

(1993) 10 SHI CK 0011
In the High Court Of Himachal Pradesh
Case No : Civil W.P. No. 85 of 1993

P.C. Anand

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 22-10-1993

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)

Citation : (1994) 1 ShimLC 79

Hon'ble Judges : Bhawani Singh, Acting C.J.; L.S. Panta, J

Bench : Division Bench

Advocate : A.K. Goel, for the Appellant; Indar Singh, A.G. and K.D. Sood, for the Respondent

Final Decision : Allowed

Judgement

Bhawani Singh, A.C.J.

1. The Petitioner is a "A" Class contractor with the Himachal Pradesh Public Works Department, having executed number of works of buildings and roads from time to time. His registration is also valid upto 31-3-1994, as per memorandum dated 6-7-1992, issued by Respondent No. 3.

2 Through the present petition, the Petitioner seeks quashing of Annexures PC and PN issued by Respondents Nos. 1 to 3, for reasons being recorded in the later part of this judgment.

3. Respondent No. 2 floated a notice inviting tenders for the work of strengthening of Chandigarh-Mandi-Manali Road N.H. 21, Km. 156/750 to 178/500 (SH: providing 75 mm thick bitumen macadam with seal surfacing in Km. 156/750 to 178/500), The estimated cost of this work, according to the second Respondent, was Rs. 1,26,23,319, and earnest money was Rs. 20,000 and the time for the completion of the work was two years. This notice is dated 29-9-1992 (Annexure-PC). The third Respondent again issued notice inviting tenders (Annexure-PN). This included all the terms and conditions of earlier

tender notice (Annexure-PC). The Petitioner further states that he had been undertaking similar jobs with estimated costs similar to those as detailed in Annexure-PC as well as subsequent tender notice for the same job. In Bilaspur Divisions Nos. 1 and 2, he tendered in response to notice inviting tenders and the value of these tenders was almost identical, though it may be that these works were not allotted to him since his tender was second lowest but he was, however, allowed to participate in tenders of almost similar estimated value. The Petitioner had also undertaken the job of strengthening this very highway at different places and the aggregate value of these works was more than rupees one crore and he has necessary ability and experience to execute such works and the same is very much clear from the certificates issued to him by the Public Works Department.

4. The further case of the Petitioner is that in accordance with the guidelines for submission of pre-qualification of tenders, identical instructions have been issued by the Chief Engineer (South) and also by the third Respondent (Annexure-PL). In accordance with Clause 10, pre-qualification of tenders is invited from appropriate category of contractors, limiting the sale of tenders to such contractors or similar nature within the last five years and whose aggregate value being not less than 50 per cent of the amount being put to tender. In accordance with the Government of India, Ministry of Surface Transport. Road Wing, letter dated 16-9-1991, tender documents for local competitive bid for execution of road and bridge work on National Highways and Centrally sponsored Scheme Mobilisation advance to contractors, relevant Clause 4 is to the following effect:

4. At present, the prequalification of contractors is mandatory in respect of works costing Rs. 2 crores or more.

(part omitted is illegible and illogical having no sense).

Therefore, "A" Class contractor, duly registered with the Himachal Pradesh Public Works Department, having the requisite infrastructure as well as the experience, is eligible to opt and tender upto any value in the State of Himachal Pradesh and neither Respondent No. 3 nor any other person is competent to levy a condition of pre-qualification as has been done vide Annexures-PC and PN, more particularly when the Petitioner has successfully undertaken similar jobs under different divisions, including under Respondent No. 2, though may not be of the value of rupees one crore in one go. The condition of pre-qualification is contrary to Annexure-PL and PM. It is also not available in the Punjab Public Works Department Manual, as applicable to the State of Himachal Pradesh. As such, this condition could not be imposed in the tenders (Annexure-PC and PN). It was on account of these conditions that the Petitioner was not supplied tender form and could not take part in the allotment of work on the basis of tender notice. This condition is arbitrary, unjust and unconstitutional. It denies the Petitioner right to carry on trade and business under Article 19(1)(g) of the Constitution of India. The Petitioner also claims that he is prepared to work at rate lesser than

the one offered by the fourth Respondent which will enable the State exchequer to save more than rupees twenty lakhs.

