
(2015) 07 SIK CK 0003
In the Sikkim High Court
Case No : Writ Petition (PIL) No. 02 of 2015

Chewang Pintso Bhutia and Others

APPELLANT

Vs

State of Sikkim and Others

RESPONDENT

Date of Decision : 07-07-2015

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2015) 07 SIK CK 0003

Hon'ble Judges : Sunil Kumar Sinha, C.J.; Meenakshi Madan Rai, J

Bench : Division Bench

Advocate : A. Moulik, Senior Advocate, Ranjit Prasad and K.D. Bhutia, for the Appellant; J.B. Pradhan, A.A.G, S.K. Chettri and Pollin Rai, Asstt. Government Advocates, Advocates for the Respondent

Judgement

Sunil Kumar Sinha, C.J.

1. Drinking water for the residents of Gangtok is brought from Rateychu River through pipe-lines. Water passes through one 350 mm diameter cast iron pipe, four 150 mm diameter galvanized iron pipes and one 200 mm diameter galvanized iron pipe. Firstly, the water is brought to the treatment plant, and thereafter, it is distributed to the public at large. The distance from the river point to the city point (treatment plant) is about 14.50 KMs. For up-gradation and modernization of raw water mains and water treatment plant, a Scheme was prepared in the year 2007 with an estimated cost of Rs. 72.62 crores. It was forwarded to the Government of India for funding under JnNURM Scheme. The Government of India accorded sanction of the Scheme on 31.12.2009. Thereafter, a tender was floated and the contract was finalized in favour of the third Respondent in the month of October, 2010 and the work order was issued in the month of November, 2010. The said contract was finalized at Rs. 31.48 crores with the following components:--

"(i) Laying of new Pipes 350 mm dia Ductile Iron pipelines for raw water main for replacement of old and unserviceable 350 mm dia cast iron pipe.

- (ii) Const. of 42 MLD Raw Water Receiving Chamber, Aerator.
- (iii) Flocculation Unit etc.
- (iv) Const. of 42 MLD new Rapid Sand Gravity Filter.
- (v) Const. of 16 MLD new Water Reservoir.
- (vi) Renovation of Existing WTP.
- (vii) Construction and extension of Lab and Chemical Building.
- (viii) Instrumentation and Control (SCADA).
- (ix) Approach Road and protection walls, Installation of Disinfection System Centralized control and monitoring mechanism at WTP etc.

Temporary By Pass Arrangements."

2. Forest Clearance was obtained in the month of May, 2011 and the work commenced thereafter.

3. When the work was in progress, on 18.09.2011 a massive earthquake occurred in the State, causing huge damage to the public and private properties. It had also affected the construction area. Many cracks appeared in and around the construction site, the area was badly damaged being fragile terrain and there were many topographical changes. As stated in the counter affidavit of the State, the labourers engaged mostly from outside the State had left the State due to the devastating earthquake and ultimately it led to stoppage of the construction work. Thereafter an estimate amounting to Rs. 18,88,41,000/- was prepared for restoration/reconstruction, which got sanctioned under the Prime Minister Package works. The main components of the said works were as follows:--

"(i) Laying of new 350 mm dia Di pipe to replace the four 150 mm dia GI and one 200 mm dia GI pipes which were severely affected and the cost of repairs was not found economical.

(ii) Construction of three bridges at 7th Mile, 8th Mile and 9th Mile.

(iii) Protection walls on the damaged slopes that were apparent and detected till the time of estimation."

4. Thus, the above construction work, which had stopped due to earthquake in September, 2011, resumed in the month of March, 2012. During the monsoon rains of June-September, 2012, as stated in the counter affidavit of the State, many more slides were triggered. The slides had occurred due to earthquake of September, 2011, which had created cracks on the earth at many locations and the precipitation that had seeped into such cracks had triggered fresh slides. The treatment of these fresh slides was not included in both the JnNURM works and PM Package works. According to the State Respondents, without the treatment of these freshly affected slopes, it was not possible to take up the pipe laying and

ancillary works sanctioned under JnNURM or PM Package. In a review meeting chaired by the Director N.III, Ministry of Urban Development, Government of India held at Guwahati on 14.06.2013 regarding the implementation of JnNURM Schemes in the North Eastern States, the State of Sikkim had explained that the works can be immediately started only after the commencement of the slope stabilization works, for which additional fund of Rs. 15.00 crores would be required.

