

(2013) 01 RAJ CK 0188
In the Rajasthan High Court
Case No : Civil Writ Petition No. 737 of 2013

M/s. Star Constructions

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 22-01-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)(g), 301

Citation : (2013) 3 CDR 1145 : (2013) 2 RLW 1469 : (2013) 1 WLN 514

Hon'ble Judges : Vijay Bishnoi, J;Dinesh Maheshwari, J

Bench : Division Bench

Advocate : Sanjay Mathur, Mr. G.R. Bhari and Mr. S.K. Poonia, for the Appellant;

Final Decision : Dismissed

Judgement

Dinesh Maheshwari, J.—The petitioner, said to be a proprietary concern and a B-Class contractor with the Public Health Engineering Department of the Government of Rajasthan, has filed this writ petition seeking to question the provisions contained in the Public Works Financial and Account Rules ["the PWF&A Rules"] insofar they put restrictions on a contractor in submitting tenders for the works in the Circle where his near relative is posted with the department. The petitioner also seeks to question the order dt. 10.01.2013 (Annex. 1) whereby the Executive Engineer, Public Health Engineering Department, District Rural Division, Chittorgarh has debarred it from participation in the tender process in future in the Circle, with reference to the questioned provisions and with reference to the facts that the brother of the proprietor of the petitioner firm is working on the post of UDC in the Circle and an Anti Corruption Bureau matter is pending. The provisions contained in Clause No. 1.19 of general conditions for enlistment of contractors and Condition No. 41 of the general conditions of contract in PWF&A Rules, as sought to be questioned in this writ petition, could be noticed at the outset as under:

1.19 Work not to be allotted to near relatives: Contractors who are near relatives of the staff (Engineering, accounts, ministerial & subordinate etc.) will not be

allowed to tender for works in the jurisdiction of officer responsible for award and execution of contract where their near relative is working.

Note: Near relative will include wife, husband, parents, Grand parents, Children and Grand Children, Brothers and Sisters, Uncle, Aunts and Cousins and their corresponding in laws.

41: Near Relatives barred from tendering

The Contractor shall not be permitted to tender for works in Circle, in which his near relative is posted as Divisional Accountant or as an officer in any capacity between the grades of the Superintending Engineer and Assistant Engineer (both inclusive). He shall also intimate the names of persons, who are working with him in any capacity, or are subsequently employed by him and who are near relatives to any Gazetted Officer in the Organization/Department. Any breach of this condition by the Contractor would render him liable to be removed from the approved list of contractors of the Department. If such facts is noticed (a) before sanction of tender, his offer shall be declared invalid and earnest money shall be forfeited, (b) after sanction of the tender then the tender sanctioning Authority may at his discretion forfeit his earnest money, performance guarantee, security deposit and enlistment deposit and the work/remaining work may allot to any registered contractor on the same rates as per rules.

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

Seeking to question the clauses/conditions aforesaid, it is contended on behalf of the petitioner that a complete procedure is prescribed under the PWF&A Rules ensuring transparency in regard to the process of invitation of tenders and their acceptance; that the tenders are finalised by a High Powered Committee before assigning the work to the contractor and the rates are finalised according to the Basic Schedule of Rates as applicable in the concerned department; that the work is supervised by the senior technical Officers and the amount is released for the work done after the approval from the site engineer/technical officer; and that the audit is also carried out. Therefore, according to the learned counsel for the petitioner, the provisions like those contained in Clause No. 1.19 and Condition No. 41 (supra) remain absolutely arbitrary, having no nexus with the object sought to be achieved. It is submitted that the questioned clauses are directly violative of Articles 19(1)(g) and 301 of the Constitution of India insofar they impose unreasonable restriction on the exercise of fundamental right to practice any occupation, trade or business, as available to the citizens. It is also submitted that even if the Department could impose some restriction or condition as regards award of contracts, the same ought to be fair and reasonable whereas the conditions, as imposed, are absolutely arbitrary and unreasonable inasmuch a person cannot be debarred from working as a contractor merely for any of his relative being employed in the department concerned or for that matter, being

posted in the particular area related with the contract. It is also suggested that there could be the cases where the employee, even if posted in some other area, may be transferred to an area where his relative had already been awarded a contract. Thus, according to the learned counsel for the petitioner, the questioned conditions are neither workable nor justified.

2. After having given thoughtful consideration to the submissions made by the learned counsel and having examined the material placed on record as also the Public Works Financial and Accounts Rules, we have not an iota of doubt that this writ petition remains totally baseless and does not merit admission.

3. So far the matters concerning the State largesse's and more particularly, the Government contracts are concerned, it needs hardly any emphasis that they relate directly to the public money and property. The Government and its agencies, for the purpose of entering into contract are, obviously, required to provide adequate safeguards so as to ensure proper use of the public money as well as appropriate execution of the public utility works. Thus, various provisions have been made in the PWF&A Rules as regards eligibility of the persons intending to contract, their liability for compensation, the time limit for execution of the work, payment on specific certification, etc. In that continuity, the provisions have also been made putting restrictions on subletting of contracts and even on change in the constitution of the firm when the contract has been awarded; and in that very continuity, the aforesaid clauses have been incorporated putting person-and-area-specific limited restriction on contracting.

