
(2010) 07 SHI CK 0136
In the High Court Of Himachal Pradesh

Ziquitza Health Care Ltd.

APPELLANT

Vs

State of HP and Another

RESPONDENT

Date of Decision : 29-07-2010

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2011) 1 ShimLC 39

Hon'ble Judges : Kurian Joseph, C.J.;Rajiv Sharma, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Kurian Joseph, C.J.—Petitioner challenges the award of the project to run Emergency Medical Response Service in the State of Himachal Pradesh to the second respondent. The main grounds of the challenge are (i) being the only tenderer, the offer of the petitioner should have been accepted (ii) the petitioner also should have been granted an opportunity to see whether it is possible to have an MOU with the State and (iii) the second respondent, with whom the MOU is signed, does not now have good reputation. The following are the prayers:

- a. Issue a writ, order or direction directing the respondent to produce the records relating to tender process in question w.r.t. "Provision of Pre-Hospital Emergency Medical Response (Ambulance) Service in Himachal Pradesh".
- b. Issue a writ, order or direction that the decision of respondent No. 1 to cancel the tender process (whereby the petitioner was qualified) as arbitrary and violative of the Constitution.
- c. Issue a writ, order or direction that the decision of the respondent to enter into MOU with respondent No. 2 GVK EMRI as arbitrary and violative of Article 14 of the Constitution.
- d. Issue a writ, order or direction directing respondent No. 1 to continue with RFP Process for "Design, Procurement, Operation and Maintenance of Pre Hospital

Emergency Response Service in Himachal Pradesh on DBOT basis" and in the facts of the case, award the contract to the petitioner.

e. Grant ad interim ex parte relief in terms of prayer b and c above.

2. At the outset itself we may indicate that this Court at the admission stage had, granted an opportunity to the petitioner to explore the possibility for an MOU with the State and the petitioner availed that opportunity also. But, according to the State, for various reasons discussed below, it is not feasible to have an MOU with the petitioner.

3. The litigation has a chequered history. On 25.11.2008, the State initiated the process of starting the Emergency Medical Response Transport Service. It is in fact an ambulance service, with life support systems provided in it, operated with the participation of the State. After evaluating various alternatives, it was initially proposed to go for a MOU route with the EMRI (Emergency Medical Reserve Institute), Hyderabad (second respondent) in view of its successful track record in the field. However, the government, ultimately, decided to go for a competitive bidding process. Thus, in May, 2009, the State called for expressions of interest (EOI) for starting the Pre-Hospital Emergency Medical Response. Eight private partners expressed their interest. On the basis of technical evaluation, five were short listed and they were given request for proposal (RFP). On 12.10.2009, the bids were opened. M/s Anjana International Industries Consortium, which quoted Rs. 419/- per trip, was selected. The petitioner quoted Rs. 1298/- per trip and the second respondent did not participate in the process, though it had participated at the stage of expression of interest and short listed thereafter. There was no other bid. In January, 2010 an agreement was signed. However, by the end of March, 2010, it was came out that the awardee, M/s Anjana International was not in a position to operationalize the project. Though the petitioner expressed its desire to enter into agreement with the Government, since the petitioner was nowhere near to the bid of the awardee, the Government was not interested. It is seen that discussions had been held with the second respondent also on the MOU route. Since bidding process had once been initiated, it was, ultimately, decided to go for a fresh tender. On 21.5.2010, within two months, fresh tender was invited. Only the petitioner participated in the process. The rate quoted was Rs. 1649/- per trip. It is significant to note that on 12.10.2009 in the initial bid, rate quoted was Rs. 1298/- per trip and the petitioner was willing to operate the scheme at that rate in March-April, 2010. It is also significant to note that all through the second respondent was interested to go in the MOU route and various discussions were also being held in the process. On comparative evaluation, it was found that in the case of the petitioner, total out-flow for five years (Project is for five years) would be Rs. 161.70 crores, whereas in the case of the second respondent, it would be only Rs. 91.30 crores and hence, a decision was taken in the Cabinet to cancel the tender process and to go in the MOU route. Thus, the second respondent was called for the discussion and steps were taken to enter an MOU. The petitioner

was intimidated about cancellation of the tender process. The State and the second respondent signed the MOU on 9.7.2010 and thus, this writ petition.