5. Thereafter, a fresh estimate for the treatment of the damages i.e. "Slope Stabilization and Protection Works at Landslide Affected area along Raw Water Mains from Intake to WTP" was prepared. DPR was also prepared and was forwarded to the Government of India in the month of October, 2013, for funding under the transition phase of JnNURM. However, the Ministry of Urban Development, Government of India did not accept the above proposal and refused to grant additional fund of Rs. 15.00 crores. This was communicated to the Government of Sikkim vide letter dated 19.11.2013 (Annexure P-2).

6. The State authorities then got administrative approval from the Government of Sikkim for an amount of Rs. 15.00 crores as the cost of slope stabilization works and moved the file for awarding the said work to the third Respondent, who was carrying out the earlier works under JnNURM Scheme. The file was routed through various State channels and ultimately it was sent for Cabinet approval, which was granted on 21.02.2014 and the said contract for "Slope Stabilization and Protection Works at Landslide Affected area along Raw Water Mains from Intake to WTP" was awarded to the third Respondent without calling any separate tender for the same. LOI dated 27.02.2014 was issued to the third Respondent, which was replied vide letter dated 01.03.2014 and a rate 5% above the estimated value of Rs. 1413.18 lakhs was offered by the third Respondent, which was accepted by the Government and a work order dated 04.03.2014 was issued. Agreement was executed on 30.04.2014. Date of commencement of the contract work was 18.03.2014 and date of completion was 17.03.2015. Thus, a contract of 12 months duration was awarded in favour of the third Respondent for a total cost of Rs. 1483.84 lakhs (estimated value plus 5% above).

7. The two Petitioners, claiming to be the public spirited persons, have filed this PIL for cancellation of the contract and for quashing of various documents relating thereto. They have mainly contended that the contract was awarded to the third Respondent without calling any tender. The third Respondent is a consortium run by the brother of the fourth Respondent, who is ex-Minister. The Government, acting arbitrarily, has shown favour to the third Respondent, therefore, the contract should be cancelled and the work should be awarded by calling tenders in accordance with law.

8. Mr. A. Moulik, learned Senior Counsel appearing on behalf of the Petitioners, has mainly contended that there is violation of Article 14 and the action of the State is arbitrary and unreasonable. According to him, the NIT should have been

floated and tenders would have been called for awarding the work of such a high magnitude. He relied on the decisions of *Akhil Bhartiya Upbhokta Congress Vs. State of Madhya Pradesh and Others*, AIR 2011 SC 1834 : (2011) 4 JT 311 : (2011) 4 SCALE 355 : (2011) 5 SCC 29 : (2011) AIRSCW 2346 ; *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, AIR 1979 SC 1628 : (1979) 2 LLJ 217 : (1979) 3 SCC 489 : (1979) 3 SCR 1014 and *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, AIR 1980 SC 1992 : (1980) 4 SCC 1 : (1980) 3 SCR 1338 .

9. On the other hand, Mr. J.B. Pradhan, learned Additional Advocate General appearing on behalf of the State and its authorities, has contended that the subject contract was a contract for a "co-related" work and there was time constrain also, therefore, the Cabinet took a decision that it would be appropriate to award this contract to the same contractor (R-3), who was already working on site. There was nothing arbitrary or illegal. He further contended that about 53% of the work has already been executed and the Petitioners have approached this Court at a belated stage. Besides, their petition does not appear to be a true PIL and it deserves to be dismissed with heavy costs.

10. Learned counsel for the other Respondents have supported the arguments advanced by the Additional Advocate General. Further, Mr. D.K. Siwakoti, learned counsel appearing on behalf of the third Respondent, has also asserted that the third Respondent was fully competent to execute the work and the action of the Government cannot be assailed only on the ground that the third Respondent was owned by the brother of an ex-Minister.

