counter affidavit filed by the respondent No. 3, it has been stated that the firm is registered with the Sales Tax Department with effect from 8.7.2003 and is valid upto 2008 and no trade tax is in balance against the said firm. The turnover as shown in the income tax return of the respondent No. 3 for the financial years 2004-05, 2005-06 and 2006-07 was Rs. 52,84,162/-, Rs. 5,51,75,390/- and Rs. 5,73,82,757/-respectively. Thus, the turnover was more than Rs. 50/- lacs. The respondent No. 3 had filed various certificates to prove his required experience in telecom and fast moving consumer goods. According to him, the certificate filed by the petitioner was forged and fabricated and no such certificate has been given by the Trade Tax Department and the application of the petitioner for information had been rejected by the Trade Tax Department on 14.9.2007. The respondents have verified and scrutinised the documents and awarded the franchisee to him on 30.8.2007 and he is functioning as such.

15. In the supplementary counter affidavit filed by the respondent No. 3, the order dated 14.9.2007 rejecting the application of the petitioner for information has been filed, which shows that the petitioner was an outsider and the information sought for being confidential could not be given. According to him, there is no trade tax liability on the scratch card business and there was no necessity to submit return to the Trade Tax Department which had not raised any demand. According to him, the petitioner was given 5 marks out of 30 marks

against Clause A - Experience whereas he was entitled to get 15 more marks for his 2 years'' experience, making his total to 88.5 marks. According to Rajendra Prasad, respondent No. 3, in the assessment year 2005-06, i.e. from 1.4.2005 o 31.3.2006, there had been a total purchase of Rs. 5,47,73,714/- and net sales was Rs. 5,71,81,345/- and if a demand draft was to be prepared for scratch card, the bank charges on the demand draft which was required to be paid, would be approximately Rs. 1,91,700/- @ Rs. 2,50 per thousand and if he was required to deposit the aforesaid amount in cash with the bank and if there was 5,470 packets of Rs. 100/- notes, for payment of Rs. 5,47,00,000/- the bank would have charged a further sum of Rs. 54,700/- known as cash handling charge, meaning thereby that he would have to pay a sum of Rs. 1,9,700 plus Rs. 54,700/-, i.e., a total of Rs. 2,56,400/- while doing business through bank whereas the net profit in the financial year was only Rs. 99,305/- and would have resulted in a net loss of Rs. 1,57.095/- and, therefore, all the transactions were being made in cash. There would have been a lot of problem and employment of other persons for day to day exercise in the bank. Moreover, in case of transaction by cheque, the scratch card would not have been delivered to him till the cheque is encashed and it takes at least one week between Banda and Karvi which is at a distance of 70 Kms. and he would have required to pay cheque collection charges/commission to the Bank.

16. In the rejoinder affidavit filed by the petitioner, it has been submitted that no trade tax assessment return for the year 2003-04 to 2006-07 was filed by respondent No. 3 to prove that his turnover was more than Rs. 50/- lacs. According to him, the respondent No. 3 failed to submit the balance sheet and audited profit and loss account as required under the tender.

17. In the supplementary rejoinder affidavit, it has been submitted by the petitioner that he tried to retrieve information regarding the return filed by the respondent No. 3 under the Right to Information Act, but without any success as yet. He also tried to get the information from the Bank but could not succeed.

18. We have heard Sarvasri R.C. Gupta and Pradeep Kumar, learned Counsel for the petitioners, Sri Subodh Kumar, learned Counsel appearing for the respondent authorities in both the writ petitions and Sri A.K. Trivedi, learned Counsel appearing for the respondent No. 3 in Civil Misc. Writ Petition No. 42631 of 2007.

19. Sri R.C. Gupta, learned Counsel submitted that M/s Rama Communication has been ousted only on the ground that the premises offered was not suitable, with no parking place available, otherwise it fulfilled all the requirements. According to him, there was no requirement of providing parking facility. So far as the selection of Rajendra Prasad is concerned, he submitted that the turnover disclosed by him is not his turnover but of another concern, namely Capital T.V. Service Centre, Banda, which is a family concern and, therefore, he was ineligible. He submitted that Rajendra Prasad, proprietor of M/s Narendra Kumar Rajendra Prasad had not filed the audit report alongwith the return under the Income Tax Act nor any such turnover had been disclosed under the Trade Tax

Act. Thus, no reliance can be placed on the audit report of the Chartered Accountant, namely Vijay Ram Bihari & Co., Banda.

