




F/R  29/03/10

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extra Ordinary Jurisdiction)

## WP(C) No.19 of 2009

Shri Kharka Bahadur Limbo,  
S/o Late Harka Bahadur Limbo,  
R/o Pechrek Martam,  
P.S. Kaluk,  
West Sikkim.

..... **Petitioner**

**versus**

1. The Principal Chief Conservator of Forest-cum-Secretary,  
Forest, Environment & Wildlife Management Department,  
Government of Sikkim,  
Forest Secretariat,  
Deorali, Gangtok.
2. The Secretary,  
Information & Public Relations Department,  
Government of Sikkim,  
Gangtok.
3. Shri Karma Thinlay Namgyal,  
S/o Shri D. N. Thakarpa,  
R/o Yangthang Khoti, Pelling,  
P.S. Geyzing,  
West Sikkim.
4. State of Sikkim  
Represented by Respondent No.1 ..... **Respondents**

For Petitioner

: Mr. S. S. Hamal, learned counsel  
with Mr. Tashi Wongdi Bhutia,  
learned counsel.

For Respondent Nos.1, 2 & 4 :

Mr. J. B. Pradhan, learned Additional  
Advocate General with Mr. Karma  
Thinlay, learned Government  
counsel, Mr. S. K. Chettri, learned  
Assistant Government counsel for  
State-respondents and Mr. Jagat Rai,  
learned standing counsel for  
respondent No.1.





For Respondent No.3 : Mr. A. K. Upadhyaya, learned senior counsel assisted by Mr. Ashim Chhetri and Mr. Dhurba Tewari, learned counsel.

**PRESENT : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE.**

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Last date of hearing : 23-03-2010

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**DATE OF JUDGMENT : 29-03-2010**

## **J U D G M E N T**

Wangdi, J.

By filing this writ petition the petitioner, *inter alia*, seeks for a *writ of mandamus* for quashing the work order filed as Annexure P7 by which the respondent No.3 was awarded the construction work of Sidkeong Tulku Bird Park at Rabdentse, West Sikkim, estimated at Rs.5,29,68,000/- (Rupees five crores twenty nine lakhs and sixty eight thousand) and for a direction for retender of the said work by giving wide and sufficient publicity. It is the case of the petitioner that he is a registered contractor of Class I (A) category under the Government of Sikkim in the West District and was, therefore, qualified to bid for the aforesaid contract work. The gravamen of the petitioner's case is that the Notice Inviting Tender (in short 'NIT') in respect of the work was not given the adequate publicity in order to enable wider participation in the tender process by all contractors possessing the requisite eligibility criteria. It is further the case of the petitioner that due to inadequacy in the extent of circulation of



the NIT it was only in the last week of January, 2009 that he got to learn of the NIT having been published, the tender process being completed and the fact that the respondent No.3 as the successful tenderer was on the verge of being issued with the work order. It is his further case that when necessary enquiries made by him and his colleagues did not result in satisfactory explanation from the concerned officers and engineers they issued a legal notice to respondent No.1 on 28-01-2009 requesting him not to proceed further with the issuance of the work order to the respondent No.3 till such time the tender notice of the work in question was given wide and sufficient publicity. It is further stated that in the reply to the aforesaid legal notice on behalf of the respondent No.1 the allegation as regards the insufficiency of and/or want of wider publicity of tender notice had been denied and that in the reply of the respondent No.2, it had been disclosed that vide letter bearing No.225 dated 23-12-2008, a copy of which had been enclosed with the legal notice, the respondent No.1 had requested for publication of the NIT in the "Sikkim Herald" and in two issues of any two prominent local newspapers having wide circulation in Sikkim, and the respondent No.2 had accordingly published it in "Samay Dainik" in its issue of 01-01-2009 and "Sikkim Express" in its issue of 02-01-2009.

