2024:HHC:15828

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWPIL No. 30 of 2024
Reserved on: 04.12.2024
Decided on: 24.12.2024.

Mohinder Kalta and another .... Petitioners

Versus

State of Himachal Pradesh and others ...Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Acting Chief Justice
The Hon'ble Mr. Justice Satyen Vaidya, Judge

[1] *Whether approved for reporting?* ***Yes***

For the petitioners:	Mr. Ravi Tanta & Mr. Shakti Bhardwaj, Advocates.
For the respondents:	Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta, Additional Advocate General, for respondents No. 1 to 3.
	Mr. Hamender Chandel, Advocate, for respondent No.4.
	Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Narender Singh, Advocate, for respondent No.5.

Satyen Vaidya, Judge

The instant Public Interest Litigation has been filed for following reliefs:

(1) A direction in light of the facts averred in the

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[1] *Whether reporters of Local Papers may be allowed to see the judgment?*

body of the writ petition to respondent No. 1 to 3 to cancel the award of work of upgradation of Matiana, Mahori to Chhaila road, Km 0/00 to 25/650 under PMGSY package No. HP-09-694, awarded to respondent No.5 vide award dated 15.03.2024, with a further direction to respondent No. 1 to 3 to call for fresh tenders for the work of upgradation of Matiana, Mahori to Chhaila road, Km 0/00 to 25/650 under PMGSY package No. HP-09-694.

(2) A direction in light of the facts averred in the body of the writ petition to respondent No.1 to 3, to inquire as to why the work of upgradation of Matiana, Mahori to Guthan road, Km 0/00 to 24/00, awarded to respondent No.5 in the year 2019 vide award dated 31.01.2009 had not been revoked till date despite their being a delay of about four years in the completion of the work, with the further direction to immediately revoke the said work from respondent No.5 and to make recovery of the additional costs which would be borne by the Government of H.P. in firstly completion of this road along with due repairs emancipating from the poor execution of the work on this road by respondent No.4.

(3) A direction in light of the facts averred in the body of the writ petition to respondent No.1 to

4, to take appropriate actions against the respondent No.5, along with all the erring officials belonging to respondent No. 1 to 4, who have apparently connived with respondent No.5 to illegally manufacture fake performance certificate Annexure P-16, declaration issued by Patel Engineering Limited Annexure P-19, incomplete work order Annexure P-20 and declaration issued by General Manager Shong Tong Hydro Electric Project Karcham, Kinnaur, H.P. Power Cooperation Limited, Annexure P-21, and have considered these documents in favour of respondent No.5 to be legally valid for grant of work of upgradation of Matiana, Mahori to Chhaila road, Km 0/00 to 25/650 under PMGSY package No. HP-09-694, vide award dated 15.03.2024, by respondent No. 1 to 3."

2. As the member of Panchayat Samiti, Development Block, Theog (elected from Ward No.1, Mahori) and Vice-President of Gram Panchayat Mahori, Development Block, Theog, respectively, the petitioners have come forward to espouse the cause of public interest. The locus shown by the petitioners for filing the instant petition is the representation of the interest of common masses i.e. residents of the area of Gram Panchayat Mahori as also to bring to the fore arbitrary

actions of official respondents in dealing with public contracts.

3. Petitioners have raised certain issues arising out of the award of following work by respondent No.3 to respondent No.5:-

> ***"****Up-gradation of Matiana-Mahori to Chhaila Road Km 0/000 to 25/650 (SH: Formation Cutting, Protection works, cross drainage works, Metalling and tarring, road side drains, crash barrier, parapets, road safety, Km stone & dumping sites etc. routine maintenance for five years after completion under PMGSY-III, Batch No. I, Package No. HP-09-694. (for short 'the work')"*

4. The work pertains to Pradhan Mantri Gram Sadak Yojana (for short. "PMGSY") Rural Roads Project, Batch I of Package No. HP-09-694 for total estimated cost of Rs.2335.88 lacs (Rs.2181.72 lacs for construction part and Rs.154.16 lacs for maintenance part, excluding GST @ 18%).

5. The bids were invited on 30.01.2024. The last date for submission of bids was 16.02.2024. Only two bids were received. One by M/s P.K. Construction Pvt. Ltd. (for *short, 'PK Construction') and* the other by Om Parkash Mehta (respondent No.5). The technical evaluation commenced on

16.02.2024 and summary of Part I / technical bid evaluation was uploaded by the official respondents on 29.02.2024. The technical bids submitted by both the bidders were held responsive. Accordingly, the financial bid was opened on 04.03.2024. The bid submitted by respondent No. 5 was found lowest, accordingly, the work was awarded to respondent No.5 *vide* award letter dated 15.03.2024.

