

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10605 of 2013

M/S IGE Medical Systems through Proprietor, Rakesh Kumar S/O Late Mahangu Singh Gala No. 11, First Floor, Saphalaya Industrial Estate, Plot No. 18, Survey No. 126/P, Amla Silvassa-396230 (U.P.), Dadara & Nagar Haveli, presently Office At 703-Jagat Trade Centre, VIIth Floor, Fraser Road, Police Station Kotwali, District Patna.

.... Petitioner/s

Versus

1. The State of Bihar through Principal Secretary, Department of Health, Government of Bihar, Patna.
2. The State Health Society through its Executive Director, Parivar Kalyan Bhawan, Sheikhpura, Patna- 800014.
3. The Executive Director, the State Health Society, Parivar Kalyan Bhawan, Sheikhpura, Patna-800014.
4. The Administrative Officer, the State Health Society, Bihar, Parivar Kalyan Bhawan, Sheikhpura, Patna-800014.
5. The In-charge Radiology & Pathology, the State Health Society, Parivar Kalyan Bhawan, Sheikhpura, Patna-800014.

.... Respondent/s

Appearance :

For the Petitioner/s	:	Mr. Shravan Kumar, Sr. Adv. Mr. Dinesh Maharaj, Adv.
For the S.H.S.	:	Mr. K.K. Sinha, Adv.
For the State	:	Mr. Kumar Mangalam AC to SC 24

CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

C.A.V JUDGMENT

Date: 18.05.2018

In the present writ application, the petitioner seeks to challenge the letter dated 13.07.2012 bearing Letter No. 5752 issued by the State Health Society, Bihar (hereinafter referred to as the “SHSB”) as contained in Annexure- 7, which has been issued following Letter No. 4649 dated 08.06.2012 (Annexure-5), by which, the Secretary, Health-cum-Executive Director of the aforementioned



Society has arbitrarily directed the petitioner to construct rooms for installation of X-ray Dark Room, storage and patient waiting room, etc. and other such directions beyond the terms of the Contract as contained in Annexure-3. The petitioner has further challenged the order of the Principal Secretary which has been issued in pursuance of the direction of the Hon'ble Court passed in C.W.J.C. No. 18118 of 2012 rejecting the representation of the petitioner vide his Memo No. 808/2013-311 (2) dated 24.04.2013 (Annexure-11).

The brief facts leading to the rise of the present writ application are stated herein for ready reference.

- (1) The State of Bihar has established the State Health Society Bihar under the Department of Health to implement various scheme of the government as well as National Schemes particularly the National Rural Health Mission (NHRM) and for the purpose of implementing the scheme and delivering basic health care in rural areas, it has been working under the concept of involving Public Private Partnership (PPP) at relatively low cost in view of



non-availability of quality health care.

(2) Accordingly, the said society decided to set up Radio-logical Centers (X-ray & Ultrasound) and other facilities in all the Government Hospitals of the State through P.P.P. involving interested private providers. This step was taken as a reform agenda to improve the health infrastructure of the Health Service in the scale.

(3) The aforesaid concept involved replacing outdated Government facilities and also to ensure that the health needs of the region continue to be met. One of the steps was to establish Radiology Centers (X-ray machines with technicians, Ultra sound machines with technicians.

(4) The aforesaid Radiology facilities was conceived to be provided by Private Sector Partners (P.S.P. to operate the Radiology Centers under the agreement



and supervision of State Health Society, Bihar and in order to give effect to the aforesaid concept a contract term of reference (TOR) was approved by the said society.

(5) Further in order implement the aforesaid scheme, the State Health Society, Bihar issued an advertisement inviting Expression of Interest on 08.01.2006 for outsourcing of Radiological facilities in all the District of Bihar.

(6) In response to the said advertisement, the petitioner M/s IGE Medical System submitted its tender documents on 27.01.2006 wherein a clear statements were made with regard to the place for establishing the centre. It was clearly represented to the respondent that machine would not be installed or supplied if found that room, dark room, desired infrastructure and securities were not proper and hospital was not



properly operational e.g. Doctors and responsible officers were not available.

It was also represented that the petitioner would not carry major repairs rather only minor infrastructural repairs.

(7) In pursuance thereto the agreement was executed (Annexure-1) with S.H.S.B. on 26.04.2006 in which it is clearly mentioned in Clause 13_A that D.H.S. would provide space with additional space for storage and dark room to set up and run X-ray centers at the following monthly rent at each unit District Hospitals (Rs.500/- per month) and Sub-Divisional Hospital (Rs.500/- per month). This amount has to be paid to the Rogi Kalyan Samiti in each hospital.

