HIGH COURT OF MADHYA PRADESH : JABALPUR

WRIT PETITION No.15826/2014

Community Action & others

Vs.

State of Madhya Pradesh & others

Shri Vipin Yadav, learned Counsel for the petitioners.

Shri Ravish Agrawal, learned Advocate General assisted by Shri Deepak Awasthy, learned Govt. Advocate for respondent No.1

Shri R.N. Singh, learned senior Counsel assisted by Shri A.J. Pawar, learned Counsel for respondent No.2.

Shri Manish Dutt, learned senior Counsel assisted by Shri Nishant Dutt, learned Counsel for respondent No.3.

Present : Hon'ble Shri Justice K.K. Trivedi

O R D E R

(31/03/2015)

The petitioners, four in number, have called in question the Request For Proposal (herein after referred to as 'RFP') for integration, operation and management of life saving systems namely Sanjeevani 108, Janani Express, Medical Mobile Units (herein after referred to as 'MMU'), Health Helpline and Doctors Express Service in Madhya Pradesh, on the ground that with malafides such a policy is made to facilitate individual and to debar those, who are already operating in the aforesaid fields for last many years. More particularly the eligibility criterias indicated in the notice inviting proposal so issued by the respondents is called in question on various grounds. Mainly it is contended by the petitioners that they are engaged in providing the said service and are operating within the State of Madhya Pradesh right from the year 2006-2007. The scheme for providing the medical assistance is formulated

in three groups namely Sanjeevani 108, which is the scheme for emergency medical ambulance service. The second scheme is known as Janni Express where the ambulance service is provided to the pregnant women. The other one is mobile medical unit under Deendayal Chalit Asptal Scheme. The petitioners No.1, 2 and 4 are engaged in running the MMU since 2007 and petitioner No.3 is running the MMU since 2006. The work orders were issued to them by the competent authority of the State.

2. It is alleged by the petitioners that since the respondent No.3 is engaged in Sanjeevani 108 Scheme, while the National Rural Health Mission Scheme was redesigned, with an ulterior motive such conditions were prescribed in the eligibility criteria that the persons like petitioners may not be able to take part in the said proceedings and ultimately the benefit would be extended to one particular company like respondent No.3. It is the case of the petitioners that with this ulterior motive the entire scheme has been formulated and circulated on 12.09.2014. It is the case of the petitioners that even when on earlier occasion proposals were invited, objections were raised by the persons like petitioners and it was pointed out that the scheme is not to be made in the manner to favour somebody and individual company or society. The representations were so made by the petitioners on 03.02.2014 and 07.02.2014.

3. Instead of deciding the representations of the petitioners where they have already disclosed the facts that intention of the respondents was to amalgamate all the schemes and to make a unified scheme with an ulterior motive, yet by notification of expression of interest, proposal was indicated that the Government of Madhya Pradesh was willing to integrate all the existing schemes under one call center and one toll free number to provide

service in health care services and patient transport through public private partnership. Certain conditions were prescribed in the said memorandum in reference to which raising the objections, representations were again filed by the petitioners on 14.03.2014 and detailed representations were made on 25.03.2014 and 15.05.2014. Instead of considering the said representations in rightful manner, the RFP was circulated on 12.09.2014. Prior to this since the bids of the petitioners were already received by the respondents, they were aware of the financial status of the petitioners and to facilitate only one, they have prescribed such conditions of eligibility in the said proposal that now the petitioners cannot take part in the tender proceedings. Even they cannot extend their offer. The very object of making such scheme is to facilitate the respondent No.3 and, therefore, present writ petition is required to be filed calling in question the validity of such scheme. It is, thus, contended that in fact such scheme is bad in law and is liable to be quashed. The reliefs to the effect are that request for the proposal dated 12.09.2014 issued by respondent No.2 be quashed and any other relief may be granted to the petitioners.

4. While entertaining this writ petition on 15.10.2014, an interim stay was granted by this Court to the effect that offers if received, be opened but shall not be finalized.