6. The petitioners have instituted the instant petition on 07.06.2024 taking exception to the award of work in favour of 5th respondent by alleging arbitrariness, unreasonableness and bias against official respondents *inter alia* on the following grounds: -

(i) The credentials and work capacity of respondent No.5 to execute the work have been questioned on the basis of his adverse performance while executing another work of similar nature known as "Matiana-Mahori-Guthan" Road (*for short, 'Guthan Road')*. It is alleged that the said work was awarded to respondent No.5 in the year 2019, but was incomplete even till date of filing of petition and further whatever work had been done was sub-standard. Reference has also been made to a resolution passed by the Gram

Panchayat, Mahori, Development Block, Theog in this respect on 06.05.2024.

(ii) The Standard Bidding Document (for short. "SBD") Clause 22.6 provided for a mechanism whereby the complaint, if any, received against technical evaluation was to be disposed of within five days and was a pre-condition for further movement in the tender process. Reference has also been made to PMGSY Manual Chapter 3.4 which *inter-alia* provides that unless complaints on Part-1 bid are resolved satisfactorily, Part-2 bids should not be opened.

(ii) (a) The petitioners have alleged that a detailed written complaint was submitted by PK Construction to the competent authority detailing therein the dis-qualifications suffered by respondent No.5, but while uploading the Part-1 evaluation summary, the official respondents suppressed the factum of complaint having been submitted by PK Construction and rather suggested "***No complaint was received***".

(b) The petitioners have highlighted a contradictory stand of official respondents, on the issue, from the communication dated 19.04.2024 from

Engineer-in-Chief, HPPWD, Shimla-2 to the Principal Secretary (PW) to the Government of Himachal Pradesh. The relevant extract of such communication is extracted as under:

> ***".....Meanwhile a complaint of M/s P.K. Construction, Shimla Pvt. Ltd. Himachal Pradesh received, but the same has been scrutinized and after scrutiny there was no base for the complaint as the total work done by Sh. O.P. Mehta is also supported by the income tax returns filed and having all the legal entries and cannot be ignored and hence the bid of Sh. O.P. Mehta has been found responsive and correct. Moreover, the work is of semi-Govt. by JSW Hydel Project not a private. It is also submitted that Sh. O.P. Mehta has already executed more than 6 works of PMGSY under Shimla Zone satisfactory and accordingly the LOA has been issued for this office dated 07.03.2024."***

(c) It has further been contended that a third version of official respondents is also available on record, according to which, they have admitted the receipt of a complaint from PK Construction on 01.03.2024, however, the same was stated to have been withdrawn on 04.03.2024.

(iii) The violation of Clause 4.4 A (b) of SBD has also been alleged, which reads as under:

"4.4 A. To qualify for award of the contract, each bidder should have in the last five years:

(a) ……..

(b) ***Satisfactorily completed as prime Contractor or sub-contractor at least one similar work equal in value to one-third (one-fourth in case of Naxal/LWE affected districts) of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited, or such higher amount as may be specified in the Appendix to ITB. The value of road work completed by the bidder under Pradhan Mantri Gram Sadak Yojana in originally stipulated period of completion shall be counted as 120% for the purpose of this Sub-Clause."***

(iii) (a) It is alleged by the petitioners that keeping in view the total contract amount of Rs.2335.88 lacs, in compliance to Clause 4.4 A (b) of SBD, the bidders were required to show that they had satisfactorily completed work of similar nature worth Rs.727.27 lacs.

(b) In the facts of the case in hand for meeting out the above requirement, respondent No.5 had submitted a work

done certificate issued by Patel Engineering Ltd. (*for short, 'the PEL')* a contractor of respondent No.4 HPPCL involved in execution of Shongtong Karchham HEP in District Kinnaur, H.P. It was shown that respondent No.5 had completed work amounting to Rs.23.51 crores in February-2022.

(c) Exception has been taken by the petitioners to the consideration of aforesaid work done certificate on the grounds ***firstly*** that respondent No.5 had not executed any such work as the documents provided by the said respondent themselves established that the work was executed by M/s Kinner Kailash Company and ***secondly***, that the work shown to be executed by respondent No.5 was not of the similar nature.