5. Shri R.A. Chaudhry, Superintending Engineer, 1st Circle, H.P. P.W.D, Mandi, has filed reply in this case. He has challenged the locus standi of the Petitioner to file the present petition stating that no injustice has been done to the Petitioner. The notice inviting tenders (Annexure-PC) was circulated vide No. PW/SNR/AB/Tender (Strengthening) 92-8000-80, dated 30-9-1992 and was also published in the leading newspapers, but the Petitioner had not applied for the tender, therefore, he has no right to file the present petition. According to him, the estimated cost of the job is Rs. 2,44,17,001/and not Rs. 1,26,23,319, though it has been admitted that the estimated cost put to tender is Rs. 1,26,23,319. Thereafter, no fresh tenders were invited vide Annexure-PN, only the date of sale/receipt of the tenders was extended by way of corrigendum to Annexure-PC. In his Division, the Petitioner had not executed work beyond rupees thirty lakhs. The works of rupees one crore executed by the Petitioner cannot be equated to the present work amounting to estimated cost of Rs. 2,37,00,000. The total works executed by the Petitioner do not exceed more than rupees 37.90 lakhs (Annexure-PD) and no reliance can be placed on the other certificate (Annexure-PG). In para 12 of the reply, it has been stated that the Petitioner has tried to confuse the issue by intermingling the words "prequalification of tender" and "tender for execution". Tenders for execution are only asked from the contractors who have been prequalified for tenders of specific works. The condition of 50% of the tender amount is only applicable for issuing prequalification tender documents and not for issuing tender for execution of work. Since the tender in question is for execution of work, as such, the condition of 50 per cent of tender amount, did not apply in this case. The value of the work to be executed by the contractor was, in fact, more but it was considered below rupees two crores, after deducting the cost of bitumen and the recovery of the plants to be issued by the department. It was considered vide letter No. PW (NZ) CTR/Tender/ Road Crust/Mandi/10112-14. dated 25-9-1992 (Annexure-A) that instead of calling prequalification tenders, the department should go for tenders for execution of work directly. It has also been stated that the department had also called for the prequalification tenders and contractors who were recommended for prequalification tenders were sent for approval to the Chief Engineer (North; and the case of the Petitioner did not figure in this list.

6. In his rejoinder, the Petitioner has asserted that he approached the Superintendent in the office of the Executive Engineer, Sundernagar, along with the application with requisite amount, but the same was not accepted by the said official on the ground that since the Petitioner did not fulfil the required condition prescribed in Annexure-PC, neither his application nor the amount sent with it could be accepted and the same was returned to the Petitioner by the said official. The Petitioner was specifically told that since the Petitioner had not executed similar works of rupees one crore or more in one go, a condition precedent for the issuance of tenders to the contractors vide Annexure-PC, he

could not be issued the tender documents, therefore, the contention that the Petitioner had not applied for the tender documents is wrong. The Petitioner also met the Chief Engineer (North), H.P. PWD, Dharamshala, who informed that pre-qualification of having executed similar class of work of rupees one crore or more in one go, has been wrongly prescribed in Annexure-PC, therefore, necessary instructions had been issued to the concerned officer to call fresh tenders. The Petitioner was also told that for the execution of this work, departmental plants would be used in all circumstances and the concerned contractor would have no option. The efforts made by the Petitioner are substantiated by letter No. PW (NZ)CTR/Tender/Road Crushed/ Mandi/10112-14 dated 25-9-1992, addressed by the Chief Engineer (North) to the Superintending Engineer, 1st Circle, H.P. PWD , Mandi, and copy endorsed to the Executive Engineer, Sundernagar Division (B and R), Sundernagar, etc., for information and taking further necessary action. Respondent No. 2 instead of complying with the direction issued by Respondent No. 3 (Annexure-A), simply issued a corrigendum (Annexure-PN), extending the date of sale of tender form in respect of the concerned work upto 7-12-1992 in place of 5-11-1992. All other terms and conditions of tender (Annexure-PC) remained unchanged. A combined reading of both these tenders (Annexures-PC and PN) demonstrates that Respondent No 2 did not at all comply with the directions of Respondent No. 3 and continued to stick to the condition of prequalification stipulated in the tender notice (Annexure-PC). It has been disputed that the cost of the work is rupees two crores and thirty seven lakhs. As a matter of fact, it would be less than rupees two crores. Despite giving the assurance that fresh tender notice, free from prequalification as stipulated in tender notice (Annexure-PC), would be issued, the same was not done and issuance of tender notice (Annexure-PN) did not make any difference, as already mentioned hereinabove.

