

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1288 of 2013
IN
Civil Writ Jurisdiction Case No. 7059 of 2013
With
Interlocutory Application No.7363 of 2013
And
Interlocutory Application No.7364 of 2013
And
Interlocutory Application No.7793 of 2013
And
Interlocutory Application No.8892 of 2014
In
Letters Patent Appeal No. 1288 of 2013

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M/S Dirghayu Mahavir Diagnostic through its Managing Director Dr. Abhishek Tiwary, S/O Dr. B. Tiwary, H.O. Kalambagh Road, P.S. Sadar, District – Muzaffarpur.

.... Petitioner-Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Health, Bihar, Patna.
2. The State Health Society through its Executive Director, Sheikhpura, Patna.
3. The Secretary, Health -cum-Executive Director, State Health Society, Bihar, Pariwar Kalyan Bhawan, Sheikhpura, Patna.
4. The Regional Deputy Director, Health Service, Tirhut Division, Muzaffarpur.
5. The Civil Surgeon-cum- Chief Medical Officer, East Champaran, Motihari.

.... Respondents-Respondent/s

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Appearance :

For the Appellant : Mr. Gautam Kejriwal, Advocate
Mr. Satish Kumar Sinha, Advocate
Mr. Shailesh Kumar, Advocate
For the Respondent-State : Mr. Thakur Jai Singh, A.C. to S.C.-26
For the respondent No.2 : Mr. K. K. Sinha, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 15-01-2015

I.A. No.7364 of 2014

This application under Section 5 of the Limitation

Act is filed with a prayer to condone the delay of 11 days in preferring the Letters Patent Appeal against the order dated 23.07.2013 passed by the learned Single Judge in CWJC No.7059 of 2013. In the application, it is stated that the delay occurred in making preparation of the appeal and the communication between the appellant and his counsel.

No counter affidavit is filed by the contesting respondent opposing the application.

The delay is meager and we are satisfied with the reasons assigned for the belated filing of the Letters Patent Appeal.

The interlocutory application is, accordingly, ordered and the delay is condoned.

Letters Patent Appeal No.1288 of 2013

The Health Department of the State of Bihar is virtually competing with other departments in the context of nepotism, inefficiency or total disregard of service to public. The result is that the poor persons who cannot afford treatment in private hospitals are put to hardship and left to winds.

Diagnosis happens to be an important step in the treatment of patients, particularly in the Allopathy. There are well established hospitals in the Government in the



State of Bihar, though their maintenance is far from satisfactory. Since the diagnostic facilities were not made available, the Government and the State Health Society, Bihar have invited tenders for establishment of Regional Diagnostic Centres at various places. One M/s Softline Media Limited, New Delhi (for short, 'SML') was assigned contract for this, in the year 2008. However, their performance was found to be not satisfactory. Therefore, the contract was terminated and as usual, litigation ensued.

The respondents intended to make alternative arrangements in the place of SML. On the spot verification of the performance of various agencies were undertaken. The petitioner herein was selected for establishing centre at Motihari and Muzaffarpur. Through order dated 25.3.2011 passed by the competent authority, it was directed that the appellant shall be entitled to function till the regular arrangement is made by the State or the agency is terminated in accordance with law. Through order dated 25.03.2013, the respondents terminated the contract of the appellant. The same was challenged by filing CWJC No.7059 of 2013.

The plea of the appellant was that no reason whatsoever was stated in the order of termination, and that

same is contrary to law, apart from being violative of terms of the order dated 25.03.2011.

The respondents opposed the writ petition by filing counter affidavit. According to them, the appellant does not have any vested right to continue the facility and that the termination was on account of the fact that the performance of the appellant was not satisfactory. It was also alleged that the appellant failed to provide certain facilities and left with no alternative, the order of termination was passed. Alternatively, it was pleaded that there existed an arbitration clause for resolution of disputes and the writ petition is not maintainable.

The learned Single Judge dismissed the writ petition through order dated 23.07.2013. Hence, the Letters Patent Appeal.

Sri Gautam Kejriwal, learned counsel for the appellant, submits that the order, through which the contract was awarded, is clear to the effect that the appellant shall be entitled to operate the Centre till the respondents make their own permanent arrangement and that even without making such arrangement, the agency was cancelled. He further submits that in the order of termination, the respondents did not indicate any reasons

whatsoever and, on the other hand, the reference was to “some reasons” without being specific. He contends that when the order of termination is silent as to the reason, the same cannot be supplemented through the averments in the counter affidavit.

So far the arbitration clause is concerned, learned counsel for the appellant submits that it was virtually one sided contract and in the matter of this nature, arbitration is not a suitable mode of resolution of dispute, particularly the order of termination is passed without invoking any clause. He submits that treatment to quite large number of patients is involved and the respondents cannot take advantage of their own illegality.