(iv) Respondent No.5 is enlisted as a Class "A" contractor with HPPWD by the name "O.P. Mehta". As per the "Rules for Enlistment of Contractors in HPPWD 2021" (*for short, "Enlistment Rules"*), any entity whether natural or legal can be registered only in one name. The violation of Rules 4.4 and 4.5 of the Enlistment Rules has thus been alleged, which reads as under:

"4.4. A contractor is not permitted to have Enlistment in more than one name i.e. individual/sole Proprietorshipfirm/ Partnership firm/ Company in HPPWD.

4.5. An individual or a partner of a firm or a Director of a company enlisted as a contractor cannot be a partner/director in any other Enlisted Firm/Company in HPPWD."

(a) It is further submitted that the work done certificate issued by PEL was not valid; for PEL was not the principal employer, rather was itself a contractor of HPPCL for execution of Shongtong Karchham HEP.

(b) As per Clause 4.4 A (b) of SBD, the bidder was required to have satisfactorily completed as **prime contractor** or **sub-contractor**, at least one similar equal work to 1/3rd of the estimated cost of work for which the bid is invited. Since, respondent No.5 had not completed the work shown under work done certificate issued by PEL either as a prime contractor or sub-contractor, the bid submitted by respondent No.5 could not have been declared responsive.

(v) The petitioners have also alleged violation

of Section 3 of PMGSY-SBD with the allegation that the qualification information was not submitted by 5th respondent as per required format.

7. It is further averred that the petitioners issued a legal notice to 4th respondent on 07.05.2024; as earlier information received by the petitioners under RTI Act from PEL was not only unconvincing but contradictory also, however, no response was received by them.

8. Respondents No. 1 to 3 have filed their joint reply. It has been submitted that the petitioners had not submitted any complaint or objection before the award of work. The official respondents, though, admitted that the work of Guthan Road was completed by 5th respondent on 12.06.2024 after a period of almost six years but have sought to render detailed explanation/justification for delay in execution of said work. As per the official respondents, the work in respect of total length of 8 Kms. was awarded to respondent No.5, but after award of work, it had transpired that in the initial stretch of the road in the length of about 2.5 Kms as awarded to 5th respondent, layers of G-I and G-II, which had earlier been laid in the year 2015 had completely

washed away and said layers were required to be re-laid. Since, in the original tender the aforesaid work of laying of these layers (G-I and G-II) was not included, it took considerable time for the departmental action which was finally sanctioned on 30.10.2019 and the tender cost was increased by Rs. 49.55 lac. The period between 2020-2021 has been dis-counted on account of the then prevailing Covid-19 pandemic. It has further been submitted that during 2022, the pace of work was accelerated by 5th respondent and almost 95% completion was achieved till August, 2022, but due to incessant rains in the entire State during the year 2023, huge damages were suffered to the already executed work on Guthan road. The restorations works were executed after 2023 by 5th respondent on the already approved rates at the time of initial award of work.

8.2 The resolution dated 06.05.2024 of Gram Panchayat, Mahori in respect of the work executed by respondent No.5 on Guthan road has been alleged to be a bogus document. It is submitted that no such resolution was passed by the Panchayat.

8.3 As regards the complaint by PK Construction, it

has been submitted that though such complaint was submitted on 01.03.2024; the discussions/deliberations were held with said bidder on 02.03.2024 and on 04.03.2024 the complaint stood voluntarily withdrawn. The discrepancies in the summary of Part I/ technical bid have been sought to be clarified by stating that since on that day, no complaint was pending, ***"no complaint was received"***, was reflected as remark in the uploaded summary of bids.

8.4 The allegation of petitioners regarding invalidity of the work done certificate submitted by 5th respondent of M/s Kinner Kailash Company has been contested on the ground that M/s Kinner Kailash Company was no separate entity and as a matter of fact was the sole proprietorship concern of 5th respondent Sh. O.P. Mehta. It has been submitted that GST and PAN number used by both the entities was the same. It has further been stated that Sh. O.P. Mehta is enlisted Class "A" contractor with respondents No. 1 to 3.

8.5 The objections as to dis-similarities in the work executed by 5th respondent at Shongtong Karchham HEP and the nature of work required to be executed under the contract in hand, has been sought to be dispelled on the

ground that the work executed by 5th respondent at Shongtong Karchham HEP was more technical.

