

IN THE HIGH COURT OF JUDICATURE AT PATNA

**Letters Patent Appeal No.650 of 2016
IN
Civil Writ Jurisdiction Case No. 7842 of 2015**

- =====
1. State Health Society through its Secretary cum Executive Director, Parivar Kalyan Bhavan, Sheikhpura, P.S.- Shastrinagar, Distt- Patna, Patna 800014.
 2. Executive Director, (Secretary Health cum Executive Director), State Health Society, Parivar Kalyan Bhavan, Sheikhpura, P.S.- Shastrinagar, Distt- Patna, Patna 800014.

.... Appellants

Versus

1. The State of Bihar through the Chief Secretary, Govt. of Bihar Patna.
 2. The Development Commissioner, Bihar Patna.
 3. The Principal Secretary, Department of Health, Bihar, Patna.
- Respondents/Respondents/Proforma Respondents
4. Dr. Jain Video On Wheels Limited, Jain Studios Campus, Scindia Villa, Sarojini Nagar, Ring Road, New Delhi, represented through its representative Mr. Dharmendra Kumar Singh, aged about 37 years, son of Mr. Nand Kishore Singh, Project Manager, Bihar having its local office at 5th Floor Times of India building, Fraser Road, Patna-800001.

.... Respondents

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Appearance :

For the Appellants : Mr. Satyavrat Verma, Advocate
For the Respondent State: A.C. to AAG12
For the Respondent No.4: Mr. P. K. Shahi, Senior Advocate
Mr. Aditya Prakash Sahay, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE JUSTICE SMT. ANJANA MISHRA

JUDGMENT AND ORDER

C.A.V.

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 19-09-2016

Dr. Jain Videos on Wheels Limited, a Public Limited Company, registered under the Companies Act, 1956, had come to this Court with a writ petition, made under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No.3175 of 2014 (hereinafter referred to as the 'First Writ petition'), seeking a direction to the respondents to,

immediately, convene a meeting to resolve various issues, which had arisen with respect to 529 Basic Life Support Ambulances (for short, BLSA), popularly known as "102 Ambulances".

2. During the pendency of the said writ application, an order was passed, on 07.02.2014, by the Secretary, Health-cum-Executive Director, State Health Society, Bihar, to the effect that the contracts of the writ petitioner, which were valid for a period of two years, having already expired, shall not be extended. By making an interlocutory application, the writ petitioner put to challenge the order, dated 07.02.2014, aforementioned.

3. The background facts, giving rise to the above writ petition, may, in brief, be set out as under:-

(i) The petitioner had entered into different agreements with 38 District Health Societies, on different dates, in December, 2001, and January, 2012, for operationalizing and managing Basic Life Support Ambulance Service. The writ petitioner's case, as set up in the writ petition, was that the contracts were being carried out by the petitioner to the satisfaction of all concerned and, therefore, there was no occasion for not extending the contracts, when there was a provision, in the contract agreements, that after a period of two years, the contract could be extended for a

further period, the duration of the scheme being five years.

4. In the counter affidavit, which was filed by the State Health Society, a large number of documents were brought on record including complaints, which had been received from time to time by different District Health Societies and their officers, with regard to the functioning of the writ petitioner.

5. A learned single Judge of this Court, therefore, observed in the order, dated 02.04.2014, passed in C.W.J.C. No. 3175 of 2014, that since disputed issues had arisen, the Court did not consider it appropriate to exercise its jurisdiction and that in a matter arising out of a contract, a Writ Court is required to look into the question as to whether there is any arbitrariness in the action of the respondents in taking a decision and, in the case at hand, it cannot *prima facie* be alleged that the action of the respondents was arbitrary.

6. The learned single Judge also pointed out, in his order, dated 02.04.2014, aforementioned, that the learned Counsel for the parties had referred to Clause 17 of the agreement, which had been entered into between the parties concerned, Clause 17 having provided that the parties shall make every effort to resolve amicably, by direct informal negotiations, any disagreement or dispute arising between them under, or in connection with, the contract and if after 30

days from the commencement of such informal negotiations, the parties are unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution to the Development Commissioner, Government of Bihar, whose decision shall be final.

