(1995) 05 MP CK 0004

In the Madhya Pradesh High Court

Case No : W. P. No. 593 of 1995 (J)

Ram Shankar Malviya APPELLANT

Vs

State of M. P. and Others RESPONDENT

Date of Decision : 01-05-1995

Acts Referred:

Citation : (1995) 2 MPJR 316

Hon'ble Judges : M. V. Tamaskar, J

Bench : Single Bench

Advocate : A. K. Chilley with Ravindra Shrivastava, for the Appellant; Anoop Choudhary, A. G. with V. K. Shukla, G. A., for the Respondent

Final Decision : Dismissed

Judgement

M.V. Tamaskar, J.

By this is petition the petitioner has challenged the mode or postponement of auctions for country liquor shops in three blocks i.e. Amla, Prabhat Pattan & Mullai. of the Betul District.

The State Government issued the notification inviting tenders for disposal of the liquor shops vide dated 25.1.1995. The dates for auction in respect of Betul district were specified as 16th and 17th February, 95. However, the auctions were not held on some pretext or the other. It was alleged that the auction in Betul district was not being at the instance of the local Minister shri M. Ramji Mahajan and the State Government did not take any decision on that matter before notifying Annexure-D, it was not proper for the Collector to postpone dates of auction.

3 The petitioner is a licence holder of country liquor shops is Betul district and has been in the excise trade for the last more than 20 years and expected that the auction will take place as notified and were prepared to compete for the auctions. They had also invested huge amount as bank guarantee and security amount, as notified by Annexure- D. The State Government had come out with a

promise to sell the shops and the postponement of the auction sale for Betul district has gravely prejudiced the petitioner as in no other district the State Govt. has postponed the auctions of the shops notified under the annexure- D. It is alleged that whole exercise was done by the Collector and the authorities malafide which can be spelled out on the auction of the State Government as disclosed before this Court from time to time. Learned Advocate General had made statement before this Court that no decision has been taken in this matter by the State Government to postpone the auctions any more. However, surprisingly during the pendency of this petition the State Government came out with an order dated 0.4.1995 alleged to be the cabinet decision.

It is alleged that the State Government cannot act arbitrarily. The action of the State Government is not in public interest. The policy decision taken was without any basis. There was no formulation of policy after taking all pros and cons and it has not been shown why the Betul district has been choosen and no other districts where the tribal population in those districts such as Mandla, Jhabua. Sarguja. Bastar is 100% tribal.

It is said that the petitioner had always legitinate expectations based on past practice of auction of liquor shops to enter in to competition for obtaining the leases of the shops in open competition. The petitioner was denied this opportunity as auctions in respect of other shops had already taken place and the petitioner could not participate in the said auctions.

It was also submitted that District Advisory Committee had recommended for holding the auctions which was followed by issue of notification as such the notification issued was statutory based on the decision of the Committee constituted under the Act and the State Government could not just brush aside the recommendations of the Committee. It was also staled that the State Govt. could not after the Presidential notification unless the Central Government declaring scheduled areas vide order dated 31.12.1977 (Annexure Ae).

It was said that adopting two modes in the same district and restricting it only to three blocks in the Betul district was clearly malafide. A particular attention was made to the allegations made in paras 5,10,15, & 16 of the petition.

On the other hand, learned Advocate General submitted that it was open to the State Government to auction the shops or not to auction the shops as there was no fundamental right in a trade of liquor. It was also submitted that a policy decision was taken not to auction the shops in three blocks on an experimental basis. It was also said that the petitioner has not impleaded the Minister concerned as party even though allegations have been made against him.

The learned Advocate General also submitted that this Court would not grant any futile writ and very emphatically submitted that the decision of the State Government dated 16.3.1995 is not liable to be quashed and this Court would not by a writ of mandamus command the State Government to hold public auctions.

The learned Advocate General also submitted that the advertisement issued on 23.1.1995 (Annexure-D) is not a statutory notification and the policy decision was taken after due deliberations in the interest of the general public.

Having discussed the rival submissions it is necessary to pin point the questions for determination. The first question that arises for consideration is whether the State Government had not taken any decision not to hold any auction for Betul district before issuing the notification dated 25.1.95 ? (2) Whether the policy decision taken subsequently was actuated by malafides ?(3) Whether any proper exercise was made to justify the policy decision on the date on examination of the pros and cons of the policy by the State Government 7 and (4) It so. whether the Court can interfere with the discretion and issue a writ of mandamus directing file respondents to hold auctions ?