**2.** It is alleged by the petitioner that publication of the NIT as stated by the respondents No.1 and 2 appeared to be doubtful as two leading newspaper vendors in Gangtok gave written certificates to him stating that those days, i.e., 01-01-



2009 and 02-01-2009, being holidays no newspapers had been received by them for sale or distribution. It is alleged that the petitioner and his two colleagues replied to the respondent No.1 through their lawyer requesting not to proceed further with the issuance of the work order to the respondent No.3 on account of the NIT not having been given wide and sufficient publicity depriving the other eligible contractors including the petitioner from their right to participate in the tender process. It is stated further that on 10-03-2009 the petitioner and his colleagues sought from the concerned authority of the State Government information under the Right to Information Act, 2005 as regards the procedure followed in the publication of the NIT and the award of the aforesaid work. In response thereto the respondent No.1 allowed his colleague one Shri Tej Bahadur Rawat to inspect the records of the work in question and to make out copies of the documents inspected by him. The petitioner states that it was only after the inspection that he learnt of the following defects in the tender process:-

- a) Only three tenders had been received from the entire West District where there were not less than fifty class I (A) Government contractors;
- b) The rates quoted by the three tenderers were much on the higher side;
- c) That the tenders were opened on 20-01-2009 by a Tender Committee which did not have a Member from the Finance Department of the Government of Sikkim or from the State Trading Corporation of Sikkim;



- d) The work was awarded to the respondent No.3 on his bidding 15% above the estimated value of the work;
- e) That the provisions of the Sikkim Financial Rule, 1979 and the Sikkim Public Works Code had been violated.

For the aforesaid reasons and in view of the law laid down in various decisions of the Hon'ble Supreme Court and this Court, the petitioner seeks to quash the work order issued to the respondent No.3.

**3.** The allegation of the petitioner with regard to the insufficiency and inadequacy of the publication of the NIT have been denied in the counter-affidavit filed on behalf of the respondents No.1 and 4. It is stated in the counter-affidavit that by a letter bearing No.225 dated 23-12-2008 filed as part of Annexure 3 to the writ petition, the respondent No.1 had requested the Editor, "Sikkim Herald" to publish the NIT in the "Sikkim Herald" and two prominent newspapers and that since the tender was being called on 20-01-2009 such publication was required to be done at the earliest. It is further stated that the said letter had been forwarded to at least 8 (eight) authorities including the District Collector, West District and the DFO (Wildlife), West District which ensured transparency in the entire exercise. The fact as to the publication of the NIT in two local newspapers as set out in the writ petition have not been denied by the respondents.



4. These respondents, however, have raised two preliminary objections as to the maintainability of the writ petition. Firstly, it has been stated that the petitioner having not fulfilled the eligibility criteria of having performed and executed similar kind of works as required under the special conditions of the NIT, cannot make a grievance of him not being able to participate in the tender process. The petitioner lacked the necessary *locus standi* to bring this writ petition. Secondly, it has been urged that the petitioner is guilty of gross delay and laches in approaching this Court. It has been stated that the petitioner on its own admission had become aware of the publication of the NIT in the last week of January, 2009 which prompted him to issue a legal notice to the State-respondents on 28-01-2009 demanding wider publication of the NIT and to forbear from issuing the work order to the respondent No.3. It is further contended that in the reply of the State-respondents dated 04-02-2009 to the legal notice dated 28-01-2009 received from the petitioner's counsel, all the details of the procedure followed in the publication of the NIT had been conveyed to the petitioner. It is, therefore, stated that since the petitioner had failed to approach the Court when he admittedly became aware of the facts and circumstances pertaining to the NIT in the last week of January, 2009 and later on 04-02-2009 and had chosen to wait as late as August, 2009, i.e., for almost 7 months, the petitioner was guilty of gross delay and laches and, therefore, the writ petition deserved to be dismissed as not maintainable on this ground and



also on the ground of the petitioner lacking the necessary *locus standi* to bring the writ petition.