Relevant extracts of Agreement are quoted here under:-

13.A

DHS to provide space with



additional space for storage and dark room to set-up and run x-ray centres at the following monthly rent at each unit – District Hospitals (Rs.500/- per month) and Sub-Divisional Hospital (Rs.500/- per month). This amount has to be paid to the Rogi Kalyan Samiti of each hospital.

8. Subsequently, the Executive Director issued letter no. 1018 dated 28.04.2006 (Annexure-2) and the same was communicated to the respective District Health Societies to follow up the terms of the agreement dated 26.04.2006. It has been reiterated in paragraph -4 (iii) of the said letter that D.H.S. will provide the space (on rent) for the centre, along with space for storage and dark room and water, all other costs are to be borne by the second party.

9. In the aforesaid agreement at Clause – 13, it had been provided that D.H.S. will provide space with additional space for



storage and dark room to set up and run X-ray Centres on payment of rental Rs.500/- in respect of District and Sub-Divisional Hospital only. The petitioner took up the work sincerely by making huge investment and employing several trained personnel to execute the same.

10. Initially, the petitioner established about 151 X-ray Centres all over Bihar in different Government Hospitals and as the contract period was only for one year, later on satisfactory performance, the period was extended up to 26.04.2008. Further, on account of satisfaction expressed by the respondents by an agreement dated 26.02.2009 (Annexure-3), the period of agreement was extended by another 10 years till 25.04.2018, whereby the petitioner was assigned to establish Sonography centres alongwith 151 X-ray Centres which it had already



established, and further at other Centres where the petitioner was required to establish X-ray Centres.

11. After the extension indicated in the aforesaid agreement, the S.H.S.B. issued letter no. 10669 dated 11.06.2009 to all the D.M. & CS of 38 districts of Bihar, informed them of the said agreement.

12. The respondent issued letter no. 4649 dated 08.06.2012 (Annexure-5) directing the petitioner to get approval of AERB for the place of installation of X-ray machine, appointment of doctors by the agency obtaining PNDT certificate etc. However, in response to the said letter, the petitioner vide letter dated 12.06.2012 raised objection that a new liability had been created and the same was violative of various terms and conditions of the TOR and agreements. The petitioner further requested vide



letter dated 23.06.2012 (Annexure-6) to withdraw the said letter dated 08.06.2012.

13. Ignoring the representation of the petitioner, respondent issued a letter no. 5752 dated 13.07.2012 (Annexure-7) casting specific responsibility in paragraph -3 that the petitioner will have to construct the space as per the AERB guidelines. In response thereto, the petitioner wrote to the respondents on 23.07.2012 (Annexure-8) requesting therein to withdraw or modify the said letter in accordance with agreement, but to no avail.

14. The petitioner then filed writ application vide C.W.J.C. NO. 18118 of 2012 in which this Hon'ble Court directed the petitioner vide its order dated 12.12.2012 (Annexure- 9) to represent to the Principal Secretary of Health. The Hon'ble Court also



observed that both the parties are bound by the terms of the agreement and are expected to discharge their obligations accordingly. The representation as directed was filed on 18.12.2012 (Annexure-10) but the same was arbitrarily rejected by the said authority and he did not give any opportunity to the petitioner nor called upon the State Health Society to respond to the points raised by the petitioner. The representation having been arbitrarily rejected vide Memo No. 808/2013-311 (2) dated 24.04.2013 without going into the issues involved, the petitioner, has thus preferred the present writ application.

Learned counsel for the petitioner submitted that the dispute arose only with the issuance of Annexure-5 wherein certain further stipulations were made, which were over and above the terms of the agreement. He further submitted that in terms of the contract/agreement, the petitioner is committed to implement the



scheme as per the terms of the agreement. It was submitted that as per the terms of agreement so far as the X-ray Centre was concerned, the duty which was cast upon itself was to provide trained technician only and generating the report was to be by the Government Doctor notified for the purpose. In the case of Ultra sound Centres/PNDT certificate is required under the provisions of P.C and PNDT Act, 1994 by the person who owns the specific place. In the instant case, it was the government hospital where the Ultrasound had been set up which were providing the necessary space and therefore, the government's Ultrasound could be conducted only by the Government's doctor. As such, in terms of the contract, there is no stipulation with the agency to provide doctor for running ultra sound centres, which is the overall responsibility of the government. Thus, the agency could not be saddled unnecessarily in this regard, as it is clearly mentioned in the agreement that their agency has to provide machine technician and further that the agency is debarred from generating any report on X-ray and Ultrasound. The agreement, according to the petitioner provides that the State Health Society/District Health Society will facilitate the PNDT certification.