The petitioner has filed certain documents and answers given by the Minister in the Assembly wherein the Minister had stated that there were no complaints of exploitation and the State Govt. was considering the question whether the liquor shops in the particular district should be auctioned or not auctioned but no decision was taken until the issue of the notification.

A reference may be made to a few dates. The notification (Annexure-D) was issued on 25.1.1995. It was also published in the daily newes paper dated 25.1.1995 (Annexure -E) declaring the dales of auction for Betul district as 16th and 17th February. 1995. These dates were postponed to 25th and 26th of February. 1995 vide Annexure -F) dated 14.2.95. Vide Annexure - G dt. 23.2.95 the respondent NO. 3 revised these dates of auction to 14th and 15th March, 1995.

The petition was filed on 1.3.1995. It was admitted for hearing on 2.3.95. On 2.3.95 the State was directed to file reply either to the whole petition or to the stay application as they deem proper. The State should inform the Court if any decision was taken not to hold auction. On 9.3.95 the Advocate General staled that there is no such decision. On 16.3.95 the Under Secretary issued one order postponing the auction to 23rd and 24th March, 1995, on the ground that the Collector was required to attend the meeting at Bhopal. Ultimately, the impugned order dated 16.3.95 alleged to be a cabinet decision was filed on 19.3.95.

Shri A.K. Chitley, learned counsel for the petitioner, assisted by Shri Ravindra Shrivastava. learned counsel, submitted that the policy decision is nothing but malafide. His sole submission was that the policy decision was not preceded by any exercise as required for arriving at a decision.

A reference may be made to Annexure- H, which is a letter written by Shri Ramji Mahajan. Ex- Minister, dated 18th January, 1993, addressed to His Excellency the Governor of M.P. Bhopal that auction is case of liquor shops in Betul district should be made separately for each unit in order to end the monopoly of the liquor contractors. The conteats of the letter (Annexure - H) are quoted below :-

After he become the Minister, he wrote to the Minister In-charge of commercial Tax a letter dated 4.2.94 that in the whole Betul district there should be no auction and the shops should be run by the Government. It was also suggested that the whole Betul district be declared as tribal. A question was asked in the Vidhan Sabha where in reply to the question No. 4 the Minister gave the following reply :-

The Collector, Betul, vide letter dated 8.4.94 wrote to the Excise Commissioner that out of the ten blocks in the Betul District 7 are already tribal and rest of the three i.e. Multai, Amla and Prabhat Pattan, in view of the letter written by the Minister In-charge that the whole district should be declared as tribal, the Commissioner should inform whether any decision has been taken by the State Government in view of the decision of the State Govt. earlier taken in the year 1981.

The Member of Legislative Assembly Shri Ashok Sable had written a letter dated 1.2.95 to the Chief Minister to know whether the State Govt. has taken any decision to abolish auctions within the Betul district and to run liquor shops. Yet another M. L. A. wanted to know whether the Stale Govt. was desiring to abolish the auction system and run the liquor shops departmentally. The Hon''ble Member wanted to know whether the Government was prepared to loose a big revenue earned through such auctions. No decision was communicated, however, to any of the members. The Chairman of the Jila Panchayat, Betul also wrote to the Chief Minister to know whether it was decided to declare the whole district as tribal and abolish auction system for Betul District. The Chairman also wanted to know what will happen to the loss of revenue and whether any decision has been taken by the Stale Government. The only thing concrete which is known that the answer given in the Assembly quoted above which stated that the matter is under consideration.

It has already been noted that after filing of the petition the learned Advocate General was directed to inform this Court whether any decision has been taken before issue of the notification dated 25.1.1995 to hold auctions through out the State for disposal of liquor shops. The learned Advocate General categorically stated that no such decision was taken.

Vide Annexure- D/1 dated 16.3.95 issued under the name of the Governor it was stated that the acution notice issued for the said shops was cancelled and it was decided to run the liquor shops departmentally from 1.4.1995.

The learned Advocate General also filed a document (Annexure-X-I) informing that the auction for Betul district was fixed for 13th and 14th March. 1995 as the Collector was required to attend the meeting of all Collectors at Bhopal, the auction cannot be held on that dates. Whether the shops will be auctioned or will be run departmentally a decision of the State Govt. shall be communicated in the meantime. However, the next date of auction for the Betul district is fixed on 23rd and 24th March. 1995.