7. Coupled with the above, the learned single Judge also observed in his order, dated 02.04.2014, passed in C.W.J.C. No. 3175 of 2014, that the writ petitioner had, in fact, originally, approached this Court for issuance of a direction to the respondents to convene a meeting on the various issues, which had arisen during the course of execution of the contract. However, the learned single Judge pointed out in the order, dated 02.04.2014, aforementioned, that during the pendency of the writ application, the dispute had already been referred to the Development Commissioner, Government of Bihar, for resolution and, in fact, a date has been fixed in the matter, i.e., 19.02.2014, but on the date, so fixed, the writ petitioner did not appear, because of the pendency of the writ application. The learned single Judge also pointed out that the learned Counsel for the petitioner had submitted that if the Court was not inclined to proceed with the writ application, then, the Development Commissioner may be directed to dispose of the matter within a reasonable period of time and that the respondents be directed to, at least, make payment of the

admissible dues forthwith and not to create any third party right during the pendency of the dispute.

8. Having found reasonable the submissions of the learned Counsel for the petitioner, the learned single Judge, by the order aforementioned, gave direction that the Development Commissioner shall consider the matter and decide the same within a period of six weeks. The learned single Judge further directed, by the order, dated 02.04.2014, that the admitted dues of the petitioner shall be paid to the petitioner within a period of four weeks and, until the decision, in the matter, is reached by the Development Commissioner, no third party right shall be created.

9. The order, dated 02.04.2014, aforementioned, being relevant, is reproduced hereinbelow:

"Heard learned counsel for the petitioner and learned counsels for the State and for the State Health Society.

The petitioner had initially approached this Court for a direction upon the respondents to immediately convene a meeting to resolve the various issues which have arisen with respect to 529 Basic Life Support Ambulances (BLSA), popularly known as 102 Ambulances.

During the pendency of the writ application an order dated 7.2.2014 was passed by the Secretary, Health-cum-Executive Director, State Health Society in which it was directed that the contracts of the petitioner, which were valid

for a period of two years, having expired they shall not be extended. The said order is under challenge through an interlocutory application.

The petitioner had entered into different agreements with 38 District Health Societies on different dates in December, 2011 and January, 2012 for operationalizing and managing Basic Life Support Ambulance Service. The contention of the petitioner is that the contract was being carried out by the petitioner to the satisfaction of all concerned and there was no occasion for not extending the contract in which there was a provision that after the period of two years the contract may be extended for further period, the duration of the Scheme itself being five years. However, by the impugned order dated 7.2.2014 the direction was not to extend the same.

In the counter affidavit filed on behalf of the State Health Society a large number of documents have been brought on the record including the complaints made from time to time by the different District Health Societies and their officials stating the various complaints with regard to lack of proper service being provided by the petitioner.

In view of the fact that disputed issues have arisen in the matter, this Court does not consider it a proper case for consideration of the same in its writ jurisdiction.

Moreover, in the matter arising out of contract, what this Court is required to look into is as to whether there is arbitrariness in the action of the respondents in deciding the matter.

Prima facie it cannot be alleged on the basis of the materials that the action of the respondents is arbitrary.

Learned counsels for the parties referred to Clause 17 of the agreements entered into between the petitioner with various District Health Societies under which it is provided that the parties shall make every effort to resolve amicably by direct informal negotiations any disagreement or dispute arising between them under or in connection with the contract and if after 30 days from the commencement of such informal negotiations, the parties are unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution to the Development Commissioner, Government of Bihar, whose decision shall be final.

In view of the fact that the petitioner had in fact originally approached this Court for a direction for convening a meeting on the various issues, the respondents during the pendency of the writ application have already referred the matter to the Development Commissioner, Government of Bihar for the resolution of the dispute and in fact a date was fixed in the matter, namely, 19th February, 2014 on which date the petitioner was required to appear but because of the pendency of the writ application has not appeared.