4. It is the contention of the petitioner that since the State having opted for a fair and transparent process of tender and since the petitioner was the only bidder, the contract should have been awarded to it. We are afraid, the contention cannot be appreciated. It is settled law that the State is not bound to accept the tender for the only reason that there was only one bid. It is also a settled position that the State is not bound to accept the lowest tender. In *Trilochan Mishra, etc. Vs. State of Orissa and Others*, a Constitution Bench of the Apex Court has succinctly dealt with these aspects and it has been held as follows:

14. With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration to be preferred to the higher tenderer.

5. In *Tata Cellular v. Union of India* (1994) 6 SCC 651, this position has been reiterated and it has been held as follows:

x x x x . Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

6. It is the contention of the learned Counsel appearing for the petitioner that the State cannot act in an arbitrary manner, even in the matter of award of contracts. Reference is made to the decision of Supreme Court in *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, wherein it has been held as follows:

17. At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is free to enter into a contract with any person he likes. The State, in exercise of its various functions, is governed by the mandate of Article 14 of the Constitution

which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in view the public interest involved in such selection. The decisions of this Court, therefore, insist that while dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the government cannot act arbitrarily at its sweet will and like a private individual, deal with any person it pleases, but its action must be in conformity with the standards or norms which are not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative body functioning in an administrative sphere.

7. As rightly pointed out by the learned Senior counsel appearing for the State and the second respondent, it is a situation where the State has taken steps only to protect its interest, by acting fairly and reasonably, in going for the best course of action by objectively considering all the relevant factors. There is no allegation of mala fides or of any under hand dealing in the process by dropping the bidding route and going for the MOU route, in the interest of the public. Only the permitted "free play in the joints" has been made in the process. Whether to go on competitive bidding route or MOU route is for the Government to consider and take a decision. It is a matter of policy. They may try one or both and adopt one. Only thing is that the procedure should be fair and free from arbitrariness. In this context, it would also be profitable to refer to the illuminative discussion in Administrative Law by Prof. Wade. In Part V Discretionary Power Chapter 12, Abuse of Discretion, (8th Edition at Page 364), while dealing with the standard of Reasonableness, it is stated as follows:

The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. x x x x This court must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority.

8. In the words of Lord Keith in R.V. Secretary of State for Trade and Industry ex

p. Lonrho (1989) 1 WLR 525, there is..."the danger of judges wrongly though unconsciously substituting their own views for the views of the decision maker who alone is charged and authorized by Parliament to exercise a discretion."

9. Therefore, choice -discretion must be left to the State. The court can only see whether the process is unreasonable. If the process is genuine and reasonable, the State's action is intra vires. If that be so, the court cannot go into further details with regard to the comparative merits or by analyzing the factual matrix and enter a finding as to whether the decision is correct or not. As held in *Chief Constable of the North Wales Police v. Evans* (1982) 3 All ER 141 at p. 144) "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized or enjoined by law to decide for itself a conclusion which is correct in the eyes of court." The stand of the State is very clear. In good faith, it intended to go for a fair and transparent bidding process. But owing to the huge financial implications, it was found to be not workable. Hence, the State went for the MOU route and in the process, the agreement was reached with the second respondent which has been successfully operating the same service on MOU route in nine States including two hilly States. The petitioner does not match or reach anywhere near to the experience, expertise and infrastructural support of the second respondent. In such circumstances, guided by the well settled principles, as stated above, the State's action cannot be said to be unfair, unreasonable or arbitrary.

10. Yet with all these, when the writ petition came up for admission, after having heard learned Counsel for the petitioner, this Court granted an opportunity to the petitioner by order, dated 15.7.2010 to explore the possibility of entering an MOU, since we were of the view that once the State having decided to drop the bidding process and go in the MOU route, the petitioner being the only one who participated in the tender process, should also be given an opportunity, in the true spirit of Article 14 of the Constitution of India. The order dated 15.7.2010 reads as follows:

2. Learned Advocate General, inviting reference to the previous history of an attempt by the State to provide emergency ambulance service, submits that the petitioner was the only tenderer to participate in the financial bid in respect of the tender published on 21.05.2010. According to the petitioner, he was the second lowest bidder in the list to be considered and awarded the contract when tenders were invited earlier and yet the contract was not awarded and the tender was cancelled. But the petitioner had no demur when fresh tender proceedings were initiated on 21.05.2010 and, hence, that aspect need not be gone into at this stage.