It was further contended by the petitioner that it was the primary responsibility of the State Health Society to provide space for establishment of the Ultrasound centres and though the space and



other facilities as required in terms of the agreement have not been made available, the petitioner has established centres in public interest, in spite of hardships faced by itself. The petitioner further contended that it was the duty of the respondent to provide space with whatever specifications, they can manage as per the said agreement and the petitioner was ready to establish and run the centres in those allotted spaces. It was, thus, contended that as per Clause 4.1 and 4.2 the DHS has to make provision for suitable structure for running radiology centres (separate for X-ray and sonography) along with space for storage, dark room, DG set and water as per the agreed time schedule, with a facility of a nearby toilet. Clause 4.2 however stipulated that the agency had to pay a nominal monthly rent of Rs.500/- per month per hospital which would be payable from the day the radiology facility would start its operation.

Learned counsel for the petitioner, thus, pointing to the terms and conditions as contained in Annexure-5, submitted that the issuance of such a letter to the petitioner, was wholly in violation of the agreement between the parties and the petitioner cannot be forced to construct space as per AERB guidelines, as there was no such agreement between the parties. On the contrary, the parties had agreed, that the respondent shall provide space and the petitioner shall pay rent. Hence, the petitioner reiterated, that, it having invested



huge funds to fulfil its commitment, cannot be compelled by the respondents to traverse beyond the terms of the agreement and imposition of any further terms would amount to violation of the agreement, which was impermissible under law. It was further submitted by learned counsel for the petitioner that the terms of agreement clearly stipulated that no deviation in the agreement is permissible unless and until the parties submitted themselves willingly to such changes in writing.

Learned counsel for the petitioner further pointed out to the order of this Court passed in C.W.J.C. NO. 18118 of 2012 wherein the petitioner had been relegated to file a representation before the Principal Secretary, Department of Health, Government of Bihar raising all the contentions which was to be disposed of in accordance with law by a reasoned order. However, contrary to the expectations of the petitioner, the contention raised therein were once again dealt with scantily, and the authorities have rejected his representation without appreciating his case in its true perspective. Thus, it was prayed that the actions of the respondents be declared to be illegal, arbitrary and against the settled principles of law warranting interference by this Court in its extra ordinary jurisdiction.

Per contra, learned counsel for the State Health Society has filed its counter affidavit opposing the writ application stating that



the present writ application is not maintainable in view of the settled contract between the parties. It was submitted thus as there is a specific clause 8.2 in the agreement in question which deals with a situation regarding settlement of dispute, if any, to refer the matter to the Development Commissioner, Government of Bihar, to settle the dispute and the decision thereof shall be final and binding on both the parties. In this view of the matter, it was contended that any grievance/dispute arising out of the agreement, is required to be settled by the authority concerned under the specific terms of agreement between the parties.

It was further contended that from perusal of the reliefs sought for and the grounds founded in the writ application, it would appear, that, admittedly the petitioner has disputed the issues arising out of the terms of agreement between the parties, and more so, the violation of terms of agreement is also alleged by the petitioner, the same may not be decided in the writ proceedings properly. Consequently if the petitioner had any grievance to that effect, if at all, he should have referred the matter to the authority under Clause 8.2 of the agreement. In light of the above, the writ application is liable to be dismissed.

Learned counsel for the State Health Society further respectfully stated and submitted that having accepted and signed the



terms and conditions of agreement, the petitioner at this stage cannot be absolved from the liability and should not be allowed to proceed in the matter by challenging the same in a writ proceedings. Hence, his prayer is liable to be rejected as not maintainable on this score itself. It was further submitted that besides the aforementioned reasons in similar circumstances, involving issue of specific clause of arbitration in the terms of agreement, this Hon'ble Court in **C.W.J.C. No. 20811 of 2010 (Kumud Kumari Vs. The Union of India)** reported in **2011(3) PLJR page 714, disposed of on 20.05.2011**, has been pleased to hold that there is no question of any discretion being exercised by this Hon'ble Court, specially when the adequate and efficacious remedy of arbitration is provided and as such, declined to interfere with the dispute arising out of an agreement in a writ proceeding.