Learned counsel for the petitioner also submits that in case this Court is not inclined to proceed with the matter then the Development

Commissioner may be directed to dispose of the matter within a reasonable period of time. It is further submitted by learned counsel that the respondents be directed to at least make payment of the admissible dues forthwith and during the pendency of the dispute before the Commissioner not to create any third party right.

In my view, the last submissions of learned counsel for the petitioner appear to be reasonable.

The writ application is, accordingly, disposed of with a direction to the Development Commissioner, Government of Bihar, to consider and dispose of the dispute between the parties within a period of one month from the appearance of the parties before him along with a copy of this order. The parties are directed to appear before the Development Commissioner on 9th April, 2014 at 11 A.M., who shall thereafter proceed to consider the matter and decide the same within a period of six weeks. It is further directed that the admitted dues of the petitioner shall be paid to it within a period of four weeks from today. Until the decision on the matter by the Development Commissioner, no third party right shall be created."

10. Pursuant to the order, dated 02.04.2014, aforementioned, both sides filed their claims before the Development Commissioner. Thereafter, the Development Commissioner, vide order, dated 19.06.2014, rejected all the

claims of the writ petitioner and remaining issues were sent back to the State Health Society for verification.

11. By filing a writ petition, under Article under Article 226 of the Constitution of India, which gave rise to C.W.J.C. No.7842 of 2015, and which is hereinafter to be referred as the '*second Writ Petition*', the writ petitioner put to challenge the order, dated 19.06.2014, which had been passed by the Development Commissioner rejecting all the claims of the writ petitioner.

12. When the *second writ petition* was taken up, on 15.02.2016, at the instance of the writ petitioner, it was submitted, on behalf of the writ petitioner, that *the writ petitioner was ready to go for arbitration*. The *second writ petition* was, therefore, disposed of, as withdrawn, with liberty granted to the petitioner to move the Bihar Public Works Contract Dispute Arbitration Tribunal (hereinafter referred to as the 'Tribunal') with regard to the disputes, which had arisen between the parties, with direction to the Tribunal that if necessary petition is filed within two weeks along with a copy of the order, the same shall be decided expeditiously, within a period of six months, and liberty was granted to the writ petitioner to make necessary application for interim protection by the Tribunal in order to safeguard future rights and ensure that the writ petitioner is not prejudiced due to the matter

having been decided finally by the Court. The learned single Judge directed that for a period of two weeks, no third party right shall be created by respondent No.4, namely, State Health Society, with regard to the matters, in question.

13. Aggrieved by the directions given by the order, dated 15.02.2016, aforementioned, this *intra* Court appeal has been preferred by State Health Society.

14. We have heard Mr. Satyavrat Verma, learned Counsel, appearing on behalf of the appellants, and learned Assistant Counsel to Additional Advocate General No.12, appearing for the respondent Nos. 1 to 3. We have heard also Mr. P.K.Shahi, learned Senior Counsel, appearing for the respondent No.4.

15. What has been contended before us, on behalf of the appellants, is that the Bihar Public Works Contract Dispute Arbitration Tribunal Act, 2008 (hereinafter referred to as '2008 Act') applies only to the *works contracts* and not to contracts, which are not, in substance, *works contracts*.

16. It is also contended, on behalf of the appellant, that in the light of the contract agreement between the parties concerned, the dispute was referable to, for adjudication by, the Development Commissioner and, in the case at hand, when the Development Commissioner had already passed the order, dated 19.06.2015, finally disposing of



the arbitral proceeding, no further order of the nature, as is the case at hand, could have been passed referring the dispute to the Tribunal constituted under the 2008 Act. The remedy of the writ petition-respondent, namely, Dr. Jain Video on Wheels Limited, lies, according to the appellants, in making an application under Section 34 of the Arbitration and Conciliation Act, 1996, putting to challenge the legality or validity of the order/award, dated 19.06.2015, which the Development Commissioner had passed.