5. By filing the return the respondent No.1 has very categorically contended that the allegations of malafides alleged against the respondents are not acceptable as are not founded on any evidence or supporting material. In fact the return of respondent No.1 is nothing but the return of respondent No.2 as the return of respondent No.2 has been adopted by the respondent No.1-State. In the return of respondent No.2 while denying all such claim made by the petitioners, it is contended that when the scheme was

floated on earlier occasion, work was assigned to different units, complaints were received that the work was not satisfactory. It is specifically contended that in particular districts of Mandla, Dindori, Shahdol, Sidhi and Umariya, out of 123 MMUs, on enquiry the District Collectors have found that 23 MMUs were not discharging proper duties and they were closed after conducting detailed investigation. The policy decision by the respondents was taken in this respect for providing integrated health service after taking into consideration the past experience in providing such service. The scheme is so made that there is a central monitoring, better coordination amongst the doctors, health care workers and the service providers. There is an aspect of providing the health services at village level and for that purpose, schemes have been started providing the auxiliary nurse, midwife and Asha workers at the village level. To coordinate between such workers and the mobile health units with the aid of modern technology, complete organized mechanism is provided under the new scheme. With this object the scheme is made.

6. It is the contention of respondents that there are vast development changes in the old scheme than the new scheme and this being a policy decision of the State for the benefit of people at large, there is no arbitrariness in making such policy. It is the contention of the respondents that every care is taken to provide participation in the said scheme and there is no such condition prescribed in the scheme which debars the existing service providers to take part in the proceedings. The only aspect which is prescribed is that looking to the services, target to be achieved and the coverage, to ensure that such life saving services may continue properly, there are certain eligibility condition for participation of the service providers. The conditions so prescribed still make the scheme applicable for the service providers like petitioners as they may take

part in the same in the manner indicated under the eligibility criteria. As it is specifically provided that an applicant may be a single entity, a joint venture company or consortium of entities formed for this purpose with a valid Memorandum of Understanding (MOU) duly executed, if the petitioners so wish, they may take part in the said proceedings. Instead they have not taken part in the said proceedings deliberately. Now therefore, the petitioners cannot challenge the validity of the scheme. The other conditions mentioned are not such that may not be achieved for large number of services to be provided by the service provider. Looking to the need of the day, the scheme was required to be improved and the same has been done by the respondents within their competence and as such challenge to the action taken by the respondents is misconceived and the writ petition is liable to be dismissed.

7. The respondent No.3 has filed an independent return contending inter alia that respondent No.3 is operating and providing ambulance services not only in one place but is operating in seven States of country successfully and has experience in providing such services. It is not that the respondent No.3 is to be favoured and, therefore, the policy has been made in this respect by the respondent-State. The inception of respondent No.3 has taken place in the year 2001 and for all these years the respondent No.3 is providing such services. It has the infrastructure and is in constant touch of latest technologies in the matter. In fact the respondent No.3 is the pioneer in the field of coordinated emergency response system in India. Thus, to say that respondent No.3 is being favoured by making such an arbitrary policy is incorrect. While replying to the allegations made by the petitioners, the respondent No.3 has very categorically contended that it is Not for Profit Society, registered under the relevant Act and is established for social welfare, rather commercial. It has more than

9000 ambulances in different States and as such it is wrong to say that to extend the helping hand to respondent No.3, the State has made such a policy and thus the respondents No.1 and 3 are playing hands in gloves. The rejoinder is filed by the petitioner but much or less the same situation has been explained. Except that it is alleged that the respondents have failed to explain the rational behind the impugned eligibility conditions contained in the RFP.

8. Heard learned Counsel for the parties at length and perused the record.

9. It is vehemently contended by learned counsel for the petitioners that when initially the scheme was made for providing such services, the requirements and eligibilities criteria were fixed by the respondent No.2. Since the petitioners were found eligible, work orders were issued to them in the year 2006 and 2007. Their work and performance has been appreciated by the authorities of respondents as is certified by them. There are no complaints against them from the public. All of a sudden what was the need of making such a policy where the eligibility criterias are provided in such a manner that the petitioners would not be in a position to take part in such tender proceedings and as virtually nobody in the entire State would meet out such criteria the work would be granted to an entrepreneur of other State. This being a calculated method of keeping the petitioners away from participation in the tender proceedings, in fact in arbitrary manner with malafide intention, the policy has been made, therefore, the same is bad in law.