11. We have heard counsel for all the parties.

12. In *Kasturi Lal* (supra), it was held that where the Government deals with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch-stone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. It must follow as a necessary corollary that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease-out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so. Such considerations may be that some Directive Principle is sought to be advanced or implemented or that the contract or the property is given not with a view to earning revenue but for the purpose of carrying out a welfare scheme for the benefit of a particular group or section of

people deserving it or that the person who has offered a higher consideration is not otherwise fit to be given the contract or the property. There may be an infinite variety of considerations which may have to be taken into account by the Government in formulating its policies and it is on a total evaluation of various considerations which have weighed with the Government in taking a particular action, that the Court would have to decide whether the action of the Government is reasonable and in public interest.

13. In *Ramana (supra)*, taking note of *E.P. Royappa Vs. State of Tamil Nadu and Another*, AIR 1974 SC 555 : (1974) LabIC 427 : (1974) 1 LLJ 172 : (1974) 4 SCC 3 : (1974) 2 SCR 348 and *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, AIR 1978 SC 597 : (1978) 1 SCC 248 : (1978) 2 SCR 621, it was held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.

14. *Ramana* and *Kasturi Lal* were taken into consideration in *Akhil Bhartiya Upbhokta Congress (supra)* and same considerations were reiterated and the allotment of land, as it was the question for consideration, was found to be gross violation of Article 14 of the Constitution and act of favouritism and nepotism.

15. The activities of the Government have a public element and they must, therefore, be reasonable keeping in view the element of public interest. Whether a particular act or policy of the Government is reasonable and is in public interest, of course, would depend upon facts and circumstances existing at the time of taking decision vis-?-vis the act or the policy. Thus, each case has to be scrutinized on its own merits. That is why there is no prohibition which may restrain the Government from taking a decision independently except those specifically provided in the Constitution or the laws in force. Any decision, which in any manner contravenes the provisions of the Constitution or the laws, therefore, would be invalid and void.

16. In the instant case, a Cabinet Memorandum dated 19.02.2014 (Annexure P-5) was prepared by the PCE-cum-Secretary, WS and PHED, Government of Sikkim, making a proposal for awarding the subject contract to the third Respondent. The reasons assigned for the proposal to take such a decision were that call of tenders would involve substantial period and in case of receiving non-responsive bids re-tendering would be required, which will also a time taking

process. In case a new agency is engaged to take up the work, much time will be required for site establishment and mobilization of man-power, materials and stores, etc. and there will be problem in execution of work by two different agencies on the same site, where the pipe laying work has already been entrusted to the third Respondent. The third Respondent was already holding possession of the site and it had a man-power of about 100 labourers with their hutments etc. The third Respondent had already deployed suitable machinery, equipments and tools and had a quality control lab. Therefore, looking to the above facts and circumstances, the works proposed, which were not the parts of the original ongoing project, may be taken as extra items of work as per clause 17.4 of Sikkim PWD Manual, 2009 and they may be awarded to the third Respondent. Besides, the immediate need of drinking water was also highlighted while making such a proposal. The above proposal was accepted and approved by the Cabinet on 21.02.2014, and then, the work order etc. were issued.

17. Mr. Pradhan has argued that the two works assigned to the third Respondent were "co-related", therefore, such policy decision was taken by the Government. However, he could not point out any statutory provision to show as to which kind of works would be taken as "co-related" works. What we understand from the argument of Mr. Pradhan is, he wanted to canvass that the works were to be taken at the same site and similar kind of engineering equipments would be requiring for the same, the nature of work was also similar and the work site was also under the occupation of the third Respondent, therefore, it would have been conveniently executed by them.

18. Whether the said policy decision of the Government was, in fact, reasonable? If we look into the scope of work under both the agreements, they were entirely different. We have mentioned the components of the first agreement in paragraph 1. These are quite different from the scope of the impugned agreement, which we quote for ready reference and comparison to satisfy ourselves that the two works were not of similar nature and characteristic and they cannot be held to be "co-related" with each other.