20. Sri Pradeep Kumar, learned Counsel challenging the selection of Rajendra Prasad, submitted that he did not have a turnover of Rs. 5/- crores and odd, as claimed by him. In fact, neither in the Trade Tax Department nor in the Income Tax Department any such turnover had been declared by him. Further, the audit report has not been filed in the Income Tax Department alongwith the return and it had not seen the light of the day before applying for BSNL franchisee in question. According to him, the audit report is a procured document and it is unbelievable that such huge transaction of Rs. 5/- crores and odd has not been routed through any bank and instead it has been done in cash. He further submitted that location of the premises offered by his client was more appropriate and suitable than that of Rajendra Prasad and the respondent Bharat Sanchar Nigam Limited (hereinafter referred to as "the Nigam") had acted arbitrarily in selecting Rajendra Prasad instead of his client, namely Dinesh Kumar Agrawal.

21. Sri Subodh Kumar, learned Counsel, submitted that M/s Rama Communication was not found suitable for being called in the interview only on the ground that the premises offered by it did not have any parking place and, therefore, was found unsuitable. He further submitted that the Nigam has proceeded on the basis of the report of the Chartered Accountant regarding the turnover of M/s Narendra Kumar Rajendra Prasad, certified and audited by Vijay Ram Bihari & Co., Banda. He further submitted that the premises offered by Rajendra Prasad was found more appropriate. Further, as per marks allocated for various parameters, he secured more than Dinesh Kumar Agrawal and, therefore, he was selected.

22. Sri A.K. Trivedi, learned Counsel appearing for Rajendra Prasad, respondent No. 3, submitted that his client had been in this trade for the last several years and the premises offered by him was found more suitable. The marks awarded to him being more than Dinesh Kumar Agrawal, there is no illegality in selection and allotment of BSNL franchisee in question. He further submitted that the circumstances under which the transactions were not done through the bank, had already been explained in the supplementary counter affidavit filed by Rajendra Prasad and no adverse inference should be drawn merely because the transaction has been done in cash.

23. We have given our anxious consideration to the various pleas raised by the learned Counsel for the parties. We find that pursuant to the advertisement dated 27.4.2007 issued by the Nigam, even though six persons had applied but ultimately only three were found eligible. Out of the total 100 marks, the Nigam had adopted criteria for awarding marks under the various categories and shortlisting was to be done on the basis of the marks obtained under the category of experience, carpet area and location of showroom, turnover and place. Based on the marks obtained by the applicants, top two were to be called

for interview in which maximum 15 marks were allocated and based on the combined marks, final selection was to be done. The Nigam had given in detail the criteria for selection of marks under various categories which, in our opinion, is fair. The marks have been given to the various applicants according to the criteria adopted by the Nigam and we do not find any fault in it.

24. M/s Rama Communication had been excluded only on the ground of the location being not suitable as there was no parking place in front of the premises offered by it. The action of the Nigam, thus, in excluding M/s Rama Communication, cannot be said to be arbitrary or irrational as the location with adequate parking facility is a must for getting good business and if the Nigam authorities have taken this into consideration, it cannot be said that they have acted arbitrarily or with some motive. The business consideration was paramount and supreme in the present case.

25. Coming to the selection of Rajendra Prasad, we find that Dinesh Kumar Agrawal, proprietor of B.P. Electronics had secured 49 marks whereas Rajendra Prasad had secured 60 marks before interview. In the interview, out of 15 marks, Dinesh Kumar Agrawal had obtained 12 marks whereas Rajendra Prasad had obtained 13.5 marks, thus, making the total of 61 and 73.5 marks respectively. The marks obtained by Rajendra Prasad being more, the selection cannot be faulted.

26. So far as the allegation that Rajendra Prasad did not have a turnover of Rs. 5/- crores and odd, as claimed by him, we find that the Chartered Accountant, namely Vijay Ram Bihari & Co., had audited the books of account and had given a report certifying the turnover disclosed by Rajendra Prasad. It may be mentioned that there is no trade tax liability on sale of scratch card and if Rajendra Prasad had not filed any return under the Trade Tax Act, there cannot be any illegality.

27. So far as the plea that the audit report had not been filed before the Income Tax Department or it had seen the light of the day only when the tenders were invited, we do not want to express any opinion as in the advertisement there was no requirement that the audit report should be filed with the Income Tax Department.

28. In view of the foregoing discussions, we are of the considered opinion that the Nigam had not acted arbitrarily or committed any illegality in making selection of Rajendra Prasad for the BSNL franchisee.

In the result, both the writ petitions are dismissed. However, there shall be no order as to costs.