10. The next submission of learned Counsel for the petitioners is that the job as was assigned to the petitioners is being done on a reasonable cost and expenses. Whereas,

to oblige an outsider, the costs and expenses are so prescribed in the policy that a huge amount out of the public exchequer would be spent for the very same job which the petitioners are performing at a very low costs. This being so, the allegations of malafide are made out because no explanation to such allegations much less satisfactory one has been given by the respondents.

11. Lastly, it is submitted by learned Counsel for the petitioners that instead of areawise function of such scheme, the unified operation from one call center of all the scheme is neither viable nor has succeeded in past. Therefore, the impugned scheme is not in the interest of public at large. The element of public utility is completely overlooked by the respondents while making the unified scheme, that too allegedly in the public interest. As such the policy is liable to be quashed.

12. Per contra learned senior Counsel for the respondent No.2 has submitted that the scheme is purely in the public interest. The object of making scheme itself prescribes that it is only and only for the benefit of public at large. Earlier separate schemes were made and individually were being operated. Now a decision is taken to club them together and to bring under the control of one call center. The past experience was that the rural people were not aware of the necessary unit to provide them immediate medical assistance and sometime instead of calling the appropriate health service provider, they were contacting the other scheme provider, as a result sometime the appropriate health assistance could not be made available to them. Now under the new scheme there would be only one call center and after identifying the need, appropriate service provider would be sent to them.

13. It is submitted by learned senior Counsel that from the past experience the ground level difficulties have been identified and to strengthen the scheme and to make it more viable and fruitful, the unified mechanism is evolved. Since now all the schemes are unified, the costs and expenses increase is invariable and that too when more improved and modern technology is being used. Therefore, the allegation that the cost is increased to favour someone is baseless. It is also contended that for such a scheme if a service provider is to be engaged, naturally the financial status of such service provider matters a lot and, therefore, such criteria of financial eligibility are provided in the scheme. The future expansion and the need of the coming days have to be taken note of as scheme is not made for one time but has to go long way as health care and medical assistance to citizen is the prime consideration of respondents. Therefore, no fault can be alleged in the scheme and as such the present petition is devoid of any merits.

14. Shri Ravish Agrawal, learned Advocate General has submitted that the State Government is alive of the need of the day for the health conditions of the citizens of State. After a thoughtful consideration and research taking into account the past experiences, the new scheme is made. While taking policy decision the State has taken care of existing service providers as well. It is not that such services have to be stopped immediately on executing new contract with the new service provider under the scheme. Though it was not necessary but such is the scope of scheme in clause 1.4 where it is provided that the new service provider has to submit a plan for implementing the scheme in phase manner. A detailed implementation plan to integrate and operate the five services through one call center across all the specified districts of the State, with

their expansion if any, has to be prepared and furnished by the service provider. The service provider would be allowed six months' time to complete the integration, implementation and operation of entire project in all the districts. Operation of Sanjeevani Ambulance would not be discontinued but shall be taken over, in phased manner. Those who are already operating in fields can also participate in proceedings of new contract. Therefore, it is incorrect to say that policy of the State is arbitrary or is made in colourable exercise of powers and thus no case is made out to grant any relief to the petitioners, specially when they have not participated in the proceedings.

15. First of all it has to be examined under what circumstances a policy can be called in question in the Courts of law. The Apex Court in the case of ***Ugar Sugar Works Ltd. vs. Delhi Administration and others, (2001) 3 SCC 635***, has held that a policy made by the State Government is not to be faulted only on the ground it hurts the business interest of a party unless it is established that the policy is based on malafides, unreasonableness, arbitrariness or unfairness etc., as has been held in paragraph 18, which read thus :

> "18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy. In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The Courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such

> policy should have been adopted or not. It is best left to the discretion of the State."

16. On previous occasion also these aspects were looked into by the Apex Court and summarizing all those laws in the case of ***Manohar Lal Sharma vs. Union of India and another, (2013) 6 SCC 616***, the Apex Court has categorically said that in all matters affecting policy the Court do not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. In the case of ***State of Himachal Pradesh and others vs. Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh, (2011) 6 SCC 597***, though dealing with the policy relating to the courses in higher education of Technilogy, it is held that policies are not to be interfered by the Courts as in absence of established malafides, if the Court interfere with such policy decision, it means to restrict the State's constitutional authority and power to frame the policy, specially in such vital areas. In the case of ***Shimnit Utsch India Private Limited and another vs. West Bengal Transport Infrastructure Development Coorporation Limited and others, (2010) 6 SCC 303***, it is held that the Government policy can be changed with changing circumstances and only on the ground of change, the policy is not said to be vitiated. The Government has discretion to adopt different policies, alter or change previous policy to serve the public interest and make it more effective. It should be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice. Summarizing the law in respect of the interference with the policy, the extension of jurisdiction of the Court, the Apex Court summarized in paragraph 49 to 51, which reads thus :

