

# THE HIGH COURT OF SIKKIM: GANGTOK

### WRIT PETITION (PIL) NO. 5 OF 2003

In the matter of Public Interest Litigation.

Shanker Shivakoti Arithang Busty, Gangtok.

.... Petitioner

#### VERSUS

State of Sikkim

.... Respondent

For the appellant: Shri M. Z. Ahmed, Smt. B.

Dutta, Shri H. L. Bhandari and

Shri D. K. Singh, Advocates.

For respondent

Shri S. P. Wangdi, Advocate General assisted by Shri J. B. Pradhan, Government Advocate Shri Karma Thinlay, Assistant Government Advocate.

PRESENT: THE HON'BLE SHRI JUSTICE R. K. PATRA, CHIEF JUSTICE. THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, JUDGE.

Date of judgment: 8th December, 2003.

## ORDER

#### R. K. PATRA, C.J.

A letter dated 14th October, 2003 addressed to the Chief Justice of this Court purported to have been sent by the petitioner was received in the registry on 18th October, 2003. It was mentioned in the said letter that the Power Department of "the Chamling government" floated tenders for execution of works amounting to Rs.80.00 crores but duly enlisted contractors who are competent and qualified to bid have been "arbitrarily/illegally



denied their rights to participate in the tender process" by the Chief Minister and two of his cabinet colleagues and even before the opening of tenders (the date of opening of tenders was 15th October, 2003) the Chief Minister has awarded the works by choosing his own relatives, supporters and friends (some of whom are not even enlisted contractors). A list of names to whom the works are said to have been awarded on 6th September, 2003 was appended to the letter. The entire letter is extracted hereunder:-

"Respected Hon'ble Chief Justice,

Rampant corruption in the Chamling Government is amply reflected in the recent tender floated by the Power Department. Though the tenders floated for the execution/ construction/supply of various items of the Power Department are supposed to be open tenders, the practice followed by the Chamling Government is patently illegal, clandestine and designed to suit the interests of the chosen few. Even before the due date of opening of the tender papers, the Chief Minister chose his own relatives, supporter and friends (some of whom are not even enlisted contractors) to execute works amounting to Rs.80.00 approximately in total. This is the largest ever the Chamling indulged in by scam The duly enlisted contractors Government. who are competent and qualified have been arbitrarily/illegally denied their rights to participate in the tender process by the Chief Minister Shri Chamling, his cabinet colleagues Shri Hishey Lachungpa and Shri P.S. Golay who are hand-in-glove in the multi-crore scam.

In the instant scam the State Exchequer is losing an amount of Rs.12.00 to 15.00 crores approximately and the Chief Minister, some of his cabinet colleagues and bureaucrats are going to benefit financially to the tune of Rs.12.00 to 15.00 crores approximately.

The list of the contractors, relatives and friends of the Chief Minister who have already been awarded the work as far back as 06.09.2003 is enclosed herewith for ready reference. The tenders, as per notice published

Pun



by the Power Department, are expected to be opened in the afternoon of 15.10.2003 only.

As a conscious citizen, I thought that it is my foremost duty to inform you about the multi-crore scam which is not only illegal but shocking to the conscience of every citizen in Sikkim.

This letter may therefore be treated as a Public Interest Writ Petition, thus initiating the legal process against all those involved in the multi-crore scam.

Thanking you.

Yours faithfully,

Sd/-(Shanker Shivakoti) Arithang Busty, Gangtok."

The above letter was followed by another letter dated 15th October, 2003 which was received in the registry on 19th October, 2003 wherein it was alleged by the petitioner that he "from reliable sources" learnt about "certain last moment changes of persons" to whom the works have been awarded. In the said letter, the amended list of contractors was catalogued.

2. This Court on perusal of the aforesaid two letters directed the registry to treat them as Writ Petition (PIL). Copies of those letters were served on the State counsel to enable him to obtain instructions. The matter was listed on 3<sup>rd</sup> November, 2003 for admission. On the request of the learned Advocate General who undertook to file reply affidavit on behalf of the concerned department the matter was listed on 24<sup>th</sup> November, 2003. When the matter was listed on 24<sup>th</sup> November, 2003 the learned Advocate General submitted that necessary affidavit would be filed on the following day. The case was directed to be listed on 27<sup>th</sup> November, 2003, on which day, Shri D. K. Singh, learned





Advocate appeared and filed vakalatnama on behalf of the petitioner. He prayed for a copy of the reply filed by the department to enable him to file rejoinder. This Court directed the State counsel to serve a copy of the reply submitted by the department on Shri D. K. Singh, which was duly done. On the request of Shri D. K. Singh, the case was adjourned to 1st December, 2003, on which day, Shri M. Z. Ahmed, learned Advocate appeared on behalf of the petitioner along with Shri D. K. Singh.