**5.** The respondent No.2, Secretary, Information & Public Relations Department, Government of Sikkim, has filed a separate counter-affidavit in which he has dealt with the aspect pertaining to the publication of the NIT in two local dailies. It is stated in the counter-affidavit that the letter bearing No.225 dated 23-12-2008 requesting for publication of NIT in the "Sikkim Herald" and two other local news dailies had been received well in time by him and, considering the urgency indicated therein it was thought expedient to get them published in two local news dailies immediately as Losong holidays were setting in from 25-12-2008 was to continue till 04-01-2009. The NIT accordingly was published in the issue of the "Samay Dainik" of 01-01-2009 and the "Sikkim Express" of 02-01-2009, 10 (ten) copies of which were received by the department as proof of such publication.

**6.** The respondent No.3 in his counter-affidavit filed separately, has reiterated what the respondent No.1 has stated in his counter-affidavit as regards the factual aspects pertaining to the publication of tender notice and the award of work to him. He also questions the *locus standi* of the petitioner in filing the present writ petition on the ground of him being ineligible to participate in the tender process and presses the issue with regard to the aspect of delay and laches. The respondent No.3 contends that as a successful bidder he had been issued with the



work order in March, 2009 following which he commenced with the execution of the work immediately in view of the time schedule of 12 months prescribed for completion on the work commencing from the date of the issue of the work order. He further states that he has invested huge amount of money and at the time of filing the counter-affidavit on 01-11-2009, 30% of the work had been completed which at the time of arguments has risen to more than 90%. Therefore, if any order is passed to the detriment of the petitioner he shall be seriously prejudiced and would suffer huge monetary losses.

7. I have heard and considered the rival contentions and have perused the writ petition and the counter-affidavits filed on behalf of the parties. It is quite clear that substantially the factual aspect with regard to the procedure followed in the publication of the NIT and the award of work have remained admitted by all. Under such circumstances, it has to be seen as to whether the action of the respondents in awarding the work to the respondent No.3 as a consequence of the impugned tender process can be sustained or not. While deciding this, the issue that requires to be settled at the threshold would be the *locus standi* of the petitioner in preferring the present writ petition wherein he has sought for quashing the work order issued to the respondent No.3 as a consequence of the tender process. In order to examine this aspect, the terms and conditions of the NIT requires consideration. In the NIT certain criteria termed as "Important





criterion for technical qualification" have been provided which reads as follows:-

**"IMPORTANT CRITERION FOR TECHNICAL QUALIFICATION**

- 1) The intending Contractor/Firm should be registered contractor to appropriate class registered with the Sikkim Public Works Department.
- 2) The intending contractor/firm should have executed similar works in their own name, in the last five years."

8. The aforesaid criteria appear to be essential requirements for being technically qualified to be eligible to participate in the tender process. The petitioner has nowhere stated in the entire writ petition that he had fulfilled the aforesaid criteria except to state in paragraph 17 of the writ petition that the Tender Committee did not conduct any pre-qualification bid and to vaguely state in paragraph 6 of his rejoinder to the counter-affidavit of the respondents No.1 and 4, that he fulfilled the requisite qualification to participate in the tender process. On being asked on this question squarely during the course of the arguments, the learned counsel appearing on behalf of the petitioner answered that the petitioner did not fulfil the condition No.2 of the "important criterion for technical qualification". On the other hand, the petitioner has nowhere stated that the respondent No.3 does not fulfil the requisite criterion prescribed to be eligible for being qualified to bid in the tender process. In fact, this is not his case at all. Under such circumstances, in my view there is no need to proceed further in the case as

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obviously the petitioner is not an "aggrieved persons" *inasmuch* as no right of the petitioner, be it constitutional or legal rights, have been infringed by the State-respondents in respect of the questioned NIT. This is because admittedly the petitioner does not fulfil the essential qualification to participate in the tender process and, therefore, lacks the necessary *locus standi* to maintain action against the respondents with matters pertaining to the contract work. The writ petition accordingly stands dismissed on this ground alone.