> "49. In the light of the aforenoticed legal position, we shall now examine whether judicial intervention is called for in NIT issued by the State of West Bengal and the State of Orissa for manufacture and supply of HSRP.

Insofar as the State of West Bengal is concerned, the first NIT was issued in the month of July 2003 fixing 6-8-2003 as the last date for submission of tender papers. Pursuant thereto, four bidders participated. The finalisation of the tender process could not take place because of interim order passed by this Court in *Assn. of Registration Plates* and other connected cases. These cases were decided by this Court on 30.11.2004.

50. Of the four bidders, who initially participated in the tender process, one withdrew and as regards Promuk, an objection was raised by Shimnit about their eligibility. Shimnit approached the Calcutta High Court and obtained an interim order from the Single Judge that tender process shall not be finalised. As a matter of fact, due to litigation no substantial progress took place for two years in finalisation of process for which NIT was issued in July 2003 and practically two bidders in the entire tender process remained in fray. In interregnum, considerable number of indigenous manufacturers obtained the requisite TAC from the approved institutions as per the provisions of the 1988 Act and thereby acquired capacity and ability to manufacture HSRP.

51. In the backdrop of these reasons, the State Government seemed to have formed an opinion that by increasing competition, greater public interest could be achieved and, accordingly, decided to cancel first NIT and issued second NIT doing away with conditions like experience in foreign countries and prescribed minimum turnover from that business. Whether the State Government could have changed terms of NIT despite the judgment of this Court in *Assn. of Registration Plates ?* Once a particular matter relating to conditions in NIT has been finally decided by the highest court, the State Government, which was party to the litigation, ought to have proceeded accordingly but, in a case such as the present one, where the circumstances changed in some material respects as aforenoticed, departure from the earlier policy cannot be held to be legally flawed, particularly when there is no challenge to the changed policy reflected in second NIT on the ground of *Wednesbury* reasonableness or

> principle of legitimate expectation or arbitrariness or irrationality. In considering whether there has been a change of circumstances sufficient to justify departure from the previous stance, the Division Bench of the Calcutta High Court recorded a finding that reasons stated by the State Government for departure from the conditions in the first NIT did exist and accepted the contention of the State Government that by increasing the area of competition, greater public interest would be subserved because of financial implications."

Again in the case of ***Michigan Rubber (India) Limited vs. State of Karnataka and others, (2012) 8 SCC 216***, the Apex Court considering the various aspects has discussed the scope of Court's interference in the matter of making policies in paragraph 35, which reads thus :

> "35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonableness. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for

> specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

17. In reference to the above laws, now the laws relied by learned Counsel for the petitioners are to be examined. Heavy reliance is placed on the case of ***Ramana Dayaram Shetty vs. The International Airport Authority of India and others,*** **AIR 1979 SC 1628**. This was a case of tenders for grant of licence to run a restaurant and shop in Airport. The law was discussed and imposition of eligibility condition was held to be proper by the Apex Court. In the case of ***M/s Kasturi Lal Lakshmi Reddy etc. vs. The State of Jammu & Kashmir and another,*** **AIR 1980 SC 1992** much emphasis is put regarding the findings of Apex Court in that case. Since the important aspect was to examine the intention behind the Government action it was held that such an action of the State was in the public interest. Similarly, in the case of ***Sterling Computers Ltd. vs. M/s M & N Publication Ltd. And others,*** **AIR 1996 SC 51**, the grant without calling tenders by the State was called in question. The making of policy was not the scope of challenge. However, the fault of such action was accepted by the concerned and, therefore, such was not debated. In the case of ***Raunaq International Ltd. vs. I.V.R. Construction Ltd. and others,*** **AIR 1999 SC 393,** the grant was challenged by unsuccessful bidder and the same principles were laid-down that except the malafide, challenge to the grant was not available to such tenderer. In the case of ***Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd. and others.*** **(1997) 1 SCC 738**, the law as was made on earlier occasions that every action of State should be founded on public interest, was reiterated.