17. Mr. P.K. Shahi, learned Senior Counsel, appearing on behalf of the writ petitioner, resists the appeal on three specific grounds.

18. It is the contention of Mr. Shahi that Clause 17.3 of the Contract Agreement between the parties concerned does not stipulate any arbitration by the Development Commissioner and, therefore, the appellants have wrongly contented that Clause 17.3 empowers the Development Commissioner to become arbiter of a dispute, which may arise between the parties. The Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act, 1996,'), cannot, submits Mr. Shahi, be applied to an arbitration agreement if the person, who is appointed as an arbitrator, becomes, in the light of the provisions of Section 12(5) of the Arbitration Act, 1996, ineligible for appointment as an Arbitrator on any of the



grounds mentioned in the 7th Schedule of the Arbitration Act, 1996. It is pointed out, in this regard, by Mr. Shahi, learned Senior Counsel, that the Development Commissioner, being the Chairman of the respondent Health Society, is an interested person and he could not have, therefore, under the Schedule of Section 12(5) of the Arbitration Act, 1996, been appointed as an arbitrator nor could he have, consequently, decided the disputes, in question.

19. Referring to Sub-section (5) of Section 12 of the Arbitration Act, 1996, Mr. Shahi, learned Senior Counsel, further submits that Sub-section (5) of Section 12 starts with *non obstante* clause and, hence, its application is *retrospective* in nature. It is pointed out by Mr. Shahi, learned Senior Counsel, that the agreements, in question, though were of 22.12.2011, yet as Sub-section (5) of Section 12 of the Arbitration Act, 1996, has come into force on 23.10.2015, the said agreements fall within the ambit of Sub-section (5) of Section 12 of the Arbitration Act, 1996, and, therefore, the bar, which Sub-section (5) of Section 12 creates, is applicable even to the present case.

20. In the light of the rival submissions made before us, the questions, which fall for consideration in the present appeal, are:

1. Whether Clause 17.3 of the contract agreement

between the parties concerned is an arbitration clause or not?

2. Whether 2008 Act is applicable only to *works contract* or other contracts as well?

3. Whether Sub-section (5) of Section 12 is *retrospective* in its application?

Whether Clause 17.3 of the contract agreement between the parties concerned is an arbitration clause or not?

21. It is the contention of Mr. Shahi, learned Senior Counsel, that Clause 17.3 is a departmental mechanism to resolve the dispute between the parties and that the Development Commissioner, being the Chairman of the State Health Society, has been vested with the power to resolve the dispute in his administrative capacity and this power, which has been given to the Development Commissioner cannot be construed as the power given to him to act as an arbitrator, when he is an interested party.

22. Let us, first, turn to Clause 17 of the *contract agreement*. Clause 17 reads:

"17.0 Resolution of Disputes

17.1 That in case of any dispute with regard to the interpretation of any term/ expression of this contract, then the meaning placed upon it by the SHSB shall be final and shall not be disputed by the Second Party.

17.2 The First Party and the Second Party

shall make every effort to resolve amicably by direct informal negotiations any disagreement or dispute arising between them under or in connection with the contract.

17.3 If, after thirty (30) days from the commencement of such informal negotiations, the first Party and the Second Party have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution to the Development Commissioner, Govt. of Bihar whose decision shall be final.”

23. From what have been mentioned in Clause 17.3, it becomes apparent that if any *dispute* arises between the parties and if the *dispute* is not settled within a period of 30 days from the commencement of informal negotiations and if the parties fail to resolve amicably a *dispute*, either party may require that the *dispute* be referred, for resolution, to the Development Commissioner, Government of Bihar, whose decision shall be final. These provisions take it beyond the pale of doubt that the Development Commissioner is a person, who is required to be arbitrator in case any *dispute* arises relating to the contract, in question, if the *dispute* could not be resolved amicably by the parties.