8.6. Respondents No. 1 to 3 have further recognized 5th respondent as sub-contractor of PEL on the basis of an agreement dated 04.01.2019 allegedly executed *inter se* PEL and 5th respondent and the alleged tacit consent of HPPCL evidenced by payments made to 5th respondent through escrow account.

9 5th respondent has also filed his reply. It has been submitted that resolution dated 06.05.2024 allegedly passed by Gram Panchayat, Mahori was a forged document. Reliance has been placed on information provided by Panchayat Secretary of the said Panchayat. An apprehension has also been shown about the bonafide of the petitioners and the public interest sought to be projected by them. 5th respondent has averred that he has executed and completed hundreds of civil works for respondents No. 1 to 3 during his long career as Class "A" contractor. As per the said respondent, he has received a number of commendation certificates. Reliance has also been placed on the resolutions passed by various Panchayats, backing the 5th respondent.

9.1 5th respondent has claimed himself to be a sub-contractor insofar as the execution of work done by him under PEL. He has also relied upon an agreement dated 04.01.2019. The payment received by him through escrow account have been relied upon as evidence to support his contention of being a sub-contractor.

9.2 As per 5th respondent, he had uploaded two work done certificates at the time of submission of his bid. The second certificate was issued by the Executive Engineer, Kumarsain, District Shimla for the work to the tune of Rs.683.17 lacs. It has been suggested that the said work was also under PMGSY and as per terms of SBD, 5th respondent was entitling to benefit of consideration of said work to the extent of 120% after its completion.

9.3 Respondent No.5 has denied violation of Enlistment Rules. He submitted that his enlistment was only as O.P. Mehta and M/s Kinner Kailash Company was not a separate entity. As per 5th respondent, M/s Kinner Kailash Company was merely a symbolic name whereas the said respondent was its sole proprietorship.

10 We have heard learned counsel for the parties and

have also gone through the records of the case carefully.

11 The first question arises whether the petition is in the nature of Public Interest Litigation?

12. It is not in dispute that the petitioners are public representatives and represent one of the Panchayats i.e. Gram Panchayat, Mahori, whose residents are beneficiaries of the Matiana-Mahori-Chhaila Road. Thus, their locus-standi is undeniable. As regards public interest, the petitioners *inter alia* have raised issues touching upon the alleged arbitrariness and consequent violation of Article 14 of the Constitution of India in grant of public contract. Further, there also is nothing on record to presume the absence of public interest as the respondents have not been able to place on record any material suggesting any personal interest or ulterior motive of the petitioners in approaching the Court.

13 The controversy with respect to genuineness of resolution of Gram Panchayat, Mahori dated 06.05.2024, should not detain us for long for the reasons that said resolution in any case dealt with the alleged modest performance of 5th respondent in executing the work of Guthan road. The parties have raised their counter-claims in

respect of further proceedings taken under the Himachal Pradesh Panchayati Raj Act on the disputed resolution of the Panchayat. What transpires is that the question is still undecided. As the said resolution was with respect to a different work, the performance thereof cannot be a relevant or at least the sole factor to adjudicate the controversy raised in the instant petition.

14 What is required to be seen is whether 5th respondent did not fulfil conditions of NIT to claim himself as technically qualified? if yes, whether the award of work to him by official respondents was vitiated being result of arbitrariness, unreasonableness and bias?

15 On facts, there is no dispute that the summary of Part-I technical evaluation of bid clearly mention that no complaint/objection was received. Undoubtedly, this was a categoric statement of fact, which has been belied by the records and subsequent admissions of respondents No. 1 to 3 and 5.

15.1 On 17.06.2024, during the course of proceedings of this matter learned Advocate General had placed on record instructions dated 15.6.2024 along with a copy of

communication dated 19.04.2024 addressed by the Engineer-in-Chief to the Principal Secretary (PW) to the Government of Himachal Pradesh. The relevant portion of said communication has already been reproduced in paragraph 6(ii)(b) *supra*. Thus, there was a clear mention that PK Construction though had filed objection petition dated 01.03.2024 but after scrutiny, the same had been found baseless, whereas in the instructions dated 15.6.2024 a categoric statement was made that the complaint filed by PK Construction had been withdrawn. Hence, there was apparent contradiction between the instructions issued on 15.06.2024 and communication dated 19.04.2024 placed along with such instruction. Admittedly, in communication dated 19.04.2024 there was not even a whisper with respect to the complaint submitted by PK Construction having been withdrawn. Both the above versions were in total contradiction of yet another third version of respondents whereby it had been represented that no complaint had been received.