18. Now in view of the aforesaid law, the submissions made by learned Counsel for the petitioners are to be tested. True it is that on earlier occasion a policy was made by the respondents according to which the petitioners were granted the contract to provide certain services. However, merely because the petitioners were on earlier occasion provided the service contracts, it cannot be said that no change in the policy could be made even when the past experience of the respondents and the need of the day, otherwise required. The previous criteria, which was provided in the proposal circulated on 04.03.2014 also was the same. The objection to this was raised by the petitioners by filing their objections. However, there was no restriction that persons like petitioners even by forming a consortium cannot take part in the proceedings. The formation of such consortium or a group is also prescribed in the definitions prescribed in the memorandum dated 12.09.2014. A bidding consortium or the consortium according to the said definition refer to a group of entities that have collectively submitted the response in accordance with the provisions of the RFP. The eligibility criterias as are prescribed in Clause 1.2 refers to certain conditions, which specifically prescribes that applicant can either be a single party, a joint venture company or consortium of entities formed for this purpose. The other expression of eligibility criteria do not create any bar or hindrance in the way of the petitioners. However, since only in Clause (d) the annual turnover is provided, it appears that the petitioners are aggrieved by this prescription. For the purposes of appreciation, it would be necessary to reproduce the eligibility criteria, which reads thus :

> "**1.2 Eligibility Criteria**
>
> The applicant can either be a single entity, a joint venture company or consortium of entities formed for this purpose with a valid memorandum of understanding (MOU) duly executed. The applicant(s) can either be a Firm,

Company, Society or a Trust fulfilling following conditions are only eligible to apply :

(a) Should have minimum one year of experience as on the last date of bid submission in successful operation and management of at least 25 seats call center based minimum 300 nos. Emergency Medical Ambulance Service, with computer telephony integration and ability to log calls with GIS based GPRS integrated vehicle monitoring system for any Government Service Provider. Operation of these 300 nos. emergency medical ambulance in a year may be cumulative of multiple sites/orders.

(b) Bidder should not have been convicted by any court of law for any criminal or civil offences either in the past or in the present. In case of a consortium, the members should not have been declared bankrupt in the past.

(c) Should not have been black listed in the past or in the present by any Central/State/Public Sector undertaking in India.

(d) Should have at least 50 crore of average annual turnover in the similar line of activities (i.e. excluding non-operating turnover) during last two completed financial years starting from financial year 2012-13. Bidder needs to submit audited turnover statements. If audited statement of FY year 2013-14 are not available, applicant should submit audited turnover statement of FY 2011-12 and turnover statement of FY 2013-14. While calculating 2 years average annual turnover, only audited statement shall be considered."

19. The RFP further prescribes the service target group and coverage. When such service is required in such large scale, a small company or even a consortium having no financial status as prescribed in Clause (d) of the eligibility criteria would not be in a position to discharge all those functions. It is also not a prescription created under the new policy that those who were not earlier associated with the assignee of the work would not be associated, even

when they have the efficiency and eligibility to be associated in that work. Therefore, merely because individually the petitioners would not be eligible to take part in the proceedings, it cannot be said that such policy made by the State is not just or proper or is arbitrary in any manner.

20. As far as the situation, circumstances and requirement for making of the new scheme discussed herein above, it has to be held that the impugned scheme has been made by the State for the benefit of public at large. No evidence of malafide is placed on record by the petitioners and, therefore, such submissions are not worthy of consideration. Mere probability cannot be treated as evidence of malafide and, therefore, the impugned policy decision cannot be said to be arbitrary or a result of colourable exercise of power by the State.

21. It is contended by learned Advocate General and learned senior Counsel for respondent No.2 that the contract of the petitioners is to expire on 31st March, 2015. Therefore, in all these circumstances, proceedings of the respondents should not be held up. The scheme itself is for the purposes of benefit of the public at large and, therefore, it cannot be said to be arbitrary or malafide.

22. In view of the aforesaid discussion, there is no force in the writ petition, which fails and is hereby dismissed. However, there shall be no order as to costs.

(**K.K. Trivedi**)
Judge

Skc