- 3. We have heard Shri Ahmed for the petitioner and Shri S. P. Wangdi, learned Advocate General for the State.
- 4. Learned Advocate General first contended that the writ petition registered by way of public interest litigation should be dismissed at the threshold mainly on the following grounds:-
  - (i) The so-called petitioner till date is a complete stranger whose real identity and whereabouts are not known. The entire action initiated by him seems to be by a concealed person who has not come to the forefront.
  - (ii) The petitioner has no locus standi to move this Court for any relief as he is not a bidder nor does he claim to be an intending bidder.
  - (iii) The petitioner has made sweeping and bald allegations in his letters without any foundation and the steps taken by him in this regard are not bona fide.
  - (iv) The lists of names mentioned in both the letters to whom the works are said to have been already awarded





are fabricated and manufactured for the purpose of this case and are not borne out by any record.

Learned counsel appearing for the petitioner by referring to Annexures P3 and P4 of the rejoinder submitted that as a matter of fact the works have already been awarded to the contractors mentioned therein and the list of such awardees was published in the newspapers. He submitted that in public interest the case may be admitted for regular hearing.

The Supreme Court has in a number of cases laid 5. down the law relating to the nature and scope of public interest litigations (PIL). Recently the decision of the Union of India to dis-invest and transfer of shares of M/s. Bharat Aluminium Company Ltd. (in brief 'BALCO') came to be challenged by B. L. Wadhera by way of public interest litigation. Wadhera was not an employee of the company nor was he a prospective bidder. His case was that since he has been closely connected with public sector undertakings he has locus standi to file writ petition by way of PIL challenging the validity of dis-investment of shares. While dealing with the matter, their Lordships of the Supreme Court in AIR 2002 SC 350 (BALCO Employees Union vs. Union of India) had the occasion to re-examine the nature and scope of the PIL. In paragraphs 77 to 79 of the judgment, their Lordships opined as follows:-

"77. While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitions have been entertained in other spheres. Prof. S. B. Sathe





has summarised the extent of the jurisdiction which has now been exercised in following words:-

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive:

- Where the concerns underlying a petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates).
- Where the affected persons belong to the disadvantaged sections of society (Women, Children, bonded labour unorganised labour etc.).
- Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes).
- Where judicial intervention is necessary for the protection of the sanctity of democratic institutions (independence of the judiciary existence of grievances redressal forums).
- Where administrative decision related to development are harmful to the resources such as air or water".
- 78. There is, in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counter-productive.
- 79. PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There have been, in recent times, increasingly instances of abuse of PIL. Therefore, there is a need to reemphasize the parameters within which PIL can be resorted to by a Petitioner and entertained by the Court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and reemphasize the same."





After referring to the cases of S. P. Gupta vs. Union of India (AIR 1982 SC 149), Sachidanand Pandcy vs. State of West Bengal (AIR 1987 SC 1109), Janata Dal vs. H. S. Chowdhary (AIR 1993 SC 892), Raunaq International Ltd. vs. I.V.R. Construction Ltd. (AIR 1999 SC 393) and Narmada Bachao Andolan vs. Union of India (AIR 2000 SC 3751) their Lordships in paragraph 87 of the judgment stated the law as follows:-

"87. It will scen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violations of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to Court due to some disadvantage. In those cases also it is the legal rights which are secured by the Courts. We may, however, add that Public Interest Litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a Court of law, but, a Public Interest Litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the Court is satisfied that there has been violation of Article 21 and the persons adversely affected are unable to approach the Court."

Their Lordships in fine held that the decision to dis-invest shares is not available to be challenged at the instance of a busy-body as the case does not fall within the parameters of PIL.

In Guruvayoor Devaswom Managing Committee vs. C. K. Rajan (2003) 7 SCC 546, the Supreme Court in paragraph 53 of the judgment observed that the dicta laid down in the case of BALCO (supra) may not be the last words but the same may be





considered to be in the nature of guidelines for entertaining a public interest litigation.

In the present case, the nub of the grievance of the petitioner is that without considering the bids as per the terms and conditions, works have been already awarded to certain named persons mentioned in his letters. In Raunaq International Ltd. vs. I.V.R. Construction Ltd., AIR 1999 SC 393 (vide para 9 of the judgment) the Supreme Court held that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations which would be (i) the price at which the other side is willing to do the work; (ii) whether the goods or services offered are of the requisite specifications; (iii) whether the person tendering has the ability to deliver the goods or services as per specifications, requisite standard and quality; (iv) past experience of the tenderer, time which would be taken to deliver the goods or services; (v) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction. In paragraph 12 of the said judgment, the Supreme Court further observed as follows:-





"12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the Court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The Court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained the Court must be careful to weigh conflicting public interests before intervening."