15.2 It is not in dispute that as per SBD, there is a mechanism provided for resolution of complaint/objection

filed against Part-1 technical bid summary. We are not inclined to accept the explanation rendered by the official respondents that the words “No complaint was received” included in Part-I financial bid summary were for the reasons that no complaint was pending on said date, which clearly appears to be an afterthought. Since, the mechanism for disposal of complaint filed to the Part-1 bid summary, was an integral part of SBD, the official respondents were under obligation to clearly describe the correct factual position. Moreover, unexplained contradictions in the stand of official respondents, more particularly, when no explanation has been rendered in respect to contents of letter dated 19.04.2024 issued by the Engineer-in-Chief to the Principal Secretary (PW) to the Government of Himachal Pradesh, renders credence to the allegations that complaint filed by PK Construction not only remained undecided but was suppressed also. Evidently, there also is nothing to suggest that the said complaint was ever considered or decided; as reflected from communication dated 19.4.2024.

15.3 At this stage it will be relevant to have a look at the contents of complaint dated 1.3.2024 submitted by PK

Construction. It was pointed out that as per clauses 1.3.1 and 1.3.2 of section 3 of qualifying information, the requirements were not met out by the 5th respondent; which read as under:

> "1.3.1 ***Work performed as prime contractor (in the same name and style) on construction work of similar nature and volume over the last five years. Attach certificate from the Engineer-in-charge;***
>
> 1.3.2 ***Work performed as Sub-Contractor (in the same name and style) on construction work of similar nature and volume over the last five years. Attach certificate from the Engineer-in-charge."***

15.4 It was alleged that the work done certificate submitted by the 5th respondent was issued by Patel Engineering Limited in favour of M/S Kinner Kailash Company and not in the name of Mr. O.P. Mehta, therefore, the work done could not be considered to have been executed in the same name and style.

15.5 It was also alleged that the 5th respondent could not avail the benefit of operating under two different names in violation of clauses 4.4 and 4.5 of the enlistment rules.

15.6 The work done certificate issued by PEL has also been alleged to be not meeting the requirement of SBD clause

4.4 A (b). According to complainant, the certificate, if any, could have been issued by HPPCL (4th respondent) being the principal employer and not by the PEL which itself was the contractor of HPPCL.

15.7 The work shown to be done under PEL by 5th respondent was also not of same nature as was the requirement of work in question.

16 Thus, the issues raised by PK Construction definitely related to the fulfilment of eligibility conditions of 5th respondent for the purposes of the contract in question.

17 The material on record reveals that the conduct of respondents 1 to 3 in respect of dealing with the complaint of PK Construction was not only lacking in meeting with the requirements of Clause 22.6 of SBD and PMGSY Manual Chapter 3.4 but was also wanting in fairness.

18 Further, it can also be seen that the work done certificate in compliance with Clause 4.4 A (b) of SBD, was required to be as principal Contractor or a sub-contractor. Admittedly, 5th respondent was not the principal contractor under HPPCL. The principal employer was respondent No.4 HPPCL and PEL was its contractor for execution of

Shongtong Karchham HEP. The 4th respondent i.e. HPPCL has filed an affidavit dated 11.11.2024 in compliance to order dated 07.11.2024 of this Court. They have specifically denied the 5th respondent to be a sub-contractor under it. What has been stated is that the 5th respondent was a sub-contractor of M/s Patel Engineering Ltd. It has also been submitted that the terms such as 'PRW', 'Sub-Contractor', 'PRW Contractor' or "Vendor" have been used interchangeably/synonymously. The 4th respondent also denied having acknowledged the 5th respondent as its sub-contractor. The payment through escrow account to the 5th respondent has though been admitted. In nutshell, the 4th respondent has admitted that the work got executed by PEL from 5th respondent was as a piece rate worker or vendor but not as its sub-contractor. This stand taken by 4th respondent, in our considered view, cannot be taken to be sufficient compliance of Clause 4.4 A (b) of SBD.