I may also refer to the affidavit filed on 17.4.1995 before this Court where details of certain communications have been given as to how the decision dated 16.3.1995 was arrived at. A reference to these letters has already been made earlier. The respondents also placed before this Court a Cabinet Decision and it was stated that in many of the tribal districts liquor shops are being run departmentally and even in Betul district out often shops seven were being run departmentally and in view of the larger interest of the tribals of the district it was decided to run the shops departmentally.

Shri Chitley. learned counsel submitted that before effecting any change of policy the State Govt. should have notified earlier that there is a change of policy so that the parties affected could prepare themselves for the change and adjust themselves accordingly. In absence of such step taken by the State Govt. the petitioner has been gravely prejudiced. Reliance was placed on the decision in State of M.P. and Others Vs. Nandlal Jaiswal and Others, . It was submitted that the sequence of events narrated in the affidavit as also the decision can be looked into by the Court. The another limb of the said argument was that the petitioner had legitimate expectations in view of the policy for the present year of remaining in the business for this year by prticipating in the auctions notified by the State Government. The submission is that the issue of the notification to hold auctions for the said liquor shops was in the nature of a promise and the State Government is estopped on the principle of Promissory Estoppel from going back to the said auction notice.

It was Submitted that the policy decision which affect the revenue of the State Govt. could be taken only after proper deliberations and there is no material to show that any deliberations had taken place between the State Govt. in Commercial Tax Department and the Finance Department and in this view of the matter the policy decision cannot be said to have been arrived at after a proper exercise justifying the change of policy. The submission of the learned counsel that if the State Government wanted to adopt change of policy why Betul district alone was selected. There should have been some material. Obviously, there is no such material except the precise prepared for the Cabinet decision which has been placed on record by the learned Advocate General. Shri Chitley very strongly objected to the non-supply of the copy of the precise to the petitioner, though the reliance was placed on the same.

It is submitted by the learned counsel for the petitioner that if the change of policy does not serve the public interest and there is a huge loss to the exchequer, the change of policy cannot be legally upheld. Learned counsel relied on the certain decisions of the Supreme Court in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others, , and Khoday Distilleries Ltd. and Others Vs. State of Karnataka and Others, . Great emphasis was placed by the learned counsel on the change of policy in regard to the (sic)ons of liquor shops which are essential for the purposes of revenue. A reference was made to the Supreme

Court decision in State of Orissa and Others Vs. Harinarayan Jaiswal and Others, . In this background it was submitted that the change of policy was thus not made fairly and it has been made with a view to harm the petitioner at the instance of the Minister. During the course of argument it was specifically asked as to why the petitioner has not made the Minister as a party if he is raising such grounds. The learned counsel replied that even if the Minister has made the proposal it was for the State Government to arrive at a policy fairly. The petitioner is prejudiced by the decision of the State Government and as such has not made the Minister a party.

This petition can be decided on the sole question whether the petitioner has any right to get the liquor shops auctioned on the basis of the notifications issued on 25th January, 1995 and continued postponement without disclosing the reason was arbitrary ?

A reference to the precise submitted to the Cabinet makes it clear that the policy is to come into force w. e. f. 1990. However, on experimental basis the Betul district has been selected as there was already a proposal from the Collector of the District.

The question is whether the issue of notification raises legitimate expectation based on past practice of disposing of the shops even in areas where there is some tribal population. Where there is 100% or near 100% tribal population, the shops are being run by the Department but where the shops are situate in area where the tribal population is near 30% or less, the general mode of disposal of shops is by auction. It is also clear from the notification issued by the State Govt. in respect of the various tribal districts. The Supreme Court had occasion to consider the theory of legitimate expectation as expounded in Daljit Singh vs. State of Punjab 1994 (5) S. C. C. 509 are quoted below :-

45. We will briefly deal with the doctrine of legitimate expectation. It is not necessary to refer to large number of case excepting the following few. On this doctrine Clive Lewis in Judicial Remedies in Public Law at page 97 states thus :

Decisions affecting legitimate expectation. -

In the public law field, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or a representation made by a public body or from a previous practice of a public body. The promise of hearing before a decision is taken may give rise to a legitimate expectation that a hearing will be given. A past practice of consulting before a decision is taken may give rise to an expectation of consultation before any future decision is taken. A promise to confer, or past practice of conferring a substantive benefit may give rise to an expectation that the individual will be given a hearing before a decision is taken not to confer the benefit. The actual enjoyment of a benefit may create a legitimate expectation that the benefit will not be removed without the individual being given a hearing. On occasions, individuals seek to enforce the promise or expectation itself, by claiming that the substantive benefit be conferred. Decisions affecting such legitimate expectations are subject to judicial review.

