

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 16th NOVEMBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 13957/2018 & CM APPL. 2281/2022**

FEDERATION OF AYUSH DRUGS MANUFACTURERS & ORS.

..... Petitioner

Through: Mr. Rohit Sharma and Mr. Ashok
Kumar, Advs.

versus

UNION OF INDIA & ORS.

..... Respondent

Through: Mr. Anurag Ahluwalia, CGSC with
Mr. Danish Faraz Khan, Advocate for
R-1,3 and 4.

Mr. Santosh Kumar Tripathi, SC,
GNCTD with Mr. Arun Panwar, Mr.
Pradeep and Ms. Mahak Rankawat,
Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The instant Writ Petition under Article 226 of the Constitution of India has been filed with the following prayers:

"(a) Direct the Government of Delhi to frame a policy under Section 11 of Micro, Small and Medium Enterprises Development Act, 2006 granting fiscal incentives to micro and small enterprises in tenders for public procurement of Ayurvedic, Siddha and Unani (ASU) Drugs; And

(b) Until the framing of such policy, direct the Government of Delhi to strictly follow the Policy dated 23.03.2012 framed by the Ministry of Micro, Small and Medium Enterprises and other directions dated 10.03.2016, 25.07.2016 and 06.12.2017 issued pursuant thereto in its public procurement tenders for supply of ASU Drugs; and

(c) Direct the Government of India to direct all State Governments that have not framed policies in terms of Section 11 of MSMED Act, 2006 do so expeditiously; and

(d) Declare that in the absence of a specific policy authorizing the same, it is illegal in a public procurement tender for supply of ASU drugs to impose a purchase preference in favour of Government bodies, enterprises and PSUs; and

(e) Restrain the Ministry of Ayush, Government of India from imposing a mandatory requirement of procuring ASU drugs from government enterprises / PSUs as a condition for releasing grants-in-aid under the National Ayush Mission to the State Governments; And

(f) Declare that in public procurement tenders for supply of ASU drugs within India, it is illegal to impose a mandatory requirement of producing WHO-GMP or AYUSH Premium or any other non-statutory quality certification apart from the statutory quality certification (GMP) issued under Rule 155B read with Schedule T of the Drugs and Cosmetics Rules, 1945; and

(g) Quash Tender No. 2018_DAYUS_ 158870_1 dated 20.09.2018 issued by Directorate of AYUSH, Government of NCT of Delhi and direct fresh

*tendering in compliance with prayers (a) to (f) above;
AND*

(h) Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case."

2. It is stated that the Petitioner is a federation of private individuals engaged in manufacture of Ayurvedic, Siddha and Unani (*hereinafter referred to as 'the ASU'*) drugs. It is stated that the members of the Petitioner Federation fall under Micro, Small and Medium Enterprises (*hereinafter referred to as 'MSME'*) as enumerated in the Micro, Small and Medium Enterprises Development Act, 2006 (*hereinafter referred to as 'the MSMED Act'*), and have valid manufacturing licenses and Good Manufacturing Practices (GMP) certificates. It is stated that being micro and small enterprises, the members of the Petitioner Federation have domestic presence and they provide health care in far flung and remote areas of the country. It is further stated that apart from catering to needs of the people from remote parts of the country, the members of the Petitioner Federation rely on public tenders floated by the respective Governments and/or PSUs for their survival.

3. MSMED Act was enacted with the objective of facilitating the promotion and development of the MSMEs. It is stated that in terms of Section 11 of the MSMED Act, the Union of India, *vide* Order dated 23.03.2012, framed a Public Procurement Policy for Micro and Small Enterprises Order, 2012, for procurement of goods and services by the Central Departments/Ministries and PSUs from Micro and Small Scale Enterprises. It is stated that the policy provides that every Central Ministry

or Department or Public Sector Undertaking shall procure a minimum of 20 percent of total annual purchases from Micro and Small Enterprises.