18.1 The agreement dated 04.01.2019 relied upon by respondents No. 1 to 3 and 5 will not help the cause of said respondents either. Clause 6.3.6.1 of said agreement, required that the sub-contractor should have registration as

a firm and the same should be attached with the sub-contract. As contended by 5th respondent that M/s Kinner Kailash Company was a symbolic name of sole proprietorship concern of O.P. Mehta, meaning thereby that M/S Kinner Kailash Company was not a firm and for such reason could not have any registration. There is nothing in the context of contractual relations which may warrant maintaining a symbolic name. The agreement dated 04.01.2019 was inter se PEL and M/s Kinner Kailash Company. This agreement was a bilateral document without any consent or involvement of the principal employer.

18.2 There is material on record to suggest that as per the terms of the contract between HPPCL and PEL, though sub-contracts were allowed, but on fulfillment of certain pre-requisites. It appears that such pre-requisites were missing in the case of 5th respondent and for such reason neither the HPPCL had recognized the said respondent as its sub-contractor nor is still willing to confirm the same.

18.3 The term "Sub-contract" necessarily involves three parties i.e. principal employer, contractor and sub-contractor. To bear a legal relationship of sub-contract, there

has to be a recognition by principal employer. Such recognition cannot be inferred by implication. Thus, the 5th respondent did not qualify to be termed as a sub-contractor under HPPCL. That being so, there was a clear violation of Clause 4.4 A (b) of SBD.

19 The Enlistment Rules categorically provides that one entity can have only one enlistment. He or it, cannot be a partner/director in any other entity. The purpose is clear and loud that there should not be unhealthy competition in the matter of government contracts. Hence, the work done certificate for fulfillment of requirement of Clause 4.4 A (b) of SBD has to be in the name of enlisted entity, because otherwise the very purpose of enlistment rules would be rendered otiose. The credit of work executed by any other entity cannot be allowed to the benefit of enlisted contractor/bidder.

19.1 The SBD as also clauses 1.31 and 1.32 of section 3 of qualifying information also clearly provides that the work done should have been in the same “name and style”. The term “name and style” used in the SBD, keeps no doubt, about its real import. One can take benefit of the ostensible

name of sole proprietorship if it was to be assessed in the context of "name" only, but when it comes to 'in the same name and style', the person or entity cannot have twin persona.

20 Another objection is that even the work shown to have been done by 5th respondent for PEL was not of the same nature. In the scope of work awarded to respondent No.5 under the contract in question, he was required to execute the works of formation cutting, tarring, grading of the road, making of cross drainage, parapets etc., whereas the work done by respondent No.5 under PEL was of construction of *'Descending Chambers'* besides excavation and allied works in tunnels. The official respondents 1 to 3 have tried to justify the equivalence of works by contending that the work executed by 5th respondent was more technical than the work awarded to him by the official respondents, nonetheless the requirement of Clause 4.4. A(b), categorically is of the work of same nature. Though, we are not experts, yet, we have noticed that even the official respondents have refrained from terming both the works to be of same nature, meaning thereby that the opinion of their experts is also not

categoric as to similarity of works.

21 Now, in the above noticed backdrop, the question arises whether the actions and conduct of respondents can be countenanced as being not opposed to Article 14 of the Constitution of India? Can it be said that said action and conduct of respondents does not suffer from arbitrariness, unreasonableness and biasness?

22 At this stage we find it apt to reproduce the following extract from the judgment passed by Hon'ble Supreme Court in the matter of ***Central Coalfields Ltd. Vs SLL-SML (Joint Venture Consortium) and others, (2016) 8 SCC 622:***

> **"47.** The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* v. *Union of India*, (1994) 6 SCC 651 there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be

subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber (India) Ltd.* v. *State of Karnataka*, (2012) 8 SCC 216] .

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

23 In ***Madras Aluminium Co. Ltd. v. T.N. SEB, (2023) 8 SCC 240***, it has been observed as under:

38. A Constitution Bench of this Court in *Natural Resources Allocation, In re, Special Reference No. 1 of 2012* [*Natural Resources Allocation, In re, Special Reference No. 1 of 2012*, (2012) 10 SCC 1] speaking through J.S. Khehar, J. (as His Lordship then was) observed in regard to contracts having the State as a

party, as hereinunder reproduced: (SCC pp. 135-36, para 183)