7. The third Respondent has also filed affidavit in this case pursuant to this Court direction dated 23-4-1993. He has admitted that as per instructions of the Ministry of Transport, vide letter No. NH-11024/1/88-DO-I, dated 7-2-1989 (Annexure-B), the prequalification of contractors is necessary where estimated cost of the project is above 200 lakhs As per these instructions, prequalification tenders were invited by the Executive Engineer, Sundernagar, Division, H.P. PWD., through the Director, Public Relations, Himachal Pradesh, vide his office letter No. PW-SNR- AB-Tender/91-92-1401-03, dated 3-5-1991. After having received 11 tenders of firms/contractors for prequalification, the same were sent to the Ministry of Surface Transport, after taking all these into consideration, through the office of the replying Respondent, for approval of the recommended names of the firms/contractors. After considering the time aspect and availability of the machineries, the Ministry of Transport directed the replying Respondent, vide communication No. NH/12016/64/91/N/HP, dated nil (Annexure B-II) that since the cost of the project would be less than rupees two crores, after deducting the cost of bitumen and plant, the Respondents may not go for prequalification bid These instructions were conveyed to the Superintending Engineer, (1st Circle,

H.P. PWD, Mandi, under whose jurisdiction she work fell, vide communication Na. PW (NZ) Tender/Road/Crust//Mandi/10112-14 dated; 25-9-1992 (Annexure-B-1). It was directed to call tenders for execution by incorporating the conditions that departmental plant will be issued for the work in all circumstances. Draft for approval for calling tenders for execution of work was sent by the Executive Engineer, Sundernagar Division, H.P. PWD, Sundernagar, vide letter No. PW-SNRAB-Tender (Strengthening)-7877, dated 28-9-1992 (Annexure.C). The draft prepared by the office of the replying Respondent was given to the Executive Engineer, Sundernagar Division, H.P. PWD, Sundernagar, through the Superintending Engineer, 1st Circle, H.P. P.W.D., Mandi, which was confirmed vide 1st Circle, H.P. P.W.D., Mandi, letter No. SER-Tender/Strengthening-SNR/92-22245, dated 26-10-1992 (Annexure C-1). On receipt of this draft, the Executive Engineer, H.P. P.W.D., Sundernagar Division, called the tender for the execution of the work vide his letter No. PW-SNR-AB-Tender/92-7997-99, dated 30-9-1992, through the Director of Public Relations, Himachal Pradesh. On the basis of the approved draft, tenders for the execution of the work were received by the Executive Engineer, Sundernagar Division This Respondent further states that the Superintending Engineer, 1st Circle, H.P. P.W.D, Mandi, has complied with the directions dated 25-9-1992 and has floated the tenders accordingly. It has further been clarified by the replying Respondent that prequalification tenders are the tender forms for selection of good contractors who possess adequate machinery, know-how and are capable of completing the job in time as prescribed by the department. The financial status of the firm, technical expertise and experience in completing the similar job in time, has also to be seen. After the prequalification of the contractors is done, the tenders are invited for work and tenders are sold to those contractors who were selected/prequalified for the work. Had the estimated cost put to tenders was more than 200 lakhs, after deducting the cost of bitumen and plant, the department would have gone for the prequalification bids and the approval of the Ministry of Surface Transport was necessary. Prequalification of tenders, that is, prequalification of contractors/firms and tenders for execution of work are two different matters which have been misinterpreted by the Petitioner.

8. The fourth Respondent has also filed the reply. He has stated that the Petitioner did not apply for the tender documents nor did he fulfil the prequalification for the issuance of tender in his favour. The Petitioner had not done work worth beyond rupees thirty lakhs and certainly not the work of rupees one crore or more in one go. As such, he is not entitled to maintain the present petition. Further, the works executed by this Respondent have also been mentioned justifying the issuance of tender in his favour. The Petitioner did not apply for the tender even when the date was extended upto 7-12-1992. In para 14 of the reply, it has been stated that tenders for this work were invited from all the "A" Class contractors without prequalification limit and the Petitioner did not apply for the same, therefore, his challenge is without any basis. In fact, he has challenged the allotment of work in favour of the fourth Respondent simply

because he happens to know the rate of the tender. Other averments of this Respondent are more or less similar to those of other Respondents.