In Council of Civil Service Unions vs. Minister for the Civil Service All RR pp. 943-44 it is stated thus "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, it so, the courts will protect his expectation by judicial review as a matter of public law. This subject has been fully explained by Lord Diplock in O''Reilly. Mackman and I need not repeat what he has so recently said. Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practise which the claimant can reasonably expect to countine. Examples of the former type of expectation are Liverpool Taxi Owner''s Ass. Re and A-G of Hong Kong v. Ng. Yuen Shiu. (I agree with Lord Diplock''s view, expressed in the speech in this appeal, that ''legitimate'' is to be preferred to ''reasonable'' in this context. I was responsible for using the word ''reasonable'' for the reason explained in Hg Yuen Shiu, but it was intended only to be exegetical of ''ligitimate''.) An example of the latter in R. V. Hull Prison Board of Visitors, ex p st. Germain, approved by this House in O''Reilly v. Mackman."

After dealing with number of cases Their Lordships formulated the cases in which the denial of such expectation would be arbitrary. It was observed as under:-

If a denial of legitimate expectation in a given case amounts to denial of right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power of violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation without anything more cannot ip so facts give a right to invoke these principles.

From the above it is clear that legitimate expectation may arise -

(a) if there is an express promise given by a public authority; or

(b) because of the existence of a regular practice which the claimant can reasonably expect to continue:

(c) Such an expectation must be reasonable. However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise.

A perusal of the above discussion would disclose that where there is change in policy or in public interest the position is altered by a rule or legislation, no question of legistimate expectation would arise. The Supreme Court had also occasion to deal this issue in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , I may refer to para 7 which is quoted below :-

7. In contractual sphere as in all other Stale actions, the State and all its

instrumentalities have to conform to Art. 14 of the Constitution of which non-arbitrariness is a significant fact. There is no unfettered discrection in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is ''fairplay'' in action''. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his inter action with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all Stale actions. To satisfy this requirement of non-arbitrariness in a State action, it is. therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bonafides of the decision in a given case. The decision so made would be exposed to challenge on the ground or arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.

The petitioner submitted that he is in the business of liquor trade for the last twenty years as had made arrangement for finance for the bid that could have been accepted and had arranged for Rs. 36 lacs as security and also Bank guarantee etc. for the purpose. He stales that the matter has not yet been examined by the State Govt. in the larger interest of the revenue or the public interest as stated i. e. to prevent exploitation of tribals in the said areas at the instance of bigger liquor contractors, in reference to the letters written by Shri Ramji Mahajan. Minister, of the said district. His intention was to oust the petitioner and that the contract should be given to samller contractors and not one contractor, who creates monopoly.

The matter was pending before the State Govt. even before Shri Ramji Mahajan was a Minister in the present Govt. and he as a public representative was raising the question of exploitation of the tribals by the liquor contractors and wanted a change of policy in this regard. He also wrote to the Minister Incharge of the Commercial Tax who on the floor of the House even though denied that there was any exploitation of the tribals did stated that the matter was under consideration whether the liquor shops in the district should be disposed of by auction or otherwise run by the department. It appears that while the notification dated 25.1.1995 was issued, there was no definite decision of the State Govt. and filing of this writ petition has expedited the decision of the State Govt. It cannot be said that the decision arrived at by the State Government was malafide or that it was not in public interest. True that the cabinet decision intends to implement the new policy in the year 1996 and whether in this backgound can it be said that the petitioner alone has been discriminated. When a policy is launched, it always be safer to test its efficacy by applying to a smaller area and extend it to larger areas either as a whole or by and by. It depends on the nature of policy likely results and number of persons affected thereby. The State Government did take into consideration why Betul district alone should be selected for this policy. As already referred to above when there is a change of policy, theory of legitimate expectation does not apply even though it may work hardship to some of the persons.

