
(2003) 11 P&H CK 0040
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 12799 of 2003

Tarsem Singh

APPELLANT

Vs

Bharat Sanchar Nigam Ltd. Etc.

RESPONDENT

Date of Decision : 04-11-2003

Acts Referred:

Constitution of India, 1950 — Article 12, 14

Citation : AIR 2004 P&H 156 : (2006) 2 CTLJ 93 : (2004) 1 ILR (P&H) 254 : (2004) 136 PLR 738 : (2004) 1 RCR(Civil) 302

Hon'ble Judges : S.S. Nijjar, J; S.S. Grewal, J

Bench : Division Bench

Advocate : P.S. Patwalia and Vivek Sharma, for the Appellant; Ashwani Talwar, for the Respondent

Final Decision : Allowed

Judgement

S.S. Nijjar, J.—The petitioner is a Government Contractor. He has been working with the Department of Telecommunication from 1988 onwards. Primarily, he is specialised in laying of underground cables. This work comprises of digging of trenches, laying of the cables, erection of D.P. boxes and other associated jobs. He has been primarily working in Patiala and Ropar districts. He has also done jobs in Jalandhar Telecom Project. His brother, Shamsheer Singh is working as a Clerk in the department of Telecommunication since 1984 and is now permanently absorbed in Bharat Sanchar Nigam Limited (a Government of India Enterprise) (hereinafter referred to as "the BSNL"). He is posted as Clerk in Nabha in the office of SDE Group Telecom. Petitioner's father retired as Sub Inspector from the Department of Telecommunications in August, 1990. BSNL was constituted in the year 2000. It is a Company incorporated under the Companies Act, 1956. It is a Government of India company. All the assets of the Department of Telecommunication alongwith liabilities were transferred to BSNL. All the employees Except Group A and B employees were absorbed in the BSNL. The remaining employees are on deputation, without deputation allowance. We

have, therefore, no hesitation in holding that the BSNL is a "State" within the meaning of Article 12 of the Constitution of India.

2. It is pleaded by the petitioner that the Punjab Circle of the BSNL is headed by Chief General Manager, Telecom. The Circle is divided into Secondary Switching Area/Revenue District (SSA). The SSAs are headed by General Manager, Telecom/District. SSAs are further sub-divided into Division Units which are under the direct control of Division Unit. The brother of the petitioner-Shamsher Singh is under the control of DTE Mandi Gobindgarh which falls under SSA, Patiala. the Headquarters of the brother of the petitioner are at Nabha.

3. The grievance of the petitioner in the present case is that the respondents have re-fused to supply the tender form to the petitioner with regard to a particular work which has been advertised on 29.7.2003 by the General Manager, BSNL, Patiala. The tender Form has been attached with the writ petition as Annexure PL The respondent-Corporation had issued the aforesaid tender notice for three works related to the area under the DTE, Rajpura, DTE, Zirakpur and DTE, Fatehgarh Sahib. The petitioner wanted to participate in the tender process, He was sought to be debarred from participation on the basis of Clause 4 of the Tender notice which is as under;-

"4. Affidavit regarding none of his/her near relative is working in the BSNL unit".

4. According to the petitioner, the aforesaid condition has been incorporated on the basis of the policy issued by the BSNL on the subject of "Participation of near relatives of the BSNL employees in the Tender/Execution of works in BSNL Units. The aforesaid policy has been attached to the writ petition as Annexure P2. Since the petitioner could not give an affidavit in terms of Clause 4 of the Tender Notice, he apprehended that his tender would be rejected. Earlier also, the petitioner had filed CWP No. 8129 of 2003 claiming the same relief. However, the aforesaid writ petition was dismissed as in-fructuous as the learned counsel appearing for the BSNL had submitted that the tenders invited have already been cancelled.