9. In the rejoinder to this reply, the Petitioner has challenged the contentions of the fourth Respondent on all the points. The stand taken in the main petition and in the rejoinder to the reply of Respondents 1 to 3 has been reasserted. The partnership of the fourth Respondent has also been assailed being illegal. These are the essential facts of the case. Now, we proceed further to examine the respective contentions of the parties.

10. It was contended forcefully by the learned Counsel appearing for the Respondents that the Petitioner has no right to challenge the allotment of work to the fourth Respondent since he did not apply for the same. In case the Petitioner had applied for the prequalification and the relevant documents were not supplied to him, he should have highlighted this question in the petition and not by way of rejoinder to the reply filed by Respondents Nos. 2 and 3.

11. We have examined this question. This objection can be answered in two ways. If we look at Annexure-PC, it is amply clear that tenders had been invited from eligible contractors in the appropriate class enlisted in the H.P. PWD., having good experience in similar works and the tenders were to be issued to the contractors who have executed similar class of work of rupees one crore or more in one go and have sufficient machinery or equipment for the execution of this work (except mishaul available with the department which was to be supplied to the eligible contractors by the department). The contractor had to bring his enlistment letter of appropriate class and the application for tender document was to be accompanied by the list of machinery and equipment in his possession and the list of similar works executed by him earlier, duly supported by experience certificate and detail of machinery from the Executive Engineer concerned where he had executed a similar work. The estimated cost of the tender has been mentioned as Rs. 1,26,23,919. Therefore, the contractor had to apply for the tender document with all details mentioned in this tender notice. He should be a contractor of appropriate class and listed with the H.P. PWD, with good experience in similar works. The tenders were to be issued to those contractors who had executed similar class of work of rupees one crore or more in one go. The Petitioner submits that he had all the qualifications, except that he had not executed work of similar class of rupees one crore or more in one go although the total value of all the works executed by him with the Public Works Department was more than this requirement. Normally, in face of conditions in Annexure-PC, the Petitioner could not have applied for the tender documents, still he had approached the Superintendent in the office of the Executive Engineer, Sundernagar, alongwith application with the requisite amount but the same was not accepted by the said official on the ground that the Petitioner was not eligible in view of the condition prescribed in Annexure-PC. Accordingly, the application was returned. The matter did not rest here. He also approached the Chief Engineer (North), H.P. PWD, Dharamshala, who informed the Petitioner that

pre-qualification of having executed similar class of work of rupees one crore or more in one go, had been wrongly prescribed in the tender (Annexure-PC), therefore, necessary instructions had been issued to the concerned officer to call fresh tenders. Such a communication was issued by the Chief Engineer (North) to the Superintending Engineer, 1st Circle, H.P. PWD., Mandi, alongwith sample tender notice which is dissimilar to the tender notice (Annexure-PC) and meets the case of the Petitioner, However, instead of issuing fresh tender notice in accordance with the directions of Chief Engineer (North), Respondent No. 2 simply issued a corrigendum (Annexure-PN) extending the date of sale of tender form in respect of the concerned work upto 7-12-1992 in place of 5-11-1992 thereby keeping all other conditions of tender (Annexure-PC) unchanged, meaning thereby, pre-qualification tender (Annexure-PC) remained intact and the Petitioner was unable to compete for the allotment of work and remained out of the race. Respondent No. 2 acted not only against the directions of Respondent No. 3 but also went against the guidelines contained in Annexure-PL, stating in item No. 10 that:

The pre-qualification of tenders may be invited from appropriate category of contractors limiting the sale of tenders to such contractors who must have successfully completed jobs of similar nature within the last five years and whose aggregate value being not less than 50% of the amount being put to tender. This condition should be exhibited in the notice inviting tenders. The E.E. must also obtain on record a certificate to that effect, satisfying himself of the validity of the same and then authorise issue of tender documents.

