SUPREME COURT OF INDIA

Comptroller and Auditor General

Vs.

Kamlesh Vadilal Mehta

C.A.No.11458 of 1995

(V. N. Khare, Ashok Bhan and S. B. Sinha JJ.)

21.01.2003

JUDGEMENT

V.N.Khare, CJI.

1. The respondent herein, is a sole proprietor of a Chartered Accountant firm in Ahmedabad, Gujarat. One of the statutory functions assigned to the appellants herein is to get the accounts of public sector undertakings and Governments concerns audited by the Chartered Accountants. The audit work of the Government and public sector undertakings is assigned to only those Chartered Accountant firms which are enrolled on the panel maintained by the appellant. In May, 1981, the appellant through an advertisement invited applications from the firms of the Chartered Accountants for the purpose of empanelment for audit of Government companies. The aforesaid advertisement stipulated that excepting the States of Orissa, Jammu and Kashmir, Assam, Manipur, Meghalaya, Nagaland and Tripura, only the partnership firm of the Chartered Accountants were eligible for enrollment on the panel and the proprietary firms of the Chartered Accountants were made ineligible either to apply or to be empanelled for being assigned audit work of the Government companies. However, in several States the proprietary firm based on those States was made eligible for being brought on the panel for audit work of Government companies and concerns. It would be appropriate at this stage to extract the relevant Clause 3 and sub-clause (d) of Clause 4 to the advertisement, which runs as under:

> "3. Particular reference is invited to Instructions 1 to 4 for filling up the form and the Footnote to Co. 1. Proprietary Firms based in the States listed therein only need apply".
>
> 4(d). The pro forma should be signed by a partner on behalf of the firm ... proprietary firms of F.C.As with registered offices in the following States only are being considered for audits in those States : Orissa, Jammu and Kashmir, Assam, Manipur, Meghalaya, Nagaland, Tripura" (Emphasis supplied)

The respondent herein submitted an application for enrolment on the panel, but the same was rejected on account of the fact that his firm was not a partnership firm, but a proprietary concern. Aggrieved, the respondent filed a writ petition under Article 226 of the Constitution challenging the exclusion of the proprietary concerns from their empanelment as being discriminatory, arbitrary and violative of Article 14 of the Constitution. One of the reliefs prayed for runs as under :

"10. That the petitioner, therefore, prays that the Honourable Court may be pleased to issue in appropriate writ, order or direction declaring and setting aside the policy of the respondent which excludes the proprietary firm of F.C.As with registered office in the States other than the States of Orissa, Jammu and Kashmir, Assam, Manipur, Meghalaya, Nagaland and Tripura as mentioned in the advertisement at Annexure-B as unconstitutional, illegal, null and void and restraining the respondent permanently from adopting the said policy and not considering the firm of the petitioner for the purpose of empanelment as per Annexure-B."

2. The said writ petition came up for hearing before a Learned single Judge of the High Court of Gujarat, who, by a judgment and order on 26-4-82 allowed the writ petition. The learned single Judge was of the view that the policy followed by the appellant was unreasonable and that such sub-classification had no real nexus with the objects sought to be achieved. The learned single Judge while holding that the exclusion of proprietary concern from being enrolled on the panel is discriminatory issued following direction:

". . . . . Hence, it would be just and proper to direct the respondent to include the name of the petitioner in the panel as stated above. It is also made clear that even in future as and when the respondent issues public notices inviting applications for empanelment in connection with entrustment of audit work of Government companies, the respondent is enjoined to see that it does not insist in continuing the artificial sub-classification of chartered accounts who are carrying on profession as Chartered Accountants in partnership . . . . . with costs."

3. The appellant filed Letters Patent Appeal before the Division Bench of the High Court, but the same was dismissed. It is against the said judgment and order of the High Court, the appellant is before us.

4. It was first contended by learned counsel for the appellant that the appellant's decision to invite the applications exclusively from partnership firms was a matter of policy and, therefore, beyond the pale of review by this Court. This argument has no substance. It must be borne in mind that there is difference between framing of a policy which is an administrative function and an exercise of statutory functions. The function of the Comptroller and Auditor General in respect of appointment of auditors for Government corporations and public sector undertakings is statutorily assigned under the Companies Act and it cannot then be urged that the Comptroller and Auditor General is free to act untrammelled and unreasonably. Whenever the CAG appoints an auditor for audit of

Government corporations and public sector undertakings under the Companies Act, he exercises statutory powers under the Companies Act and such an exercise of power manifestly is a statutory function and not a matter of policy.

5. It was then contended by the learned counsel for the appellant that the policy of empanelment of partnership firm of Chartered Accountants by the appellant was on account of the fact that the partnership firm of Chartered Accountants have been found more efficient and in better position to carry out the statutory audit in view of the continuity, accumulation of experience and facilitating adherence to time schedule for completion of audit work than a sole proprietary firm of the Chartered Accountants and, as such, the partnership firm of the Chartered Accountants was a class in itself and a valid classification for the purposes of Article 14 of the Constitution. It was also urged in this context that the said classification would be seen to pass the test of reasonableness on account of the intelligible differentia between partnership firms on the one hand, and proprietary concerns on the other in terms of factors such as size, flexibility and continuity. It was also submitted that the said differentia bore a reasonable nexus to the object which was sought to be achieved by the impugned advertisement, namely the efficiency and effective auditing of Government companies.