5. Mr. Patwalia, learned Senior Counsel has submitted that Clause 4 of the tender notice as also the relevant clauses in policy (Annexure P2) are ultra vires Article 14 of the Constitution of India. He submits that the relevant Clause of the policy (Annexure P2) and Clause 4 of the tender notice do not have any nexus with the object sought to be achieved. He submits that the respondents cannot debar the relatives of the employees from participating in the Telecommunication work throughout India, irrespective of the fact that the relative who is employed with BSNL would not be in a position to influence the decision to be taken by the respondents. Learned Senior Counsel has also submitted that the policy (Annexure P2) is stated to be based on Rule 4 of the Central Civil Services (Conduct) Rules as amended upto date. According to the learned Sr. Counsel the aforesaid rule only forbids the government servant from dealing with any matter or give or sanction any contract to any (company or firm) or any other person if

any member of his family is employed in the company which may be under his control. Learned Sr. Counsel further submits that the aforesaid submissions, however, no longer need to be considered by us on first principles as the matter has already been considered by a Division Bench of the Himachal Pradesh High Court in Civil Writ Petition No. 122 of 2003 decided on 24.5.2003 wherein the Clauses relied upon by the respondents have been held to be unconstitutional and ultra vires Article 14 of the Constitution of India.

6. The respondents have filed the written statement. It is stated that in accordance with the policy (Annexure P2), the petitioner falls within the definition of "near relative" of Shamsheer Singh being his brother and in accordance with Rule (iii)(a) of the policy, he is not permitted to give his bid in the tender floated for works in BSNL Unit in which the brother of the petitioner is posted. The relevant unit for the purposes of this Clause is the concerned SSA. The brother of the petitioner, being posted in Patiala SSA rendered the petitioner ineligible to participate in the Tender. Mr. Talwar, learned counsel appearing for the respondents has submitted that the judgment relied upon by the learned Senior counsel for the petitioner of the Himachal Pradesh High Court is not binding on this Court. Learned Counsel further submits that the aforesaid judgment does not lay down the correct law.

7. We have considered the submissions of the learned counsel for the parties. For the correct appreciation of the respective submissions of the learned counsel for the parties, it would be necessary to reproduce the relevant Clause of the tender notice (Annexure P1) as also the relevant clauses of the policy (Annexure P2), and Rule 4(3) of the Central Civil Services (Conduct) Rules, as under;-"Clause 4 of the tender notice:

4. Affidavit regarding none of his/her near relative is working in the BSNL Unit." Relevant Clauses of the Policy:

ii) As per Government of India's CCS Conduct Rule 4, no government servant shall in the discharge of his official duties deal with any matter or sanction any contract to any company or for any other person if any member of his family is employed in that company or firm or under that person or if he or any member of his family is interested in such matter or contract in any other manner and the government servant shall refer every such matter or contract to his official superiors. This Clause is applicable to all BSNL, employees and in view of this as soon as any BSNL employees becomes aware of the above aspect, he must intimate this to the prescribed authority. For non executive employees this authority is SSA Head/Circle Head/Chief Engineer/Chief Archt./Corporate Office under whom he is posted. For executive employees (at present some of them are called as Gazetted officers), the prescribed authority for this purpose is Circle Head/Chief Engineer/Chief Archt./Corporate Office under whom he is posted.

iii)(a). The company or firm or any other person is not permitted to tender for works in BSNL Unit in which his near relative(s) is (are) posted. The Unit is

defined as SSA/Circle/Chief Engineer/Archd./Corporate Office for non executive employees and all SSA in a circle including SSA/Circle/Chief Engineer/Archd./Corporate Office for executive employees (including those called and Gazetted Officers at present). Therefore, it has been decided by the competent authority that a clause must be added in the tender and other related documents that the tenderer should give a certificate that none of his/her such near relative is working in the units as defined above where he is going to apply for tender/work. In case of proprietorship firm certificate will be given by the proprietor, for partnership firm certificate will be given by all the partners and in case of limited company by all the Directors of the Company any breach of these conditions by the Company or firm or any other person, the tender/work will be cancelled and earnest money/security deposited will be forfeited at any stage whenever it is so noticed. The department will not pay any damages to the Company or firm or the concerned person. The company or firm or the person will also be debarred for further participation in the concerned unit.

b) In respect of cases where the tender notice/work related orders have been issued and are waiting for submission, the concerned unit should issue corrigendum for inclusion of above clause. However, where tender/work related documents have been opened and are waiting for finalisation the certificate may be taken from the Company or firm or any other concerned person giving details of the relatives employee in the jurisdiction of the tender. The company or firm or the person concerned will not be debarred in this case but his work will be kept under proper watch to avoid any future complaint. Further the relative will not be involved in the decision making and execution of the work.