"SCOPE OF WORK OF THE IMPUGNED AGREEMENT"

19. The impugned agreement basically relates to protective works of Slope Stabilization at different locations from Km 1.60 to Km 13.40 with few other works of ancillary character, whereas, the components of the earlier work would show that they were mainly for carrying water from the river point to the WTP as also work relating to the renovation of existing WTP.

20. So far as the decision of the Government that it would be difficult for the two contractors to execute different works at one site is concerned, it has no basis at all. The said decision appears to be based on mere hypothesis. The State has said that problems may be created when the two contractors would work simultaneously at the work site. We note from the counter affidavit of the State that while making proposal for demand of funds for the new work, they

themselves have contended that without the treatment of the freshly affected slopes, it was not possible to take up the pipe laying and ancillary works sanctioned under JnNURM or PM Package. (See paragraph 11 of the counter affidavit). Thus, it clearly conveys that the two works were not to be taken up simultaneously and the Government was of clear opinion that without completion of the works under the impugned contract, the works under the earlier contract would not be carried out. Therefore, it was not a case in which the works were to be taken up simultaneously and the decision on this account appears to be unfounded and imaginary.

21. Moreover, the point of no difficulty in continuing the work simultaneously by two contractors, whose scope of work are totally different, can well be understood in the light of the contracts which are awarded to a consortium of two or more entities/partners with a view to expedite a composite agreement entered into between the employer and a consortium or joint venture. Normally, such contracts are awarded to a joint venture or consortium of experts of their respective fields with an idea to get the work done by a single agreement. In such agreements liabilities of various consortium partners are mutually fixed on principle-to-principle basis and they are freely executing their part of work simultaneously without making hindrances to the work of other consortium partners. We must keep in mind that all these factors are to be looked into in the realm of contract where the transactions are commercial and the employer is always interested to manage the works of contract, on commercial considerations, in such a manner which may be beneficial and time and result oriented. Thus, the decision of the Government that the works, if awarded to two different contractors would create a problem is unacceptable.

22. Mr. Pradhan, then canvassed about the urgency. Needless to say that if one is really interested to award a contract by calling tenders, in normal circumstance, in era of e-tendering process or say even manually, we have experience, it hardly consumes one or two months. In the instant case, necessity for Slope Stabilization (impugned work) was felt for the first time in September, 2012. Thereafter, the matter travelled through various channels and ultimately it came to be finalized in the month of January-February, 2014, i.e. almost after about one and half year. There is nothing on record to show that in between this period or even during the period of earlier contract, which was given to the third Respondent in the month of November, 2010, there was any interruption in water supply. Thus, if such a long period was sustained and the supply continued uninterruptedly, there was no urgency and the State could have easily gone to call tenders for this new work.

23. For the forgoing reasons, we are of the view that the action of the State was not reasonable and was arbitrary and violative of Article 14 of the Constitution.

24. Mr. Pradhan, next contended about locus and conduct of the Petitioners. We find from the records that the Petitioner No. 1 has served as Secretary, Publicity and Media Management of Sikkim Bhutia Lepcha Apex Committee. He has also

served as Principal of a reputed Institution run by Muyal Liang Trust and is voluntarily serving as Secretary of the All Sikkim Monasteries Association. Petitioner No. 2 has claimed to be a social worker.

25. In *S.P. Gupta v. Union of India and Another*: 1981 (Supp) SC 87 , it was held that any member of the public having sufficient interest can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or the law and seek enforcement of such public duty and observance of such constitutional or legal provision. The reason being, this is absolutely essential for maintaining the rule of law, furthering the cause of justice and accelerating the pace of realization of the constitutional objectives. The Judgment rendered in *Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others*, AIR 1981 SC 844 : (1981) 42 FLR 192 : (1980) LabIC 1367 : (1981) 1 LLJ 193 : (1981) 1 SCC 568 : (1981) 2 SCR 52 was also taken note of, in which it was pointed out that "Law is a social auditor and this audit function can be put into action only when someone with real public interest ignites the jurisdiction". The only check which was imposed was that the member of the public who approaches the Court, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration.