9. The matter may also be considered in another light also. This is with regard to the objection raised on the question of delay on the part of the petitioner to bring the present writ petition. It is an admitted position as appearing in paragraph 3 of the writ petition that the petitioner became aware of the issuance of the NIT in the last week of January, 2009, of the bidding having taken place and the respondent No.3 being on the verge of being awarded the work as the successful bidder, thereby prompting him to issue a legal notice to the State-respondents on 28-01-2009. It is also an admitted position that the petitioner was given a detailed reply by the Office of the Assistant Engineer (Civil), Engineering Cell, FE&WMD, GOS under the respondent No.1 vide letter bearing No.22/E/FEWMD/GOS/08-09 dated 04-02-2009 [Annexure 3 (colly)] by which copies of letter to the Editor, "Sikkim Herald" dated 23-12-2008 requesting for publication of NIT, copies of two local dailies "Samay Dainik" and



"Sikkim Express" dated 01-01-2009 and 02-01-2009 respectively had been forwarded to the petitioner.

**10.** It is, therefore, manifest from the above that the petitioner became aware of all the facts and circumstances pertaining to the NIT as far back as in the last week of January, 2009 in the first instance and later on 04-02-2009, a position that stood admitted by him. If the petitioner had been genuinely aggrieved, it would have been quite natural and prudent for him to have approached this Court soon thereafter. Instead of doing so, he had chosen to issue another legal notice on 09-02-2009 in reply to letter dated 04-02-2009 asserting substantially the very facts contained in legal notice dated 28-01-2009 and on that basis sought for the execution of the work being stopped, failing which, it was stated that the petitioner would have no option but to approach this Court for justice. But the fact remains that the petitioner did not do so. Instead of that he opted to seek for the detailed information with regard to the procedure followed in publication of the NIT and the award of work on 10-03-2009 and sought for permission to inspect the records pertaining to the work. This permission was granted to the petitioner on 12-06-2009 and was also allowed to make out copies of the documents on that very day.

**11.** In the first instance, it is difficult for this Court to believe the petitioner's assertion that it was only after the inspection of the records of the contract work on 12-06-2009 that

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he became aware of the details of the procedure followed in the award of work, an assertion grossly contradictory to his averments contained in paragraphs 3 and 4 of the writ petition. In the second instance the only grievance of the petitioner being the want of to wide publication of the NIT in respect of the contract work, he ought to have approached this Court with such grievance at the least as soon as he received the details in respect thereof from the State-respondents vide letter dated 04-02-2009 (Annexure - 3) if not earlier. Even assuming that the petitioner became aware of the details only on 12-06-2009, it was expected of him to have approached this Court soon after 12-06-2009. Obviously he did not do so and chose to remain recalcitrant and wait for another two months to lapse before finally doing so.

**12.** It is a settled position of law that making of repeated representations is not regarded as satisfactory explanation of the delay. Reference in this regard may be made to the case of ***State of Orissa vs. Pyarimohan Samantaray & Ors. : (1977) 3 SCC 396*** and ***State of Orissa & Ors. vs. Arun Kumar Patnaik & Ors. : (1976) 3 SCC 579***. In these cases writ petitions were dismissed solely on the ground of delay and laches.

**13.** There may, however, be instances where despite the delays Courts may be impelled to interfere and pass orders quashing the impugned action, but that would depend on the facts and circumstances of each case. When a Court is required to exercise a discretionary power it has to be alive also to the



question of equity, i.e., equity not only in favour of the petitioner but also that of the respondents. In the present case, although the impugned action has left much to be desired and things could have been better, this Court has desisted from interfering with the matter for the reasons aforesaid and for what shall be stated hereafter.

**14.** As already noticed the petitioner became aware of the time schedule of the question work in the last week of January, 2009 and in the first week of February, 2009. It was, therefore, expected of him to have approached the Court immediately after the non-compliance of his legal notice dated 28-01-2009 or thereafter. Instead of doing that he chose to issue another legal notice in reply to of the letter dated 04-02-2009 followed by another request on 09-02-2009 and a notice under the Right to Information Act on 13-03-2009 which obviously was responded to on 12-06-2009. Despite the fact that the petitioner became aware of the work order in respect of the contract work to the respondent No.3 in the first week of March, 2009, the petitioner again did not approach this Court but rather chose to remain indolent preferring to approach the executive authorities. During the lapse of time of about 7 months the respondent No.3 has invested huge amounts of money and admittedly has completed more than 90% of the work thereby placing the respondent No.3 in a disadvantageous position.