c) Where the tenders or the works are already in operation (or awarded) the tenderer may be requested to give details of relatives employed in the jurisdiction of the tender. In such cases, the tenderer will be allowed to continue the work but special watch may have to be kept about his performance to avoid any complaint. The concerned relative will not be involved in execution and settlement of claims of the contractors.

d) The format of the certificate to be given is "I son of R/o hereby certify that none of my relative(s) as defined in the tender document is/are employee in BSNL Unit as per details given in tender document. In case at any stage, it is found that the information given by me is false/incorrect, BSNL shall have the absolute right to take any action as deemed fit/without any prior intimation to me." Rule 4(3) of the CCS (Conduct) Rules

Rule 4(3): No government servant shall in the discharge of his official duties deal with any matter or give or sanction any contract to any company or firm or any other person if any member of his family is employed in that company or firm or under that person or if he or member of his family is interested in such matter or contract in any other manner and the Government servant shall refer every such matter or contract to his official superior and the matter or contract shall thereafter be disposed of according to the instructions of the authority to whom

the reference is made."

8. A bare perusal of Clause (iii)(a) makes it obvious that the petitioner would be rendered disqualified on the basis that his brother is employed with the BSNL in the SSA in which the work is to be executed. Not only this, he would be debarred for further participation in the unit. We are of the considered opinion that Clause 4 of the Tender Notice is clearly unconstitutional and violates the mandate of Article 14 of the Constitution of India. It is not disputed that the brother of the petitioner is working merely as a Clerk with BSNL. It is also not disputed that the decision is to be taken by the General Manager, SSA, Patiala. It is inconceivable that the brother of the petitioner would be able to influence such a high ranking Officer. Apart from this, it is to be seen that under Rule 4(3) of the CCS (Conduct) Rules, a government servant is restrained from dealing with any matter or giving sanction to any contract in favour of his relatives. In such circumstances, the matter has to be referred to the officials superior to the government servant. Clause 4 of the Tender Notice as also Clauses (iii)(a) of the Policy are contrary to the mandate of Rule 4(3) of the CCS (Conduct) rules. For this added reason, Clause 4 of the tender notice cannot be sustained. In our opinion, Clause (ii) of the policy is in consonance with Rule 4(3) of the CCS (Conduct) Rules. Clause (iii)(a) is clearly contrary to Clause (ii) which provides that the concerned employee shall refer the tenders/contracts of his near relatives to be dealt by his/her superiors. Rule 4(3) of the CCS (Conduct) Rules and Clause (ii) of the Policy (Annexure P2) do not put a complete ban on the participation of the relatives. On the other hand, Clause (Hi) of the aforesaid policy disqualifies the relative of an employee from even making the tender. This Clause is clearly contrary to Rule 4(3) of the CCS (Conduct) Rules and Clause (ii) of the Policy (Annexure P2). Apart from this, there is no nexus with any object sought to be achieved. Anxiety of the policy makers is to provide for a procedure which would rule out the possibility of tenders for work being accepted, for consideration other than the merits of the participants. We are of the opinion that sufficient safeguards have been provided to ensure that the relatives of the prospective contractors do not gain any undue advantage. Clause (ii) of the Policy provides a complete scheme as to the Officer to whom the reference is to be made. In case of non-executive employees, reference has to be made to the SSA/Circle/Chief Engineer/Archd./Corporate Office under whom he is posted. Therefore, we have no hesitation in holding that Clause 4 of the Tender Notice is violative of Article 14 of the Constitution of India.

Although we have examined the matter on principle, strictly speaking, it was not necessary to do so in view of the judgment of the Division Bench of the Himachal Pradesh High Court rendered in C.W.P. No. 122 of 2003 decided on 24.5.2003. In the aforesaid judgment, it has been held that Clause (in) is void as it has no nexus to the object sought to be achieved. In the aforesaid judgment, it has been observed as under:-

"A Division Bench of this Court (as noticed in the very beginning) in the case of

Narinder Kumar Sangar v. Union of India and Anr., C.W.P. No. 33 of 1995 had the occasion to deal with a similar impugned stipulation for the enlistment of contractors. The impugned Clause in that advertisement reads as under;-

"If his/her close relative is employed in any capacity in the SSA where registration is sought."