3. According to the State, the rate quoted by the petitioner per trip was Rs. 1649/-, which the state could not afford to. Since two attempts failed, the State only made an attempt to find out the feasibility of entering into a Memorandum of Understanding with the second respondent.

4. Learned Counsel for the petitioner submits that in the background of the unsatisfactory execution of similar contracts in other States and the report also of the Central Government, it will not be in public interest to permit the second respondent to have the service as per the impugned Memorandum of Understanding. It is also submitted that once the tenders have been invited and incase the same is cancelled, and in case the State wanted to go for a different type of transaction, the petitioner should have also been granted an opportunity to see whether it could also reach a Memorandum of Understanding.

5. Without prejudice to the respective contentions of the parties, we have requested the petitioner to ascertain whether in the same terms of the Memorandum of Understanding, as now entered into by the first respondent with the second respondent or with lesser liability to the State, the petitioner is willing to execute and provide the service. Learned Counsel for the petitioner submits that the petitioner is also interested in having the negotiation with the State Government so as to reach a Memorandum of Understanding, as above. The first respondent may explore the feasibility of this suggestion made by the petitioner before proceeding with matter any further. The petitioner is directed to be present before the first respondent on 19th July, 2010 at 11 a.m. in that regard.

6. Post on 22nd July, 2010.

Copy dasti, on usual terms.

11. The petitioner was thus given an opportunity to explore the possibility as to whether it can enter into MOU with the State. It is seen from the affidavit, filed by the State itself, that the petitioner had worked out the operating cost at Rs. 1,07,000/-, whereas according to the petitioner, the cost with the second respondent would be Rs. 1,20,000/-.

12. Learned Senior Counsel appearing for the State submits that the offer made by the petitioner was without any solid basis and it was not supported by any scientific data. It is also submitted that the petitioner is not an experienced partner in the MOU route. Its operation is only in three States on tender basis, whereas the second respondent is having MOU in nine States, including two hilly States. On the infrastructure side, it is submitted that the petitioner claims to have claimed only 630 Ambulances, whereas the second respondent has 2600 Ambulances. It would be profitable to extract the submissions made in the short reply, which would give a clear picture as to the consideration made by the State on all relevant aspects, on the claims made by the petitioner and why the same was not accepted. The same reads as follows:

(a) That the rate quoted by the Ziqitza Health Care (i.e. Rs. 1,07,000/- per ambulance per month) which cannot be verified as Ziqitza Health Care is not working in Memorandum of Understanding (MOU) mode in any State. In contrast the estimated cost submitted by Emergency Management Research Institute (EMRI) is based on the average expenditure in the other States including Uttrakhand and Meghalaya, which are hill States. As the State will have to bear

the costs on the basis of actual expenditure as per the terms of the MOU, therefore, the estimated cost mentioned in Ziqitza is only an estimation which is not supported by any documentary evidence. Therefore, this hypothetical offer cannot be seen as cost saving or financial advantage for the State.

(b) That the respondent No. 2 (Emergency Management Research Institute) is more experienced and has a fleet of 2600 ambulances as compared to the petitioner who claims to have a fleet of 630 ambulances. However, as per the details provided in response to the RFP-II the petitioner (Ziqitza Health Care Limited) has stated that he has a fleet of 109 ambulances in total. During discussions on 19.7.2010, the petitioner claimed to have strength of 264 ambulances which include 164 ambulances owned by Rajasthan Government that have been taken over by them on 1.7.2010.

(c) That the Emergency Management Research Institute is not only the best service provider it is also the most experienced agency in this field in the Country.

(d) That the Emergency Management Research Institute has signed MOU with 9 States in the country where the services are being provided successfully to the people of those States. These States include Uttrakhand also where the topography is same as that of Himachal Pradesh. The Accountant General, Uttrakhand has appreciated the performance of the Emergency Management Research Institute in the Performance Audit of the State.