[emphasis supplied]

- examine the facts of the case at hand. A reply in the form of a report has been filed on behalf of the Power Department of the State government. It has been affirmed by the Chief Engineer. Perusal of the said report would show that the sealed item rate tenders for different works described in the notice were invited. In respect of all the tender works (except the contract work whose value is Rs.5.94 lakhs) 1st class contractors are eligible to bid. For the contract work whose value is Rs.5.94 lakhs, Class III and IV contractors are eligible to bid. The notice inviting tenders was published in the Sikkim Herald dated 28th August, 2003, the Financial Express dated 30th August, 2003 and the Business Standard dated 30th August, 2003 and 31st August, 2003. As per the notice inviting tenders the time schedule was as follows:-
  - (1) Sale of tender document 8th to 15th September, 2003.
  - (2) Date of submission of tender 30th September, 2003.
  - (3) Date of opening tender 30th September, 2003.





A Tender Committee comprising seven officers belonging to the Power and Finance Departments has been constituted by the State government. While the matter stood thus, a representation was made by some contractors on 26th September, 2003 requesting the Chief Engineer for extension of time for submission of tenders on the ground that they needed some time to study the entire tender documents and for quoting the rates On its consideration, the date of submission of tenders and their opening was extended to 15th October, 2003. The bids offered by the contractors is under scrutiny by the Tender Committee. The learned Advocate General specifically pointed out that the allegation of the petitioner that works have already been allotted to the persons named in his letters as well as in annexures P3 and P4 of the rejoinder is totally baseless. On our direction the relevant record dealing with the tenders was produced before us. We have gone through the entire records and we find that the bids are under consideration by the Tender Committee and no decision has yet been taken on it. We do not find anything in the record to indicate that any work has been awarded to any particular individual. In the circumstances, we are inclined to hold the so-called lists of persons mentioned in the letters of the petitioner as well as in his rejoinder are created for the purpose of this case.

8. In a pro bono proceeding, this Court in exercise of its jurisdiction has to be careful to see that the person bringing the PIL is litigating bona fide for public good. The power of the Court





being large as it is, it must be exercised cautiously and with great circumspection. A pseudo "public spirited citizen" may approach the Court on the basis of ill-informed or mis-informed materials by way of public interest litigation alleging lack of transparency in granting largess by the government. To ferret out his bona fides the Court may have to examine his locus because no one should be allowed to indulge in wild and reckless allegations touching the character of others and the process of the Court should not be allowed to be utilised to vindicate one's personal grudge or for witch-hunting. Therefore, it would be appropriate to examine the locus standi of the petitioner. He addressed a letter dated 4th November, 2003 to the Chief Justice of this Court saying that since he has approached this Court alleging corruption in the award of works, he and his family members have been receiving threatening calls/threats. Accordingly, he prayed that he should be protected because his life is in danger. A copy of the said letter was handed over to the learned State counsel requesting him to get the matter verified. Government Advocate forwarded the same to the local police. The S.D.P.O., Gangtok in his report dated 22nd November, 2003 informed the learned Government Advocate as follows :-

> your enquiry the abovementioned subject which is attached, the police has received no complaint from Shankar Shivakoti regarding any threatening calls/threats to his life. Further the police tried to contact the abovenamed person at Arithang and found out that one Shankar Shivakoti, lives at Arithang near Hamro garage, with his relatives. But as informed by his relatives, he has not turned up at Arithang





since October 03, nor do they know his present whereabouts."

From the above, it may be seen that the petitioner's allegation has
to be taken with a pinch of salt. He seems to have approached
this Court to espouse the cause of some unnamed and
undisclosed persons in the garb of protecting public interest.

- 9. Considering the totality of the background and circumstances, we are convinced that the so-called grievance of the petitioner made in his letters dated 14th October, 2003 and 15th October, 2003 is pre-posterous and does not come within the parameters of public interest litigation.
- 10. In the result, the writ petition deserves to be and is hereby rejected with costs assessed at of Rs.4,000/-. It is made clear that this costs of Rs.4,000/- shall be paid by the petitioner within a period of three weeks from today and he is directed to deposit the same with the registry of this Court within the above stipulated period. The said amount shall be treated as part of the State Legal Aid Fund and the registry of this Court shall make the same available with the State Legal Aid Fund. On his failure to deposit the amount within the time-frame the registry shall take necessary steps for realisation of the same.

( N. Surjamani Singh )

N. malgeen

Judge 08.12.2003 (R. K. Patra) Chief Justice