By the aforesaid impugned Clause in the advertisement in question, all such persons were barred from applying for enlistment as contractors, if any one of their close relatives, were employed in any capacity in the SSA (a unit of BSNL) where they had sought registration. Dealing with the illegality, validity and the correctness of the aforesaid impugned Clause, the Division Bench observed as under:-

"The above sub Clause(s) of Clause 6 of the guideline is not only void, but also has no nexus to the object sought to be achieved. This is arbitrary in as much as a person who is holding a post of Class III or Class IV category, if he is related to a person, will not be able to influence the high level authority in awarding the contracts."

After making the aforesaid observations, the Division Bench clearly held that the aforesaid impugned Clause being arbitrary deserved to be quashed and accordingly the Clause was quashed. A very pertinent observation was made in the aforesaid judgment to the effect that the quashing of the aforesaid Clause would not mean that the authority competent to call for tenders for the award of contracts would have no right or discretion to reject any tender, if it was found that the authority competent to award the contract was being influenced by any employee of the Department.

The aforesaid judgment of the Division Bench has assumed finality as we are told, the respondents did not file any appeal against this judgment in the Supreme Court. Apart from the aforesaid judgment having assumed finality and the declaration of law made therein, which has binding effect upon the respondents, we once again take this opportunity of reiterating that indeed a prospective tenderer cannot be barred at the very threshold from participation in a tendering process, if he is otherwise fully eligible on all counts, merely on the ground that someone or the other related to him is employed in one capacity or the other in a particular BSNL Unit, which had called the tenders. Disqualifying or barring of such prospective tenderer per se only on this ground, in our considered opinion, is a highly arbitrary act, without there being any nexus with the object sought to be achieved. What is sought to be explained in the reply filed on behalf of the respondents that what is also possibly discernible from a reading of a communication dated 11th September, 2002 does appear to be a laudable objective and that is to ensure that the process of tendering is kept clean and untempered by any corrupt or extraneous consideration but that does appear to have been fully taken care of, appropriately guarded and properly protected in Clause (ii) supra, whereby it does appear that any government

servant, based on CCS (Conduct) Rule 4 is not permitted to deal with any matter, which may come before him in the course of discharge of his official duties where any relative or other person interested is directly or indirectly involved and it is accordingly enjoined upon every such Government Servant to report such a matter to his superior. In the face of this protection and safeguard, debarring any prospective tenderer from participating in the tendering process only on the ground of some of his relatives or the other, being employed in one capacity or the other runs counter to the aforesaid stipulation and in any case has no nexus with the object sought to be achieved. There can be instance galore where a relative of a prospective tenderer is employed either in a very inferior post, say a Class-IV or Class III post in a large organisation and without any consequence whatsoever and even in such a situation, the prospective tenderer has been debarred from participation in the tendering process. By a sweeping process of debarring, all such prospective tenders cannot be disqualified from participation in the tendering process. Of course, each case can be viewed and dealt with on its own merits. Not only the aforesaid, whenever a tendering process gets underway and decision is taken by the competent authority, whether to award or not to award the work to a tender, such decision is taken at the highest level. Each case would depend on its merits to find out whether in such a decision taking process that particular employees who might have been related to the tenderer had any influencing role to play in the decision making process. As each case would depend on its own merits, each such case can be dealt with properly, but right from the threshold barring a prospective tender only on the ground of his relative being employed would be patently in violation of Article 14 of the Constitution of India, the same being a wholly arbitrary exercise of administrative power."

9. We are in respectful agreement with the aforesaid observation of the Division Bench. At this juncture, we may notice that by order dated 18.8.2003, a Division Bench of this Court has directed that the petitioner be permitted to participate in the tender.

Consequently, the petitioner has submitted the necessary documents for participation in the tender.

In view of the foregoing discussion, we allow the present writ petition and direct the respondents to consider the tender of the petitioner on merits, in accordance with law.

Petition allowed. No costs.

Sd/-

S.S. Grewal, J.