His action is also against para 4 of letter No. RW/NH-11024/2/80-001, dated 16-9-1991 (Annexure-PM), relevant part of which has already been reproduced above. The work on the National Highway is executed by the State Government under the supervision of Ministry of Surface Transport, Government of India and all expenditure is met by the Central Government. Raising of plea in the rejoinder does not make significant dent in the case of the Petitioner. He has specifically said in the main affidavit /that he was excluded from competing for the work on account of the condition of pre-qualification of having executed work of similar nature of rupees one crore in one go, which is arbitrary, whimsical and unconstitutional in character. He had all the qualification except this and, therefore, the pleadings recorded in the main affidavit were sufficient to give him locus-standi to approach this Court and highlight the issue. When the Respondents assailed his locus-standi on the ground that he had not applied for the tender, he answered this question in the subsequent affidavit. All the affidavits form part of the pleadings and the case of the Petitioner. Explaining a question raised by the other party in a subsequent affidavit, does not mean that the plea is baseless. The Respondents could have filed affidavit of the office Superintendent denying this contention of the Petitioner. In the circumstances aforesaid, we do not see any substance in the objection of the Respondents.

12. The second answer is that the Petitioner has sufficient locus-standi to

question the decision making process as well as the allotment of the work to the fourth Respondent. He has sufficient interest in the transaction. He is "A" Class contractor with experience in this nature of work and just expectation to get the work by competing with others. The traditional rule of locus standi has undergone massive change with the decision of the Constitutional Bench of the apex court in S.P. Gupta Vs. President of India and Others, Access to justice has been made easy. Legitimacy of public nature of functions can be challenged by a person who may not be personally aggrieved of the action and who may not have approached the State to discharge the same in a particular way. Therefore, this question should not detain us long and we hold that the case of the Petitioner does not suffer for lack of standing.

In Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, an order awarding contract by the Government to a party was questioned on the ground that it was arbitrary, matafied and not in public interest and the same created monopoly in favour of that party and that the contract was awarded without affording an opportunity to others to compete and the same was not based on any rational or relevant principle and, therefore, was violative of Article 14 of the Constitution and also the Rule of administrative law which inhibits the arbitrary action by the State. The apex court observed that:

Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the Government is still the Government and is subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. 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 touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

13. Shri K.D. Sood laid great stress on the following observations of the apex court in this judgment:

But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not

informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because, as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action and therefore the Court would not strike down Governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied, it would be the plainest duty of the Court under the Constitution to invalidate the Governmental action. This is one of the most important functions of the Court and also one of the most essential for preservation of the rule of law.

14. There is no dispute with the above quoted principle, however, the following para may be of greater importance in the facts and circumstances of this case:

The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of that decision of this Court in *Ramana D. Shetty v. International Airport Authority of India and Ors.* (supra) that the Government is not free like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well established that the Government need not deal with anyone, but if it does so it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing 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 and like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The Governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the Court as a rule of administrative law and it was also validated by the Court as an emanation flowing directly from the doctrine of equality embodied in Article 14.

This principle was approved in *Union of India and others Vs. Hindustan Development Corpn. and others*, [See also; *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*,

15. We also reject the contention of the Respondents that the Petitioner could apply in response to tender notice (Annexure-PN) within the extended date for the reason that it was only a corrigendum extending the date of the tender only while other conditions contained in tender notice Annexure-PC continued to remain operative.

16. Having examined the material on record carefully, we see noticeable attempt on the part of the Respondents, more particularly Respondent No. 2, in processing the matter in an arbitrary, whimsical and irrational manner with clear

motive to exclude the Petitioner from participating in the allotment of this work. The second Respondent did not care to comply with the guidelines and instructions on the subject even though he was directed to do so by authorities hierarchically superior to him. An attempt has also been made to confuse the issue although the fourth Respondent has also admitted that it was a case of pre-qualification tender. It can, thus, be held that the Petitioner has been excluded arbitrarily from participating in the tender of work although he was duly qualified to compete, thereby violating his fundamental right of equality and to carry on trade and business as envisaged under Articles 14 and 19(1)(g) of the Constitution of India.

17. The second question that came for consideration during the course of submissions by the learned Counsel for the parties was whether the work should be allotted to the Petitioner offering to do so at a lesser rate, as compared to the fourth Respondent. Shri A.K. Goel vehemently contended that this Court should direct the allotment of work to the Petitioner so that public funds are saved to a great extent and the execution of work taken up immediately. We do not think it proper to adopt this course. We would like that this work is put to tender afresh giving equal opportunity to all the contractors to submit their tenders.

18. The result, therefore, is that this petition is allowed, tender notices are hereby quashed and Respondents Nos. 1 to 3 are directed to issue fresh tenders for the execution of this work. The parties are, however, left to bear their own costs.