Sri K.K. Sinha, learned counsel for the respondents, on the other hand, submits that once there exists a clause for arbitration, the writ petition is not maintainable and the learned Single Judge has taken correct view of the matter. He contends that Public Interest Litigation was also initiated after the termination of the contract of the appellant and in compliance with the orders passed therein, the Government itself has taken steps to provide facilities, on its own. He submits that the process is on and in a short time; the facilities will be run by the

Government itself.

For one reason or the other, the respondents were not able to establish and run the diagnostic facilities in the Government Hospitals. With a view to provide better facilities to the poorer section of the society, who come to Government Hospitals for treatment, provision was made for establishment of Regional Diagnostic Centres to be operated by the private agencies. The centers were allotted to one agency SML and that did not function well. The contract was terminated, but no alternative arrangements were made for quite some time.

Obviously realizing that there is need to provide the facilities, the respondents have chosen various agencies to operate the Regional Diagnostic Centres. The appellant was selected for running the centres at two places. In the order dated 25.03.2011 issued in this behalf, it was clearly mentioned that the appellant shall be entitled to operate the centre, till the respondents establish their own centres. A clause was also incorporated to the effect that the agency can be terminated at any time, since it was purely provisional.

The appellant started functioning till it was terminated in the year 2013.

The respondents do have the right to terminate the agency, either on establishing their own Diagnostic centres or by following the procedure prescribed by law. Admittedly, the respondents did not establish their own centres, even by now. On 25.03.2013, the respondent terminated the contract of the appellant. The reason mentioned therein is that “कतिपय कारणों से”.

कतिपय (Katipay) is a Sanskrit word. It means some or uncertain. When the respondents themselves are not clear about the reasons on account of which they intended to cancel the agency, it is just understandable as to how an objective or informed decision can be said to have been taken. It hardly needs any emphasis that a decision taken by an administrative authority must be supported by reasons and the party affected by such order must know the reasons. The second and more important is that any punitive action can be taken, only after following principle of natural justice.

An effort was made by the respondents to spell out some reasons in the counter affidavit. It was pleaded that the performance of the appellant was not proper and was not satisfactory and in certain respects they did not provide the facilities at all, in terms of the agreement.

In this regard, the law is fairly well settled. In **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others, {(1978) 1 SCC 405}**, the Hon'ble Supreme Court observed as under:

“ The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Commissioner of Police, Bombay vs. Gordhandas Bhanji, AIR 1952 SC 16:

Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by the public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

An administrative authority does not have the



luxury of passing any order, bereft of any reasons, and then to supplement the same through other proceedings or in the form of pleadings in the counter affidavit. The order must stand or fall on the basis of averments made therein, but cannot be provided the clutches to stand. Tested from that angle, the order made in this petition deserves to be set aside.

Further the impugned order was not preceded by any show cause notice. It is too late day to emphasise the importance of principles of natural justice. Mere proof of violation thereof, not necessarily, the prejudice flowing from the denial of *audi alterum partem* is sufficient to set at naught the order that suffers from vice.

The order dated 25.03.2011, through which the agency was entrusted by the appellant, by itself, does not spell out any provision for arbitration. It is stated that in the agreement that has to be executed, as a sequel that, there existed a clause for arbitration. Whatever be the importance of such clauses, in the civil contract; where public interest is not involved, the same cannot be pressed into service, to sustain, an administrative order which is patently illegal. In the ultimate analysis, the plea raised by the respondent is the one, of existence of alternative remedy. It is fairly well

known that a writ court does not countenance such plea when the order challenged before it is passed in violation of principles of natural justice.

Further, in the field of administrative law, the clause providing arbitration has its own limitation. The services that are required to be provided are of emergency nature. On the one hand, the State did not provide the facility and, on the other hand, it has terminated the contract. At any rate the respondents did not invoke any specific clauses in the agreement for cancelling the agency. Hence the plea of the respondents as regards arbitration cannot be accepted.

The result of the impugned order is that the Government hospitals are without any facilities. The respondents want the matter to lie over, because if arbitration is initiated, it will take its own time. This Court would not permit such approach, lest the public interest suffers.

We, therefore, allow this Letters Patent Appeal and set aside the order dated 23.07.2013 passed by the learned Single Judge in CWJC No.7059 of 2013. The writ petition is allowed and the impugned order is set aside. The respondents shall continue with the agency of the appellant

forthwith, on the same terms and conditions as existed earlier; till they establish and commence their own centres.

We make it clear that none of the directions issued herein can be treated as a hindrance in the establishment of Diagnostic Centres by the State itself or to take action in accordance with law, if there is any lapse on the part of the appellant.

Interlocutory applications, if any, shall stand disposed of. There shall be no order as to costs.

(L. Narasimha Reddy, CJ)

(Gopal Prasad, J)

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