24. Having, thus, concluded that the Development Commissioner ought to have been treated, in a case of present nature of *dispute*, as an arbitrator and he was, indeed, treated by order, dated 02.04.2014, passed in C.W.J.C. No.3175 of

2014, (i.e., the first writ petition), as an arbitrator, the question, now, is: whether the Development Commissioner, so appointed, incurred any disqualification in terms of the provisions of Sub-section (5) of Section 12 read with 7th Schedule of the Arbitration Act, 1996, and whether he functioned without jurisdiction.

25. With regard to the above, it needs to be noted that Sub-section (5) of Section 12, 1996 Act, which has come into force, with effect from 23.10.2015, makes it clear that if the relationship of any person, appointed as a arbitrator, with the Health Society, is such that he falls within the disqualifying conditions mentioned in Sub-section (5) of Section 12, he cannot function as an arbitrator.

Whether 2008 Act is applicable only to works contract or other contracts as well?

26. While considering the question posed above, it needs to be pointed out that Section 2(b) of 2008 Act defines an *arbitration clause* to mean a clause, in the *works contract*, to submit present or future differences to arbitration. The definition, so given, clearly shows that the 2008 Act applies to only *works contract* and not to other contracts. The word "*dispute*", as defined by Section 2(e) of 2008 Act, means any difference, relating to any claim arising out of the execution or non-execution of the *whole or part of a contract for works or*

services or both including the rescission thereof. This definition of *dispute* necessarily means that the differences, relating to arbitration, must have arisen out of *works contract* or *such services*, which relate to *works contract*.

27. Thus, neither the definition of arbitration clause nor the definition of the dispute, as contained in 2008 Act, makes it possible for the Tribunal, constituted under the 2008 Act, to become arbitrator of differences or dispute that relates to a work, which is not a *works contract*.

28. As Mr. Shahi places reliance on the definition of *works contract*, embodied in Section 2(k) of 2008 Act, we deem it appropriate to reproduce Clause (k) of Section 2 of 2008 Act, which defines *works contract* in the following words:

"Works contract" means a contract made by the State Government or a public undertaking with any other person for the execution of any of its works relating to construction, repairs or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, all types of bridge, culvert, factory or work shops or of such other work of the State Government or, as the case may be, of the public undertaking, as the State government may, by notification in the official Gazette, specify and includes-

(i) a contract made for the supply of goods relating to the execution of any of such works or for supply of any other goods irrespective of whether it is required for any specific project or

work or any type of consultancy services/service providers.

(ii) Contracts made for the supply of services relating to the execution of any of such works; including consultancy services for preparation of DPR's supervision; project advisory, quality assurance, Project Management or any other management services.

(iii) Words and expressions used and not defined in this Act, but defined in the Arbitration Act, shall have the meanings assigned to them in the Arbitration Act."

29. From a bare reading of the definition of the *works contract*, it becomes abundantly clear that the *works contract*, under the 2008 Act, means a contract, which the State Government or a public undertaking may make with any other person for execution of any of its works relating to construction, repairs or maintenance of any building or superstructure, dam, weir, canal, reservoir, tank, lake, road, all types of bridge, culvert, factory or work shops or of such other work of the State Government or, as the case may be, of the public undertaking, as the State government may, by notification in the Official Gazette, specify and includes a contract made for the supply of goods relating to the execution of any of such works or for supply of any other goods irrespective of whether it is required for any specific project or work or any type of consultancy services/service



providers, contracts made for the supply of services relating to the execution of any of such works; including consultancy services for preparation of DPR's supervision; project advisory, quality assurance, Project Management or any other management services and Words and expressions used and not defined in this Act, but defined in the Arbitration Act, shall have the meanings assigned to them in the Arbitration Act, 1996.

30. When dispassionately considered, it becomes abundantly clear that Section 2(k) of 2008 Act can be applied only to *works contract* and to only such services, which relate to *work contract*.

31. The third category of cases, which may fall within the term '*works contract*', will be those contracts, which the State Government or the Public Sector Undertaking, as the case may be, so specified by notification in the official gazette.

