
(2002) 03 MP CK 0029
In the Madhya Pradesh High Court
Case No : Writ Petition No. 3991 of 2001

Shiv Prasad Pandey

APPELLANT

Vs

Bharat Sanchar Nigam Limited

RESPONDENT

Date of Decision : 21-03-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226, 227

Citation : (2002) 5 MPHT 566 : (2003) 1 MPLJ 86

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : V.K. Shukla, for the Appellant; O.P. Namdeo, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J.

By this writ petition preferred under Articles 226 and 227 of the Constitution of India the petitioner has prayed for a writ of certiorari for quashment of the order dated 16-6-2001 (Annexure P-7), issued by the Divisional Engineer, Planning & Administrative Office of Telecom District Manager, Rewa, the respondent No. 3 herein.

The facts as have been exposited are that the petitioner is an experience contractor in cable laying work and he is eligible to get the tender form as per the Notice Inviting Tender (in short "NIT") dated 20-7-2001. The respondent No. 1, Bharat Sanchar Nigam Limited, a Government of India undertaking invited tenders from the registered contractors through its competent authority for laying of under ground cable in 100 cm depth, by the NIT, dated 20th July, 2001 which was published in the local newspaper. The said paper publication has been brought on record as Annexure P-1. As per the NIT for four sections tender forms were invited independently and separately. In Clause 5 of the NIT there is a stipulation that the tenderers shall not be permitted to tender if any of his near relative is working as an officer in any capacity in M.P. Telecom Circle and he

should submit an affidavit that none of his near relatives is employed in M.P. Telecom Circle at the time of purchase of tender form. The petitioner is eligible to obtain the tender form and hence, he submitted an application to the respondent No. 2, the Telecom District Manager for issuance of tender form to him on 31st July, 2001 which was well within time. As pleaded, he had complied with all the necessary formalities for obtaining the tender form. However, no tender form was issued to him and he was intimated that the affidavit shown by him was not in prescribed format. He was directed to appear in person alongwith the originals to receive the tender form. This was intimated to him by the letter dated 14-7-2001 which was received by him on 16-8-2001. It is averred that the last date of submission of tender form was 13:00 hours on 16-8-2001 and the said communication was received after time was over. It has been submitted that the petitioner was very much present in the office of the respondent No. 2 on 13-8-2001 but the department did not bring to his notice the said fact but he was intimated by the letter sent to him by registered post.

According to the writ petitioner, after receipt of the said letter vide Annexure P-4 he submitted before the respondents that there was no defect in his application and if there was any defect in it he should be afforded an opportunity to convince the competent authority. In spite of such a communication no tender form was issued to him and eventually, he was initiated on 17-8- 2001 that his application for issuance of tender form had been rejected on the ground that the petitioner had not appeared alongwith originals as desired by the said respondent. It is urged in the petition that the petitioner is eligible to obtain the tender form but the same has not been done. Various other aspects have been stated in the petitioner which need not be stated in detail. However, it is essential to state that the petitioner has challenged the Clauses 4 and 5 of NIT on the ground that they smack of arbitrariness. It is also urged that the said conditions are not only illegal, unjust and arbitrary but also violative of CPWD Manual. It is also urged that the other persons whose relations are working in the department have been given the tender forms but the petitioner has been discriminated which offends the basic ingredient of the Article 14 of the Constitution.

A return has been filed by the respondent Nos. 1 to 3 contending, inter alia, that there are specific directions of the Chief General Manager Telecom M.P. Circle, Bhopal that the near relatives of the officer/officials serving in the department shall not be permitted to tender in any of the contracts/NIT and they shall not be permitted to participate in the proceedings and no tender form shall be issued to them so that high standard of public morality and transparency is maintained in contractual matters. Circulars to that effect have been brought on record as Annexures R-1 to R-3. The tenderers have to submit an affidavit that none of his near relative as defined in NIT/circular are employed with the M.P. Telecom Circle in any capacity in whatsoever. In the case at hand, as pleaded, the petitioner, who is a Government contractor applied for purchase of tender form and submitted an affidavit that none of his near relative is serving in the department but on enquiry it was found that his elder brother was serving in the department

under T.D.M., Rewa itself as "Senior Telecom Office Assistant Grade 3". In view of this aspect the petitioner was not supplied the tender form. It has also been stated that the petitioner had submitted the application which was incomplete and, therefore he was not supplied the tender form. Various other allegations have also been disputed. The refutation made in the return need not be stated in detail as the main hub of the matter is in a different area altogether.

A rejoinder affidavit has been filed by the petitioner wherein it has been pleaded that the respondents are not obeying the order passed by this Court and the cable work is being carried on without due sanction of law. A reference has been made to the Condition No. 14 prescribed by the BSNL wherein the concept of near relative has been clarified. A reference has been made to Clause 40 of the proforma agreement. In essence, it is pleaded in the rejoinder affidavit that if a close relative is in the cadre of Gazetted Officer the contractor would not be permitted to submit his tender for the work in question. The petitioner has narrated about his performance in various works. It is also stated in the rejoinder affidavit that his brother is working as Instructor in the Branch of Telecom Training Centre on deputation and is not related to the matter of processing the tender and, therefore, cannot be regarded as a person who can influence the tender process.

An additional return on behalf of the respondents has been filed wherein it has been highlighted that the tender in question has not been finalised till date and no work order has been issued and, therefore, the question of violating the order passed by this Court does not arise.