It was further urged and submitted that the contract signed between the parties in the year, 2006 with subsequent agreement in the year 2009, does not forbid the respondents to strengthen the in-house capacity and to improve the infrastructure of the government hospital of the State and also to provide the best possible health services to each and every people of the State. Furthermore, the reliefs prayed for and the grounds as made out cannot be sustained in the facts and circumstances of the case as the



petitioner has every obligation to abide by and respect the earlier signed agreement dated 26.04.2006 (Annexure-1) wherein at Clause 16 specifically deals with responsibilities of the petitioner. Further, Clause 16.1 clearly stipulates that the operating procedure prescribed by the Government of India must be followed for good quality, testing accompanied with compliance monitoring and timely reporting. Further, Clause 16. XIV says that the second party (petitioner) will obtain necessary permission and licences and comply with all statutory requirements for running the operations and produce relevant documents during inspection by statutory authority.

Besides above, the guidelines of Atomic Energy Regulatory Board (AERB) of Govt. of India are to ensure that use of ionizing radiation and nuclear energy does not cause undue risk to health and environment and nothing new is being forced by taking action on behalf of the respondent society.

It was further contended by the Respondent that not only this, the petitioner, besides others, has an obligation to abide by the agreement dated 26.02.2009 (Annexure-3) with its specific clause 1.4 C, (vi) which is quoted hereunder clearly states as follows:- ,

1.4 C (vi) “the Agency has to ensure the installation, maintenance, functioning with provision of expert trained/technical manpower round the clock. Agency will be



responsible for hiring qualified trained technical personal as per guidelines and standard operating procedure and training them for running the radiology centre (X-ray & Ultra-sound).”

Clause C (xi) says that the responsibility of getting proper licence from competent authority for running the radiology centre will lie upon agency, PNDT certificate etc. The client will facilitate necessary clearance in getting the licence under PNDT Act.

Thus, it was submitted that the action is wholly legal, valid and justified as no new conditions have been imposed nor has the petitioner been pushed to the wall as alleged. Further neither the representation has been rejected arbitrarily nor the respondents are bent upon to introduce the things as alleged to harass the petitioner. As such, the statements/allegations made while taking the grounds to assail the writ application, are misconceived and do not flow from any deviation of the terms of agreement, the same are liable to be rejected.

It was further submitted by learned counsel for the respondents that those stipulations are already enumerated in the initial agreement itself and to clarify the matter, it is stated and reiterated that, the agency has every obligation to abide by the agreement in question in which Clause C “the service coverage”



includes clause C (xi) wherein the responsibility of getting proper licence from competent authorities for running the Radiology Centre will lie upon agency, PNDT, certificate etc. The client will facilitate necessary clearance in getting the licences under PNDT Act.

With regard to the question of qualified persons, it was clarified by the Respondents that the terms “trained technicians” include qualified technicians. Thereby, it is not in dispute that only a qualified technicians can be a trained technicians and not otherwise. It is necessary to state here that the petitioner has completely failed to comply with the terms and conditions of the contract agreement. Furthermore, by violating the same, the petitioner has failed to even start these facility in 50 per cent of the total hospital of the State, despite a long period of time of more than six years. As a result thereof, the petitioner has compelled a huge population of the State to be deprived of the services under contract. Further, the respondents are not putting any new condition beyond the agreement nor have they violated any conditions to be provided by the respondents as they were bound to adopt the Standard Operating Procedure. Despite full co-operation, the petitioner failed to proceed under the terms of agreement in any manner rather only the terms and conditions were sought to enforce by the impugned order.

It was further submitted that the petitioner whose



primary motto was to earn more and more profit, started serving in only those hospitals, where the patient turn out was good enough to yield big profit, and left those outreach and remote hospitals, where patient inflow was poor.

With regard to the issue of providing space, it was stated that from Annexure- 7, it would appear that the society will only provide the space and not the constructed room for the provision under reference, the petitioner thereby has been trying to mislead/distort the conditions. Thus, the respondents are not forcing the petitioner to travel beyond the terms and conditions between the parties and the writ application is fit to be dismissed.

Heard learned counsel for the petitioner and learned counsel appearing on behalf of the State Health Society.

The only ground on which the petitioner has sought relief is that he has been asked to traverse beyond the terms of the agreement entered into between itself and the State Health Society.

A perusal of the agreement between the parties (Annexure-1) as it came to be, clearly indicates that the petitioner is the second party, who has been assigned the duty of setting up X-ray centres, equipped with requisite equipment and personnel at all the districts of Bihar for the contract period from the time of commissioning of the unit. The project area of the petitioner was for



all 38 districts of the Bihar.