4. It is stated that Para 10 of the Policy categorically provides that Micro and Small Enterprises shall be provided with tenders free of cost, and be exempted from payment of earnest money. Moreover, by directions dated 10.03.2016 issued in terms of Para 16 of the policy, the Ministry of Micro, Small and Medium Enterprises issued a Policy Circular relaxing the norms for Start-ups and Micro and Small Enterprises in public procurement with regard to Prior Experience and turnover criteria, subject to meeting of quality and technical specifications.

5. It is stated that on 20.09.2018, the Directorate of Ayush, GNCTD, New Delhi, floated a tender for procurement of Ayurvedic and Unani Medicines. It is stated that in terms of the said tender, for a bidder to be eligible for the tender, the bidder should have an annual turnover of Rs.15,00,00,000/- and a prior experience of three years for each product quoted in the tender. It is further stated that the bidders have to deposit Rs.66,00,000/- as Earnest Money Deposit to participate in the tender. Being aggrieved by requirement of high minimum turnover, requirement of prior experience and expertise, requirement of producing non-statutory quality certifications such as WHO-GMP or Ayush Premium certification in procurement of ASU drugs by the State Government, the Petitioners have filed the instant Writ Petition.

6. It is stated by the learned Counsel for the Petitioner that the Micro and Small enterprises engaged in manufacture of ASU drugs serve an important role in providing health care in far flung and remote areas of the country. However, they depend on public procurement by the Central and State

Governments for their economic viability, and without encouragement and incentives for their participation in public procurement tenders, the viability and existence of the MSMEs is under threat. He states that the MSMED Act was enacted with the objective of facilitating the promotion and development of the MSMEs, however, due to improper implementation of the MSMED Act and absence of policies at the State level and due to preference policy in matters of procurement, the purposes with which the MSMED Act was promulgated is not being served.

7. The learned Counsel submits that in public procurement of ASU drugs by State Governments and Central Government, the contracts are designed to favour big pharmaceutical firms by the imposition of unreasonable qualifying conditions and non-grant of concessions as declared to be conferred on MSMEs. He states that Section 11 of the MSMED Act requires the Government to frame preferential policies for MSMEs in respect of procurement of goods and services for its Ministries, Departments and PSUs. He states that the Central Government has framed a policy titled as '*Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012*' dated 23.03.2012 which provides that every Central Ministry or Department or Public Sector Undertaking shall procure a minimum of 20 percent of total annual purchases from Micro and Small Enterprises. It is stated that Para 10 of the Policy categorically provides that Micro and Small Enterprises shall be provided with tenders free of cost, and be exempted from payment of earnest money.

8. The learned Counsel states that by directions dated 10.03.2016 issued in terms of Para 16 of the policy, the Ministry of Micro, Small and Medium Enterprises issued a Policy Circular relaxing the norms for Start-ups and

Micro and Small Enterprises in public procurement with regard to Prior Experience and turnover criteria, subject to meeting of quality and technical specifications. He states that these concessions have been re-affirmed by the Central Government in Office Memorandum dated 25.07.2016 and letters dated 06.12.2017. He states that despite clear directions from the Central Government and despite the mandate of MSMED Act, Government of Delhi has not framed a policy under Section 11 of the MSMED Act for exempting the MSMEs from the requirement of a minimum turn-over and has, therefore, violated the mandate of the Act.

9. *Per contra*, learned Counsel for the Union of India has contended that Section 11 of the MSMED act cannot be said to be mandatory. He submits that the Central Government has been sensitive to the needs of the MSMEs and has been notifying preferential policies in respect of procurement of goods and services produced and provided by the MSMEs. It is states that as far as tenders regarding ASU drugs are concerned, at this juncture, the Government has not framed any policies for exempting the MSMEs from the requirement of a minimum turn-over. However, the Ministry of Ayush is issuing uniform policies to avoid purchase of substandard drugs. He states that procurement guidelines under the National AYUSH Mission also make provision of purchase from PSUs, Pharmacies under State Governments and cooperatives manufacture in their own manufacturing units having the mandatory compliance.