6. To substantiate the point, reference was made to such instances as the ability of one partner to substitute or supplement another in an exigency; the continuity of the partnership firm normally assured upon the demise of one of the partners, if not in law then in practice; the inability of a proprietary concern to meet the audit deadlines stipulated by Sections 210(2)(b) and 619A of the Companies Act; and the usual practice of private companies relying on partnerships, largely to the exclusion of proprietary firms.

7. The aforesaid argument raises the question as to whether the sub-classification of partnership firms stands the test of reasonableness on the touchstone of Article 14.

8. It is not disputed that the Chartered Accountants having qualification are eligible for being considered for entrustment of audit work for public sector undertaking or the Government concerns. Once it is accepted that these Chartered Accountants are qualified and eligible for the audit work and also are eligible for being brought on the panel of audit work for public sector undertakings and Government concerns, there appears no valid reason why the impugned advertisement has created a sub-classification from the general class of eligible Chartered Accountants which relates to smaller group of Chartered Accountants who form partnership concerns only.

9. The appellant insists that it is only a smaller group of Chartered Accountants firms that would be eligible for being brought on the panel for audit of public sector undertakings or Government concerns. The audit work of public sector undertaking, no doubt, is to be done by the qualified and efficient Chartered Accountants. Once a person is qualified, experienced and efficient, it is difficult to understand how he could be discriminated against only for the reason that he has chosen to act alone in the professional career and has not been able to form a partnership firm. The efficiency, as pointed out by the High Court, springs from the personal experience, proficiency and personal capacities. It is, therefore, not possible to link

these characteristics and professional acumen to a person or persons in a firm alone. A single individual as an auditor in a proprietary concern can have such characteristics and professional acumen by himself and also through the assistance of experienced auditor who could be in his services as efficient as any partnership firm. It is often seen in many cases that some of the partners of the partnership firm are sleeping partners with no professional duties to discharge. A partnership concern is not a legal entity like company; it is a group of individual partners. In a partnership firm, it is the partner who will be assisted in carrying out the work but quite remains the eligible Chartered Accountant. It is the same situation as in a proprietary concern where a Chartered Accountant would be carrying on audit work all-in-one. Merely because some of the Chartered Accountants have formed a partnership firm, it cannot be assumed that they become more efficient for carrying out audit work than the individual Chartered Accountant who forms proprietary concern. It is, therefore, evident that the appellant himself erroneously assumed that the partnership firms are more efficient than the proprietary concern in the matter of audit of accounts of the public sector undertakings or of the Government concerns.

10. A useful analogy may be drawn with the experience of the legal profession. It could not be justifiably argued that the quality of the legal services rendered by a senior advocate is compromised by virtue of the fact that he is the sole and ultimate repository of knowledge and responsibility in a given matter. Nor could it reasonably be said that a client would be put to unnecessary risk by being compelled to sink or swim with the solitary lawyer. Personal experience and integrity are the essential attributes of every successful professional, and they are the virtues that win the day for the client, whether it is a corporation seeking an audit of its accounts or an individual seeking a remedy in Court. A clear line of command is also known to prevent a diffusion of responsibility. As such, a Chartered Accountant cannot be discriminated against merely because he elected to invest his professional expertise in a proprietary concern, rather than to express it in the form of a partnership firm.

11. In any event it would not follow as a categorical imperative that a partnership is better placed for auditing Government concerns simply because "two minds are better than one". There could be several instances when a partnership firm, which is ostensibly an association of contributing individuals, is in actual fact found to consist of a solitary working partner who may for the purpose of securing tax benefits, or for other reasons, choose to form an alliance with sundry uninterested persons, or "sleeping partners". In such a scenario it would be fallacious to attribute a greater capacity to partnership firms than to proprietary concerns simply on account of the nomenclature or numbers involved.

12. For the aforesaid reasons the classification between proprietary and partnership firms is arbitrary and unfair, and accordingly falls on the anvil of Article 14 of the Constitution.

13. It was also urged that the proprietary firms of Chartered Accountants have been allowed empanelment in certain States namely, in the States of Orissa, Jammu and Kashmir, Assam, Manipur, Meghalaya, Nagaland and Tripura out of necessity and exigency and it would be not in public interest to allot audit work of Government concerns to partnership firms from

outside the State and, therefore, there was no discrimination involved in empanelment of proprietary concern in such States.

14. We find this submission inconsistent with the earlier submission that the proprietary concern although qualified are not suitable for considerable task of auditing public sector enterprises. Either proprietary concerns are suitable and, therefore, eligible, or they are not. If the proprietary concern of Chartered Accountants are really inefficient, there appears no reason why they have been made eligible to audit the Government and public sector undertakings in the aforesaid States. Further, if there was a paucity of partnership firm of Chartered Accountants in a given State, the services of partnership firm who were said to be efficient based on in other States could be taken. Under such circumstances, we are of the view that the impugned notification does not stand the test of Article 14 of the Constitution.

15. For the aforesaid reasons, we do not find any merit in the appeal. It fails and is accordingly dismissed. There shall be no order as to costs.

Appeal dismissed.