The agreement with the parties is contained in Annexure- 1.

A perusal of the relevant Clause 16 indicates as follows:-

Clause 16 (i) The operating procedures prescribed by the GOI must be followed for good quality testing, accompanied with compliance monitoring and timely reporting.

Therefore, Clause 16 (x) further enunciates second party will be responsible for hiring qualified technical personnel as per guidelines and Standard Operating Procedures (SOPs) and training them for running the centres.

Clause 16 (iv) indicates that the Second Party will obtain necessary permissions and licenses such as laboratory License, Trade License and comply with all statutory requirements for running the operations and produce relevant documents during inspection by statutory authorities.

Clause 16 (xix) further indicates that Second Party will comply with standard operating



procedures and submit any document needed as per agreed standard operating procedures in a timely manner.

At Clause 17 of the aforementioned agreement (Annexure-1) dated 26.04.2006 at sub-Clause (ii) , the daily monitoring of the X-ray centres shall be ensured by the DM/CS.

Clause 17(v) indicates that the DHS will only provide the space (on rent) and water; all other costs are to be borne by the Second Party. At Clause 24, it was provided that the disputes if any shall be settled amicably between the two parties and not in any court of law, however, if at all in that event, the same shall be in the Court of Law within the jurisdiction of Patna only.

The aforementioned agreement Annexure- 1 was followed by another agreement dated 26th of February, 2009 (Annexure-3) wherein it was indicated that the agreement signed on 26.04.2006 had been extended upto 26.04.2008 and in furtherance thereof, fresh agreement was being executed to extend the contract period with the agency (petitioner) for another ten years i.e. upto 26.04.2018. By this agreement, the agency was also required set-up radiology centres (Sonography) in all the 151 health units where the



Agency's X-ray units were already functional, which would be valid till 25.04.2018. It was also evident from this agreement that at Clause C (xiii) & (xv), the Agency must fulfil all requirements as laid down under NABL accreditation in case of Radiology services and Clause C (xv) stated that the operating procedures prescribed by the GOI must be followed for good quality testing accompanied with compliance monitoring and time operating.

Thus, it is clear from the entire agreement entered into between the parties that under all circumstances, the Government of India guidelines were to be adhered with by the Second Party and the Standard Operating Procedure could not be ignored.

Coming to the notice which is impugned in the present writ application, a perusal of the same clearly indicates that it is but a reiteration of Clause 16.1 of the original agreement, wherein it has been clearly stated that the Standard Operating Procedure were to be followed by the Second Party. The operating procedures have thus, been described in detail in the aforementioned letter dated 08.06.2012. It is important to indicate here that conducting of any X-ray involves a great deal of radiation hazards for which, necessary precautions are to be adhered to and they have well been described in the Standard Operating Procedures. Thus, the letter issued from the office of the Principal Secretary, Health-cum-Executive Director, State Health



Society, Bihar reminding the petitioner to follow the Standard Operating Procedure, which was specifically contained in both the agreements, cannot be considered to be in excess of the contractual obligation imposed on the Second Party-petitioner.

Thus, this Court does not feel inclined to issue certiorari for setting aside the letter dated 08.06.2012 as contained in Annexure- 5. So far as interference with Annexure- 7 is concerned, whereby the Secretary, Health-cum- Executive Director has issued a direction to the petitioner to construct rooms for installation of X-ray dark room, Storage and patient waiting room etc., such instructions cannot be said to be in violation of the terms of the contract, as on perusal of both Annexures 1 & 3, it can be conclusively inferred that that the State Health Society was only to provide space for establishing the X-ray unit and Sonology Centres and the provision for installation of X-ray dark room, Storage and Patient Waiting Room would all form part of the contract, as these were intricately linked with the establishment of the X-ray unit and/or the Ultrasound unit at the respective districts.

Accordingly, the impugned letter issued to the petitioner does not appear to be against the terms of the contract entered into by itself and the respondents. For the reasons stated above, this Court is also not persuaded to make any interference with the directions as



contained in Annexure- 7 and this Court is also of the considered opinion that the respondents have rightly rejected the representation of the petitioner

In the result, the present application is devoid of any merit and is, accordingly, dismissed.

(Anjana Mishra, J)

Jagdish/-

AFR/NAFR	AFR
CAV DATE	17-07-17
Uploading Date	21-05-2018
Transmission Date	