32. In the case at hand, there is, admittedly, no such notification as contemplated by Section 2(k). Consequently, the contract between the parties, for operationalizing and managing *intra-city* bus services, cannot be said to fall within the term '*works contract*' and, therefore, Section 2(k) will not apply to the case at hand.

33. In other words, in the case at hand, the contract was not a *works contract* and, therefore, the services,

provided by the petitioner, could not have been treated as a contract falling within the jurisdiction of the Tribunal constituted under 2008 Act.

34. There is, therefore, no manner of doubt, in our mind, that 2008 Act applies only to the *works contract* and since the contract, which the present parties have entered into, is not a *works contract*, the Tribunal, constituted under the Act of 2008, has no jurisdiction to decide the kind of *dispute*, which has arisen between the parties concerned.

Whether Sub-section (5) of Section 12 is retrospective in its application?

35. What is, however, necessary to note is that in the case at hand, the *contract agreement*, having provisions for arbitration, was entered into on 02.01.2012 i.e. long before Sub-section (5) came to be inserted in Section 12. The *non-obstante* clause, which Sub-section (5) starts with, makes it clear that any prior agreement, which is contrary to the provisions of Sub-section (5), would not prevail upon Sub-section (5) of Section 12; rather, the provisions, embodied in Sub-section (5), will override and prevail upon a *contract agreement*, which is contrary to the provisions of Sub-section (5) of Section 12.

36. What is, however, of immense importance to note is that the *non-obstante* clause will not apply, and cannot



be applied, to an arbitration proceeding, which had already commenced; or else, all the arbitration proceedings, pending on 23.10.2015, when Sub-section (5) of Section 12 of the Arbitration and Conciliation Act, 1996, came into force, would become infructuous or untenable in law. This is certainly not the purpose or the object of the *non obstante* clause. What the *non obstante* clause does is that those agreements, which contained *Arbitration Clause* appointing a person, who may, otherwise, fall within the disqualifications prescribed by Sub-section (5), such a contract cannot be enforced to the extent the appointment of the arbitrator is concerned; but it will not vitiate or make untenable in law those arbitration proceedings, which have already commenced pursuant to the agreement between the parties before Sub-section (5) was brought into force.

37. In the case at hand, the arbitration proceeding, in terms of Clause 17.3 of the contract agreement, had already commenced before Sub-section (5) of Section 12 came into force. This apart, the proviso to Sub-section (5) makes it clear that the parties may waive the applicability of this clause by an express agreement in writing.

38. What follows from the above discussion is that the Development Commissioner had the jurisdiction and he acted in exercise of this jurisdiction.



39. What crystallizes from the above discussion is that 2008 Act is not applicable to the disputes, which had arisen between the parties concerned, and that Sub-section (5) of Section 12 of the Arbitration Act, 1996, does not create any impediment in law to the resolution of the dispute by the Development Commissioner as an arbitrator. If the writ petitioner is aggrieved by the decision of the Development Commissioner, Government of Bihar, as arbitrator, such a decision can be impugned, in terms of Section 34 of the Arbitration Act, 1996, provided that the facts and circumstances of the present case justify application of Section 34 of the Arbitration Act, 1996, and it will also remain open to the writ petitioner to apply for interim measures as prescribed by Section 9 of the Arbitration Act, 1996.

40. Because of what has been discussed and pointed out above, we are clearly of the view that the order under appeal, whereby the *dispute* has been referred to the Tribunal, under 2008 Act for adjudication, is not sustainable in the facts and attending circumstances of the present case and the law relevant thereto.

41. We, therefore, set aside the directions given by the order under appeal.

42. This Letters Patent Appeal accordingly stands allowed to the extent as indicated above.

43. There shall, however, be no order as to costs.

(I. A. Ansari, CJ)

Anjana Mishra, J : I agree.

(Anjana Mishra, J)

K.C.jha/-

AFR/NAFR	AFR
CAV DATE	22.07.2016
Uploading Date	20.09.2016
Transmission Date	N.A.