I have heard Mr. V.K. Shukla, learned Counsel for the petitioner, and Mr. O.P. Namdeo, learned Counsel for the respondents. It is submitted by Mr. Shukla that the condition imposed in the tender notice is absolutely arbitrary and the same cannot be sustained. It is urged by him that it affects the right of the petitioner under Article 19(1)(g) of the Constitution to carry on any business or to make an effort to carry on any business. It is also put forth that condition imposed also offends Article 14 of the Constitution as the classification has been created without any rationale and any justification. It is also urged by him that his relation is not in such a post so as to influence the decision making process and, therefore, he should have been permitted to participate.

Mr. O.P. Namdeo, learned Counsel for the respondents, submitted that considering the totality of circumstances the aforesaid condition was incorporated. It is put forth by him that initially condition was related to the term "Officer", but later on word "official" has been added. It is put forth by him that classification is reasonable and unarbitrary. Learned Counsel has also urged that the petitioner has filed a false affidavit and, therefore, at his instance clause should not be interpreted.

To appreciate the rival submissions raised at the Bar it is apposite to reproduce the relevant clause from the tender notice. It reads as under :--

"4. The contractors shall not be permitted to tender if any of his near relative is working as an officer/official in any capacity in M.P. Telecom Circle. Term near relative is meant for wife, husband, children, grand children, brothers, sisters, uncles and aunts and cousins and their corresponding in laws. He should submit an affidavit that no his/her near relative is employed in M.P. Telecom Circle at the time of purchase of tender form."

Initially the clause, as is apparent from Annexure R-1, read as under :--

"1. The contractor shall not be permitted to tender if any of his near relative is working as an officer in any capacity in M.P. Circle. He should submit an affidavit that no his/her near relation is employed in M.P. Telecom Circle.

By the term near relative is meant wife, husband, parent and grand parents, children and grand children, brothers and sisters, uncles and aunts and cousins and their corresponding in-laws."

Later on, by letter dated 19-7-99 a further instruction was issued which is reproduced below:--

"In the above circular the word "officer" appearing in the second line of "Para 1" may be read as "officer/officials"."

Thereafter, Annexure R-3 dated 14-9-2000 was issued and the condition was modified. The modified condition reads as under :--

""The contractor shall not be permitted to tender if any of his near relative is working as an officer/official in any capacity in M.P. Circle. He should submit an affidavit that no his/her near relative is employed in D.O.T. and working in M.P. Telecom Circle."

The core of the matter such a clause is arbitrary and a person can be deprived of permission to tender. A colossal complaint has been built up by the learned Counsel for the petitioner that the brother of the petitioner is not working as an officer nor in any official capacity but is working in a lower rank as an Instructor in the Branch of Telecom Training Centre on deputation. The question that arises for consideration is whether the petitioner was required to file the proper affidavit. The words used in the tender form are "working as an officer/official in any capacity". The brother of the petitioner is included in the prohibitory clause in question. The petitioner has sworn the affidavit as per Annexure P-15. In Paragraph 4 the deponent has stated certain facts, the translation of which is as under :--

"4. That, there is no near relative of mine in the Nigam working as officer/official who can by the influence of his post illegally assist me in the aforesaid work."

Thus, the petitioner did not clearly state that what was his relation and on what post his relation was working. An edifice is built by Mr. Shukla that such relation cannot influence the tender making process. Learned Counsel has impressed upon this Court to interpret the word "official" as it does not include the category

in which the brother of the petitioner is working. I would have ordinarily ventured to interpret the said word and what is its legal impact would have been. I would have possibly determined whether incorporation of such clause is permissible in law. I would have also dealt with the fact whether the incorporation of said clause offend conscience of equality clause as enshrined under Article 14 of the Constitution. But, a pregnant one, the fact which cannot be easily ignored is that the petitioner in his affidavit did not say that he had a brother who was working in the Department in such capacity. In that event, the Department would have been in a position to detect whether the petitioner had been truthful and, thereafter, possibly interpreted as per the requirement of law. The petitioner, on the contrary, chose to play possum and tried to take a chance with the Department. It is a well settled principle of law that a litigant is expected to visit the Court with clean hands. He who does not come with clean hands to the Court of law has to suffer the wrath of justice. He who comes to temple of justice must come with an absolute truthfulness and should not suppress anything which is within his special knowledge. He who suppresses what is within his knowledge commits fraud. It is well known "fraud" and "justice" cannot co-exist. Fraud vitiates everything. Truth is the ultimate end of justice. "Justice" cannot remain alien to "truth" and "truth" cannot ignore the concept of justice. As the petitioner has not come with clean hands and indubitably did not speak the whole thing in his affidavit and tried to behave in a different manner to get the advantage, I am not inclined to interpret the clause at his behest. In law it is well settled a person who approaches the High Court for issuing prerogative writ which is issued by exercising discretionary/equitable jurisdiction may refuse to interpret a provision if the petitioner is at fault. As in the present case the petitioner is not truthful, I decline to interpret the provision at his instance.

In this context I am reminded of the saying of Oliver Wendell:

"It is a question of how strong an infusion of fraud is necessary to turn a flavour into a poison."

I may also, in this context quote Waite who said thus :--

"Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud."

The salience of the aforesaid saying can not be marginalised. Hence, I repeat at the costs of the repetition, I am not disposed to interpret the provision at the behest of the petitioner.

Resultantly, the writ petition stands dismissed with cost of Rs. 1,500/-. This cost is imposed as the petitioner had not spoken the truth and he who does not speak the truth cannot be allowed to go scot-free as the same would establish a bad precedent. Courts of law do not countenance bad precedents.