4. It is noticed that the above referred Clause 1.19 is contained in Section-I of Appendix-XVI to the PWF&A Rules laying down general conditions for enlistment of contractors in Public Works Departments; and it is provided that the contractor, who is near relative of staff, would not be allowed to tender for the works in the jurisdiction of the Officer responsible for award and execution of the contract where his near relative is working. The term "near relative" has been specified as including the persons standing in direct relationship, whether that of blood relation or of matrimonial relation.

5. Clause 41 is contained in Appendix-XI of PWF&A Rules that carries the General Conditions to be incorporated, by and large, in every contract and therein, again, it is provided that the contractor would not be permitted to tender for the work in the Circle where his near relative is posted as Divisional Accountant or as an officer in between the grades of Superintending Engineer and Assistant Engineer (both inclusive). It is also enjoined upon the contractor to inform about the persons working with him or substantially employed by him, who are near relatives of any gazetted Officer in the department concerned. The term "near relative" has been specified in this clause too with reference to the blood or matrimonial relations.

6. The purpose behind the aforesaid clauses/conditions is not far to seek. They are essentially to lay down the basic rules for maintaining financial discipline as

also to ensure transparency in the functioning of the department while dealing with the public contracts and thereby, with public money. They are also to ensure fairness in the activities of the State and Public Authorities and to guard against any likelihood of aversion or affection. Not much dilatation appears requisite on the requirement of adherence to such basic principles of transparency in public dealings. In the matters of public contracts and thereby, public money, if the respondents have provided for such restrictions which guard against any likelihood of any influence coming into play in the decision-making process and thereby obviate any likely impression of bias, favoritism or nepotism, in our view, the provisions cannot be faulted at.

7. True it is that per Clause (g) of Article 19 of the Constitution of India, all citizens have the fundamental right to practice any profession or to carry out any occupation, trade or business but then, exercise of such fundamental right too is conditioned by sub-clause (6) of Article 19 which permits imposition of reasonable restrictions. However, and so far the matter of the present nature is concerned, the petitioner has not been prohibited from carrying on its business activity i.e., of the contracts it wishes to enter into with the respondents. The only restriction is against seeking contracts in the specified area i.e., the Circle where any near relative of the contractor, falling within defined categories, is serving. The fundamental right conferred by Clause (g) of Article 19 of the Constitution of India to trade or business is not affected at all. The validity of the restriction so imposed could only be tested, if at all, on the anvil of Article 14 of the Constitution of India i.e., if the restriction is arbitrary, unreasonable or excessive.

8. The question of reasonableness of any restriction cannot be examined or visualised in abstract but is required to be examined with reference to the nature of job or operation; and vis-a-vis the object sought to be achieved. As observed hereinbefore, the matter concerns the award of Government contracts related with the public works while allowing competitive bidding. In such a matter, if the contractor is not permitted to tender in a particular area (referred as "Circle" in Clause 41) in which his near relative is posted as Divisional Accountant or as senior engineering staff, it is but apparent that the idea and intention is to guard against any such eventuality which may give rise to even a suspicion about any bias creeping in. Clause 1.19 has the effect essentially of providing that the contractor whose near relative is working in the area concerned, would not be permitted to tender for the works in the jurisdiction of the officer responsible for the award and execution of the work where such near relative is working. The class of persons covered by restrictions has also been specified viz., the persons having direct blood or matrimonial relationship and else, it is not a generalised restriction. The restriction clauses even otherwise operate in a limited sphere; and in our view, provide minimum safeguards for the purpose of dealing with public money. We are unable to find any arbitrariness or unreasonableness in the questioned clauses so as to declare them illegal or invalid.

9. The suggestion about the likelihood of any particular employee being transferred to a particular area where his relative is already working is hardly of any bearing on the validity of questioned provisions. The respondents have provided for sufficient checks at the entry point i.e., at the inception of the contract so as to ensure reasonable transparency and to avoid any likelihood of favoritism. Secondly, as to how any particular post is to be manned and how any further safeguard is to be provided are all the matters required to be left for consideration of the Authorities concerned. Suffice is to observe for the present purpose that what is sought to be achieved by the clauses is of avoiding the possibility of any influence being exercised and of maintaining fairness and transparency in the dealings of the State. The restrictions imposed are neither arbitrary nor unreasonable; and cannot be considered offending any of the constitutional provisions.

10. The petitioner has attempted to question the communication (Annex. 1) but has not indicated all the facts of the matter. However, a perusal of the communication (Annex. 1) makes out that the denial of awarding of the contract in the particular Circle where the brother of the proprietor of the petitioner firm is said to be working as Upper Division Clerk, has the basis in a pending Anti-Corruption Bureau case. The contents of the questioned communication Annexure-1 could also be usefully noticed as under:

11. In the given fact situation, where it is indicated that there is a matter pending with the Anti Corruption Bureau and the brother of the petitioner-firm is working in the Circle as Upper Division Clerk, in our view, the department is justified in declining to enter into any further contractual relation with the petitioner-firm, particularly in the given Circle. It is also noticed that even in the communication aforesaid, the department has made it clear that the previously allotted works would remain unaffected, looking to the exigencies and the State interest.

12. In the totality of the circumstances, we are unable to find any fault, infirmity or short-coming, whether in the questioned clauses/conditions or in the communication Annexure-1. In the result, the writ petition fails and is, therefore, dismissed.