Yet another aspect of the case is whether there was requirement of issuing any notice regarding change of policy in order that the persons affected may adjust them suitably. The petitioner has strongly relied on the decision of the Supreme Court in Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, . The nature of exercise to be arrived at a decision to formulate a policy would depend on number of circumstances, where the only decision to be taken was whether in tribal areas the mode of diposal of liquor shops should be from that auction to one to be run by the department not much excise was necessary as in case of opening of distilleries which was a case in Nandlal Jaiswal. Reference to Nandlal''s case is instructive but yet looking to the nature of policy the exercise done by the State Government cannot be said to be absolutely beret on pending material. When a public policy is formulated in public interest, there is bound to be loss of revenue and the loss of revenue is set off by achieving the public interest which is bigger goal. If for instance the policy of prohibition is adopted, there would be complete loss of the revenue from the excise, though total prohibition is eutopia as some attempt towards it is also noteworthy. The step appears to make the areas exploitation free. When the shops are run by the department, there is bound to be some loss. Yet as stated above it is a policy which is yet to be tested and has to attempted at some point of time.

The petitioner may be an unfortunate victim of the same but the action cannot be said to be arbitrary. As stated by the Supreme Court a public authority possesses powers only to use them for public good. This imposes the duties to act fairly and to adopt a procedure which is ''fairplay in action''. Can it be said that in the present case the State or the Excise Commissioner acted fairly. This Court has examined the steps taken by the State Govt. In this regard, Learned Counsel for the petitioner has submitted that earlier there was a notification declaring the districts as tribal area under the Presidential Notification, unless the said notification was amended, the State Govt. had no jurisdiction to enforce the policy in the area which was not predominantly tribal. Shri Chitley, learned counsel for the petitioner fairly submitted that in order to implement the policy under the Excise law there was no need to amend the Presidential Notification. However, he said that this policy is being implemented abruptly without notice and the Betul district alone has been selected because the Minister Incharge wanted the policy to be implemented.

The elected representatives of the people have to perform their duty even if it is not favourable to some and may ultimately result in loss to others. The Minister In charge has been carrying out his mission even before he was not in the Assembly, may be then because of his insistence the State Government has accepted the matter and has changed the policy. Does it give any right to the petitioner to challenge it on the ground of malafide. Obviously, the Minister

Incharge is not to gain and therefore, his action is more in public interest than getting any advantage for him. As such the allegations of malafide are absolutely baseless. Activities which are rest extra commercial cannot be carried out by any decision. The State can prohibit completely trade or business in potable liquor. The State Govt. is simply regulating the trade. Article 47 of the Constitution is one of the directive principles which is fundamental in the governance of the country. As such when the State takes a policy decision which is some what nearer to the furtherance of the said object, the action can be said to be bonafide and not malafide.

Petitioner''s reference to Khuday Distilleries Ltd. v. State of Karnataka 1994 (1) S.C.C. 574, is thus answered by the above revenue. The submission that when the State permits trade or business in the potable liquor with or without limitation, the citizen has the right to carry on trade or business subject to the limitations, if any, and the State cannot make discrimination between the citizens who are qualified to carry on the trade or business. It may be stated that the above statement of law made by the Supreme Court has to be read with the decision cited above which give a larger scope to State to formulate policies and if there is a change of policy, the present decision will have no application to the facts of the present case.

This petition is essentially founded on the theory of discrimination and arbitrary exercise by the State and its functionaries. If the element of arbitrariness is squarely negatived by the above reasoning i. e. the decision by the State of change the policy and implement it to a limited area and to extend it further, the same cannot be said to be arbitrary and malafide. In this view of the matter this petition is liable to be dismissed.

The petitioner is already affected by the change of policy. He has come to this Court because of the uncertainty. The State Government should alert where the question of revenue is involved and the policy involves a loss of revenue to the State. The citizen has equal right to know the policy before hand. The policy decision was taken during the course of this petition even though the matter was pending earlier. In such a situation the petitioner even though prejudiced by the State action cannot get any writ of mandamus. The policy of the Stale Govt. was arrived at failry in public interest. In this view of the matter that the whole judgment terns on the finding that the policy was fairly arrived at the theory of legitimate expectation does not apply, other question raised do not require any consideration. The petition is dismissed but without any order as to costs.