10. A detailed affidavit has been filed by the GNCTD. Relevant portion of the same reads as under:

"2. The present affidavit is being filed in order to place on record before this Hon'ble Court, the policies that are in place by the answering Respondent in terms of

prayer (a) of the Petition, which are in the following terms:

2.1. In the open tenders floated by answering Respondent for procurement of Ayurveda and Unani medicines, following benefits are being given to MSMEs;

- a. Availability of tender documents - free of cost;*
- b. Exemption from the requirement to deposit Earnest Money;*
- c. Exemption from the required turnover criteria.*

2.2. The said exemptions are made available to micro and small enterprises upon submission of a valid "Single Point Registration Certificate" (SPRC) from National Small Scale Industries Corporation (NSIC). Here it is pertinent to mention that NSIC issues enlistment Certificates to Micro and small manufacturers of ASU&H (Ayurveda, Siddha, Unani & Homoeopathy) medicines after assessing the manufacturing capacity only by the NSIC empaneled third party inspecting agency.

2.3. With respect to tenders other than procurement of AYUSH medicines, like, tenders for outsourced manpower etc. that are available on Government e-Marketplace (GeM) portal, an initiative of the Central Government, the same are being floated by the Directorate of AYUSH on GeM Portal.

2.4 GeM has an in-built option to provide relaxations to MSMEs, which are in terms of the policies followed by the Central Government as per Section 11 of the MSME Act.

2.5 As a matter of Directorate's policy, the said option is always opted-in so that the relaxations to MSMEs could be provided in case of other said tenders."

11. Heard the Counsel for the parties, and perused the material on record.
12. It is well settled that High Courts, exercising its jurisdiction under Article 226 of the Constitution of India, do not pass writs of mandamus directing the State to adopt a particular policy. Policy making is purely in the realm of Government and Courts do not pass directions in the matters of framing of policy.
13. The Apex Court in Small Scale Industrial Manufactures Assn. v. Union of India, (2021) 8 SCC 511, has observed as under:

"60. In catena of decisions and time and again this Court has considered the limited scope of judicial review in economic policy matters. From various decisions of this Court, this Court has consistently observed and held as under:

60.1. The Court will not debate academic matters or concern itself with intricacies of trade and commerce.

60.2. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review.

60.3. Economic and fiscal regulatory measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters.

61. In R.K. Garg [R.K. Garg v. Union of India, (1981) 4 SCC 675 : 1982 SCC (Tax) 30] , it has been observed

and held that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. It is further observed that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters.

62. *In Arun Kumar Agrawal [Arun Kumar Agrawal v. Union of India, (2013) 7 SCC 1] , this Court (at SCC p. 18, para 43) had an occasion to consider the following observations made by the Supreme Court of the United States in Metropolis Theater Co. v. Chicago [Metropolis Theater Co. v. Chicago, 1913 SCC OnLine US SC 123 : 57 L Ed 730 : 228 US 61 (1913)] :*

“43. ... ‘... The problems of Government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is the best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void....’ (Metropolis Theater Co. case [Metropolis Theater Co. v. Chicago, 1913 SCC OnLine US SC 123 : 57 L Ed 730 : 228 US 61 (1913)] , L Ed p. 734)”

63. *This Court in Nandlal Jaiswal [State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566] has observed that the Government, as laid down in Permian Basin Area Rate Cases, In re [Permian Basin Area Rate Cases, In re, 1968 SCC OnLine US SC 87 : 20 L Ed 2d 312 : 390 US 747 (1968)] , is entitled to make pragmatic adjustments which may be called for by particular*

circumstances. The court cannot strike down a policy decision taken by the State Government merely because it feels that another policy decision would have been fairer or wiser or more scientific or logical. The court can interfere only if the policy decision is patently arbitrary, discriminatory or mala fide.

64. *In Balco Employees' Union [Balco Employees' Union v. Union of India, (2002) 2 SCC 333] , this Court has observed that wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved. It is further observed that in the case of a policy decision on economic matters, the courts should be very circumspect in conducting an enquiry or investigation and must be more reluctant to impugn the judgment of the experts who may have arrived at a conclusion unless the court is satisfied that there is illegality in the decision itself.*

65. *In Peerless General Finance & Investment Co. Ltd. [Peerless General Finance & Investment Co. Ltd. v. RBI, (1992) 2 SCC 343] , it is observed and held by this Court that the function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is further observed that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can*

seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts. It is further observed that it is not the function of the court to amend and lay down some other directions. The function of the court is not to advise in matters relating to financial and economic policies for which bodies like RBI are fully competent. The court can only strike down some or entire directions issued by RBI in case the court is satisfied that the directions were wholly unreasonable or violative of any provisions of the Constitution or any statute. It would be hazardous and risky for the courts to tread an unknown path and should leave such task to the expert bodies. This Court has repeatedly said that matters of economic policy ought to be left to the Government.