> "*183*. The parameters laid down by this Court on the scope of applicability of Article 14 of the Constitution of India, in matters where the State, its instrumentalities, and their functionaries, are engaged in contractual obligations (as they emerge from the judgments extracted in paras 159 to 182, above) are being briefly paraphrased. For an action to be able to withstand the test of Article 14 of the Constitution of India, it has already been expressed in the main opinion that it has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable treatment. The judgments referred to, endorse all those requirements where the State, its instrumentalities, and their functionaries, are engaged in contractual transactions. Therefore, all "governmental policy" drawn with reference to contractual matters, it has been held, must conform to the aforesaid parameters. While *Article 14 of the Constitution of India permits a reasonable classification having a rational nexus to the object sought to be achieved, it does not permit the power of pick and choose arbitrarily out of several persons falling in the same category. Therefore, criteria or procedure have to be adopted so that the choice among those falling in the same category is based on reason, fair play and non-arbitrariness*. Even if there are only two contenders falling in the zone of consideration, there should be a clear, transparent and objective criteria or procedure to indicate which out of the two is to be preferred. It is this, which would ensure transparency."
>
> (emphasis supplied)

39. A Bench of two learned Judges of this Court in *Shrilekha Vidyarthi (Kumari)* v. *State of U.P.* [*Shrilekha*

Vidyarthi (Kumari) v. *State of U.P.*, (1991) 1 SCC 212 : 1991 SCC (L&S) 742] observed that there exists "an obvious difference" between contracts concerning private parties to those which have State as a party. The primary difference being that the State while exercising its powers and discharging its functions "acts indubitably, as is expected of it, for public good and in public interest". The said factor singularly is sufficient to bring into any transaction the minimal requirements of public law, to which the State is a party. The fact that a dispute falls into the contractual realm does not relieve the State of its obligation to comply with the requirements of Article 14.

40. Further the Court in *Shrilekha Vidyarthi case* [*Shrilekha Vidyarthi (Kumari)* v. *State of U.P.*, (1991) 1 SCC 212 : 1991 SCC (L&S) 742] had observed that : (SCC p. 237, para 24)

> "*24*. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. *It is really the nature of its personality as State which is significant and must characterise all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters*. There is a basic difference between the acts of the State which must invariably

> be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, *we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity*."
>
> (emphasis supplied)

24. The legal position has been reiterated by Hon'ble Supreme Court in ***Banshidhar Construction (P) Ltd. v. Bharat Coking Coal Ltd.*, (2024) 10 SCC 273** as under:

> **28.** There cannot be any disagreement to the legal proposition propounded in a catena of decisions of this Court relied upon by the learned counsel for the respondents to the effect that the Court does not sit as a court of appeal in the matter of award of contracts and it merely reviews the manner in which the decision was made; and that the Government and its instrumentalities must have a freedom of entering into the contracts. However, it is equally well-settled that the decision of the Government/its instrumentalities must be free from arbitrariness and must not be affected by any bias or actuated by mala fides.
>
> **29.** Government bodies being public authorities are expected to uphold fairness, equality and public interest even while dealing with contractual matters. Right to equality under Article 14 abhors arbitrariness. Public authorities have to ensure that no bias, favouritism or arbitrariness are shown during the bidding process and that the entire bidding process is carried out in absolutely transparent manner.
>
> **30-34.....**

35. In *Mihan (India) Ltd.* v. *GMR Airports Ltd.* [*Mihan (India) Ltd.* v. *GMR Airports Ltd.*, (2022) 19 SCC 69 : 2022 SCC Online SC 574] , while observing that the government contracts granted by the government bodies must uphold fairness, equality and rule of law while dealing with the contractual matters, it was observed in SCC para 65 as under:

> "*65.* In view of the above, it is apparent that in government contracts, if granted by the government bodies, it is expected to uphold fairness, equality and rule of law while dealing with contractual matters. Right to equality under Article 14 of the Constitution of India abhors arbitrariness. The transparent bidding process is favoured by the Court to ensure that constitutional requirements are satisfied. It is said that the constitutional guarantee as provided under Article 14 of the Constitution of India demands the State to act in a fair and reasonable manner unless public interest demands otherwise. It is expedient that the degree of compromise of any private legitimate interest must correspond proportionately to the public interest."

36. It was sought to be submitted by the learned counsel for the respondents relying upon the observations made in *Central Coalfields Ltd.* v. *SLL-SML (JVC)* [*Central Coalfields Ltd.* v. *SLL-SML (JVC)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106] , that whether a term of NIT is essential or not is a decision taken by the employer which should be respected. However, in the said judgment also it is observed that if the employer has exercised the inherent authority to deviate from the essential term, such deviation has to be made applicable to all the bidders and potential bidders. It was observed in paras 47 and 48 as under : (SCC p. 638)

> "*47.* The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of

the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision 'that no responsible authority acting reasonably and in accordance with relevant law could have reached' as held in *Jagdish Mandal* [*Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber (India) Ltd.* v. *State of Karnataka*, (2012) 8 SCC 216] .