26. In the instant case, nothing has been brought on record to show that the two Petitioners have prosecuted the cause, either for their personal gain or private profit or political reasons. Thus, we hold that the Petitioners have locus to maintain this writ petition for public injury caused on account of above decision of the State.

27. Now the question arises about the relief (s) to be granted. In normal circumstance, we would have quashed the decision of the Government as also the agreement in favour of the third Respondent and would have directed to award the work by calling tenders. But here the situation is quite different. The Government took decision to award the contract to the third Respondent on 21.02.2014 and the work order was issued on 04.03.2014. Formal agreement was executed and the work commenced from 18.03.2014. The records of the Petitioners (Annexure P-11) would show that the Petitioner No. 2 had made an application under RTI Act on 07.07.2014 and the requisite information were made available to him on 25.07.2014 (Annexure P-12). In answer to Query (e) and (j) raised by the Petitioner No. 2, it was clearly informed to him that 20% work was already completed by that date and no tender was floated for awarding the said work. The Petitioners then sent a legal notice dated 24.09.2014 and thereafter they kept quiet and ultimately this writ petition was filed on 13.02.2015, which was in defect and it was resubmitted to the Registry, after removing the defects, on 24.03.2015. Thus, the petitioners have approached this Court after about one year from the date of issuance of the work order.

28. The Respondents have brought on record the statement showing details of work done till 10.06.2015. It shows that till that date 48% work amounting to

Rs. 7,60,40,861/- was already completed by Respondent No. 3 and payment of Rs. 5.00 crores was already made and a sum of Rs. 2,60,40,861/- was due for payment as per the measurement. A query was made on the date of argument and the Additional Advocate General, on instructions of Mr. K.P.T. Bhutia, Additional Chief Engineer and Mr. Sailendra Sharma, Superintending Engineer, PHE Department, made statement before us that by that date about 53% work was completed by the third Respondent.

29. In *Narmada Bachao Andolan Vs. Union of India and Others*, AIR 2000 SC 3751 : (2000) 2 JT 6 Supp : (2000) 7 SCALE 34 : (2000) 10 SCC 664 : (2000) 4 SCR 94 Supp : (2000) AIRSCW 4809 : (2000) 7 Supreme 264 , it was held that PIL should be thrown out at the threshold if it is filed after the commencement of execution of the project and no relief should be given to persons who approach the Court without reasonable explanation after inordinate delay. The said decision was taken note of in *D.D.A. Vs. Rajendra Singh and Others*, AIR 2010 SC 2516 : (2009) 10 JT 137 : (2009) 10 SCALE 273 : (2009) 8 SCC 582 : (2009) 12 SCR 163 and the view taken in *Narmada Bachao* was reiterated.

30. In *Ramana (supra)*, the writ petition was filed by the appellant more than five months after the acceptance of the tender of Respondent No. 4 and during that period, Respondent No. 4 had incurred considerable expenditure aggregating to about Rs. 1,25,000/- in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. The Supreme Court, in view of the above fact situation did not set aside the contract and held that the position would have been different if the appellant would have filed the writ petition immediately after the acceptance of tender of Respondent No. 4, and the Appeal on this account was dismissed.

31. Here also, we would have set aside the decision of the Government and have cancelled the agreement of the third Respondent, if the Petitioners would have come before us at an early stage. The Petitioners, even getting knowledge about all relevant facts caused delay of about one year in coming to this Court and by the time the matter came up for the first motion, a considerable amount of work had already been executed. We are of the view that it would not be in the public interest to set aside the decision of the Government and cancel the contract at this stage.

32. For all these reasons, the writ petition is dismissed. However, the Government is directed to observe various principles referred to above, in future, when it deals with the public whether by way of entering into contracts or granting other forms of largess, keeping in mind that such activities have a public element and it must be informed with reasons and guided by public interest.

33. CMA No. 113 of 2015 also stands disposed of.

34. There shall be no order as to costs.