66. *In Narmada Bachao Andolan [Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664] , in paras 229 and 233, it is observed and held as under : (SCC pp. 762-63)*

“229. It is now well settled that the courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the courts are ill-equipped to adjudicate on a policy decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.

233. At the same time, in exercise of its enormous power the Court should not be called upon to or

undertake governmental duties or functions. The courts cannot run the Government nor can the administration indulge in abuse or non-use of power and get away with it. The essence of judicial review is a constitutional fundamental. The role of the higher judiciary under the Constitution casts on it a great obligation as the sentinel to defend the values of the Constitution and the rights of Indians. The courts must, therefore, act within their judicial permissible limitations to uphold the rule of law and harness their power in public interest. It is precisely for this reason that it has been consistently held by this Court that in matters of policy the court will not interfere. When there is a valid law requiring the Government to act in a particular manner the court ought not to, without striking down the law, give any direction which is not in accordance with law. In other words, the court itself is not above the law.”

67. *In Prag Ice & Oil Mills [Prag Ice & Oil Mills v. Union of India, (1978) 3 SCC 459 : AIR 1978 SC 1296] , this Court observed as under : (SCC p. 478, para 24)*

“24. ... We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the Government of the day to decide. Many of them, ... are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts.”

68. *In P.T.R. Exports (Madras) (P) Ltd. [P.T.R. Exports (Madras) (P) Ltd. v. Union of India, (1996) 5*

SCC 268] , this Court observed as under : (SCC p. 272, paras 3 & 5)

“ ... In matters of economic policy, it is settled law that the court gives a large leeway to the executive and the legislature. ... Government would take diverse factors for formulating the policy ... in the overall larger interest of the economy of the country ... The Court therefore would prefer to allow free play to the Government to evolve fiscal policy in the public interest and to act upon the same.”

69. What is best in the national economy and in what manner and to what extent the financial reliefs/packages be formulated, offered and implemented is ultimately to be decided by the Government and RBI on the aid and advice of the experts. The same is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review. Merely because some class/sector may not be agreeable and/or satisfied with such packages/policy decisions, the courts, in exercise of the power of judicial review, do not ordinarily interfere with the policy decisions, unless such policy could be faulted on the ground of mala fides, arbitrariness, unfairness, etc.”

14. In view of the above, this Court cannot pass a writ of mandamus directing the State of frame policies regarding the tender conditions to be issued by the Government for procurement of ASU drugs manufactured by MSMEs. However, this Court directs that the instant Writ Petition be treated as a representation. The Respondents herein are, therefore, directed to consider the representation of the Petitioners and take a decision on the same in accordance with law.

15. With these observations the Writ Petition is disposed of along with the pending application(s), if any.

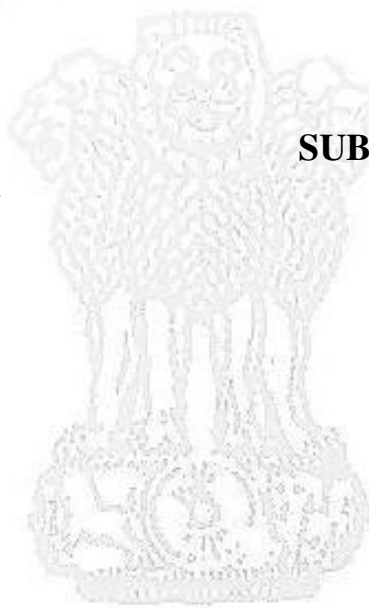
16. It is further made clear that this Court has not made any observations on the merits of the case.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

NOVEMBER 16, 2022

Rahul



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