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty* v. *International Airport Authority of India*, (1979) 3 SCC 489] . However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

> **37.** The submissions made by the learned counsel for the respondents that the project in question being infrastructure project and also one of the mega projects, this Court may not interfere more particularly in view of the fact that agreement has already been entered into between the respondent BCCL and the Special Purpose Vehicle of Respondent 8, cannot be accepted, when we have found that the impugned decision of the respondent BCCL was grossly arbitrary, illegal, discriminatory and violative of Article 14 of the Constitution of India. As held earlier, the Government bodies/instrumentalities are expected to act in absolutely fair, reasonable and transparent manner, particularly in the award of contracts for mega projects. Any element of arbitrariness or discrimination may lead to hampering of the entire project which would not be in the public interest.

25. Thus, what can be looked into by this court is soundness of decision-making process at the touch stone of principles such as whether it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached". Additionally, it can also be considered as to whether the decision-making process confirms to the principles enshrined in Article 14 of the Constitution in India.

26. Noticeably, in the facts of the case at hand, the respondents 1 to 3 and 5 have not disputed the applicability

of SBD clause 4.4 A(b) as foundational requirement to see eligibility of the bidder. That being so the respondents 1 to 3 were required to show some special or extraordinary reasons for deviation, if any.

26.1 We have already held in earlier part of this judgment that the 5th respondent did not fulfill the requirements of SBD clause 4.4 A(b) on account of following:

(i) It has not been established that 5th respondent was an authorized sub-contractor for execution of work at Shongtong Karchham HEP;

(ii) 5th respondent could not use his purported dual persona to defeat the requirements of NIT as also the real import and purpose of enlistment rules; and

(iii) The respondents 1 to 3 have not shown their unequivocal satisfaction in respect of the similarity of works allegedly executed by M/S Kinner Kailash Company and the one required to be executed by the 5th respondent at Matiana-Mahori-Chhaila Road.

27. The respondents 1 to 3 on the other hand have

their own justifications, as noticed above, for awarding the work in favour of 5th respondent. Such reasons or purported justifications, in our considered view, are not sufficient to certify absence of arbitrariness, unreasonableness and bias in the decision-making process of respondents 1 to 3. No special reason to satisfy the conscience of this court has been brought forth by the respondents 1 to 3. Rather, the insistence of respondents 1 to 3 on denying the violation of fundamental requirements of NIT, gives cause for drawal of inference as to existence of a motive that does not meet the benchmarks of fairness and reasonableness.

28 The manner in which the respondents 1 to 3 have botched and abused their jurisdiction dealing with complaint of PK Construction further fortifies the reasons for not trusting their alleged bona fides.

29 As rightly said that *"the right of equality guaranteed by Article 14 of the Constitution of India abhors arbitrariness"*, we have found clear traces of repugnance to the required fairness and reasonableness in the conduct of respondents 1 to 3 in the process of their decision making finally culminating in the award of work in favour of the 5th

respondent.

30. Lastly it has been argued for respondents 1 to 3 and 5 that after the award of work, the same was started immediately and execution worth about Rs. Sixty lacs had already been achieved till such execution was ordered to be stayed by this Court.

30.1 Admittedly, the total estimated cost of the work is Rs.2335.88 lacs, therefore, the respondents 1 to 3 having been found in violation of law, cannot be allowed to claim equity more particularly when more than 97% of the work is still remaining.

31. In light of above discussion, we allow the petition. Award of work in respect of Up-gradation of Matiana-Mahori to Chhaila Road Km 0/000 to 25/650 under PMGSY-III, Batch No. I, Package No. HP-09-694 to the 5th respondent by respondents 1 to 3 vide award letter dated 15.3.2024 is quashed. The respondents 1 to 3 shall re tender the remaining work of Up-gradation of Matiana-Mahori to Chhaila Road Km 0/000 to 25/650 under PMGSY-III, Batch No. I, Package No. HP-09-694 within one month from the date of this judgment.

32. The petition is accordingly disposed of so also the miscellaneous application(s), if any.

(Tarlok Singh Chauhan)
Acting Chief Justice

24th December, 2024
(GR)

(Satyen Vaidya)
Judge