(e) That recently the world famous magazine "Harvard Business Review" has also appreciated the services rendered by the Emergency Management Research Institute (Harvard Business Review, July-August 2010. www.hbr.org). It is termed as one of the best innovation coming from India.

(f) There is no reason to select Ziqitza Health Care Limited as a service provider ahead of EMRI. If all other things remain as they are, EMRI has more experience and Ziqitza has no experience to function in MOU route. As a policy Ziqitza is opposed to entering into MOU with the State Government.

(g) That Ziqitza Health Care is opposed to MoU route as a policy matter and favours Tender Route. Tender means that the company bidding for the service will build its profit margins into the bid. As Ziqitza health Care has no experience of MoU Route it is possible that they may not be able to run the service properly.

(h) That the fact that Ziqitza Health Care increased the bid in response to RFP-II and after evaluating the competencies of both EMRI and Ziqitza it is clear that MoU with EMRI is better option. After cancellation of second Tender the State had to select the best service provider which can deliver better service. And the State chose EMRI on the basis of their core competence in MoU route, their experience and comparative advantages. Besides acceptance of request of Ziqitza Health Care will lead to administrative and legal problems besides other difficulties.

(i) EMRI is a non-profit Society that runs the service without earning any profit whereas Ziqitza Health Care Limited is a business entity which has a business

model based on building profit margins in running ambulance services on differential pricing. It is evident that both organizations have entirely different understanding, vision, work culture and work ethics and different motivators work for each. EMRI works in public interest without earning profits while Ziqitza Health Care charges the people availing the service depending upon their ability to pay by way of a differential model, therefore, there is a basic difference between the approach followed by the two organizations, therefore, to have a MoU with EMRI is a better alternative as the State will provide free ambulance service to all.

13. It is fairly clear that the Government has applied its mind on all the relevant factors. The court cannot interfere with the government's freedom of contract. The interference is only when the action is vitiated by arbitrariness, unfairness, illegality, irrationality or unreasonableness, as held by the Supreme Court in *Tata Cellular's* case (supra). It is held therein (head note) as follows:

Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

14. Though the learned Counsel appearing for the petitioner vehemently contended, inviting reference also to the decision of the Supreme Court in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, stating that irrelevant factors have crept in, while taking the decision in favour of the second respondent, having regard to the submissions made in the affidavit and as extracted above, the contention cannot be appreciated. The Supreme Court has, in fact, held in the above decision that in case the State's action is "reasonable, rational and in the public interest", the court shall not interfere in the matter. As stated in the affidavit itself, the government has considered the experience, financial implications and expertise of both the petitioner and the respondents and has decided to engage the second respondent. Learned Counsel appearing for the petitioner has also invited our attention to the adverse remarks made against the second respondent by the Government of India and the Government of Rajasthan. Learned Senior counsel appearing for the State and the learned Senior Counsel for the second respondent, referring to the various documents, submit that those allegations do not have valid basis and in any case the same do not have any bearing on the decision taken by the State. What is most relevant to be noted is the successful track record of the second respondent in nine States, in the MoU route, which

include two hilly States, like State of Himachal Pradesh. We do not think that we should be entering into an adjudication on the merits of those contentions since we find that the State has taken into consideration these aspects as well, while taking the final decision to go for the MoU with the second respondent. In the words of Lord Diplock, in *Council of Civil Service Unions and Ors. v. Minister for Civil Service* 1985 AC 374, "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognized in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v. Bairstow* (1956) A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

15. We do not find any illegality or irrationality or procedural impropriety in the

instant case, having regard to the detailed consideration made by the State, on all aspects. The State has acted only within its power. The decision is made in a fair, rational and reasonable manner. There is no procedural impropriety either, particularly after the petitioner also having been given an opportunity. No doubt, such a comparative consideration was not there with an opportunity to the petitioner when the State decided to go in MoU route and when it signed the agreement with the second respondent. But, this Court having granted a proper opportunity, dehors the signing of the agreement, and in the process, the State having considered in detail as to comparative merits of the parties, on all relevant aspects, particularly experience, expertise and financial implications, there is no merit in the contentions of the petitioner. The State has only tried to get the best person, as held in Tata Cellular case (supra), and hence, no judicial review is called for in the matter. The writ petition is accordingly dismissed.