**15.** Apart from the above, it is of pertinence also to note that the work in question is a public work in which naturally larger



public interest is involved which would take precedence over individual or private right. It would, therefore, be most iniquitous for this Court now to quash the work order issued in favour of respondent No.3 at the instance of the petitioner. In the case of **Ramana Dayaram Shetty vs. International Airport Authority of India and Ors. : (1979) 3 SCC 489**, the Hon'ble Supreme Court on this very principle refused to interfere with the award of a work even though the person to whom the work was awarded was not at all eligible as per terms and conditions laid down in the NIT. In the case of **State of M.P. and Ors. vs. Nandlal Jaiswal and Ors. : (1986) 4 SCC 566**, it has been held as follows:-

"The power of the High Court to issue an appropriate writ under Article 226 is discretionary and the High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. Where there is inordinate and unexplained delay and third party rights are created in the intervening period, the High Court would decline to interfere, even if the State action complained of is unconstitutional or illegal because the court's interference is likely to cause confusion and public inconvenience and bring in new injustices."

16. In this regard, we may also refer to the decisions in the case of **West Bengal Electricity Board vs. Patel Engineering Co. Ltd. & Ors. : AIR 2001 SC 682** (694, paragraph 32) and **Ashok Kumar Sharma & Ors. vs. Chander Shekhar & Ano. : (1997) 4 SCC 18** (21, paragraph 6). Therefore, the consideration of the principle of equity while

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deciding on the question of quashing an impugned action need hardly be over-emphasised.

We may also refer to the decisions of this Court in **WP(C) No.4 of 2002** in the matter of **Modi Entertainers Networks Private Limited vs. State of Sikkim & Ors.** and in **WP(C) No.21 of 2006** in the matter of **Balchand Sarda vs. State of Sikkim & Ors.**

**17.** Another peculiar feature of this case is that the petitioner has not at all pleaded *mala fide* other than vaguely alleging that the action was arbitrary, discriminatory, illegal and unfair. The petitioner in support of his case has placed reliance on the following decisions:-

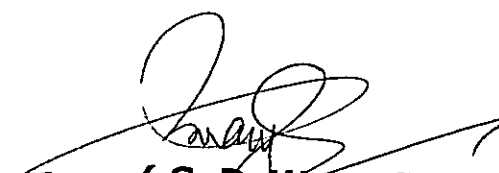
1. **Siddharta Kalita & Ors. vs. State of Assam & Ors.** : **AIR 2001 Gau 131** (Paragraph 9);
2. **Mahendra Kumar Mohanty vs. Collector, Khorda & Ano.** : **AIR 2007 Ori 170** (Paragraphs 2, 8, 9, 11);
3. **Ms. Tshering Diki Bhutia vs. State of Sikkim & Ors.** : **1998 Sikkim Law Journal 84**;
4. **Vyapari Sangh vs. State of M.P. & Ors.** : **AIR 2005 M.P. 99** (Paragraph 26); and
5. **Tek Nath Sapkota vs. State of Sikkim & Ano.** : **AIR 1995 Sikkim 1** (paragraph 8).

**18.** This Court has no hesitation in excepting the principles enunciated in the aforesaid decisions, but the question is that even assuming that the action of the State-respondents



was absolutely illegal, arbitrary, discriminatory and unconstitutional, can this Court entertain the writ petition when it is obviously so belated on account of which the respondent No.3 now stands at a disadvantageous position. The answer certainly would be in the negative as it would be iniquitous on the part of this Court to interfere with the action of the State-respondents at this stage.

**19.** In the result, the writ petition stands dismissed. No order as to costs.

  
( S. P. Wangdi )  
Judge  
29-03-2010