

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.15034 of 2014

M/s Suraksha Diagnostic Pvt. Ltd. Salt Lake City, Sector-1, Kolkata- 700091
through one of its Directors namely, Shri Raman Kejriwal, son of Shri K.K.
Kejriwal, resident of JC 21, Salt Lake City, Sector- 3, Kolkata- 700098

... .. Petitioner/s

Versus

1. The State Of Bihar and Ors Government of Bihar, Patna
2. The Secretary, Health cum Executive Director, State Health Society, Bihar
through Secretary, Health Bihar
3. The Secretary, Health Cum Executive Director, State Health Society, Bihar
4. The State Programme Officer, Secretary, Health cum Executive Director,
State Health Society, Bihar

... .. Respondent/s

Appearance :

For the Petitioner/s : M/s Ashish Giri
Nikhil Kumar Agrawal, Advocate
For the Respondent/s : Mr. Manish Kumar,
AC to AAG 6
For B.S.H.C : M/s K.K.Sinha
Shashi Shekhar, Advocates

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

CAV JUDGMENT

Date : 09-08-2024

1. At the outset, it is relevant to mention here that
earlier the writ petition was filed for quashing the order dated
06.11.2014 passed by the Executive Director, State Health
Society, Bihar, by which the petitioner has been made to forfeit
the earnest money deposited by him by way of Bank
guarantees, the Request for Proposal (RFP) cancelled and the
petitioner blacklisted from conducting work in the Department



of Health, Government of Bihar and its agencies like State Health Society and Bihar Medical Services & Infrastructure Corporation Limited, and for a direction to the respondents to refund the amounts of the Bank guarantees with interest.

2. A coordinate Bench of this Court vide judgment dated 19.04.2016 disposed of the Writ petition(CWJC No. 15034 of 2014), dealt with the facts and circumstances of the case. The relevant part of the judgment is quoted hereinbelow as follows:

“13. Accordingly, the impugned order dated 06.11.2014 insofar as it has blacklisted the petitioner from conducting work with the Department of Health, Government of Bihar and its agencies is hereby quashed.

14. As regards cancellation of the RFP by the Society, this Court is not inclined to interfere as the same never culminated in a concluded contract between the parties. If the society was of the view that the petitioner was not serious about proceeding with the work, it was fully justified in abandoning negotiations with the petitioner and it was free to explore its options with other interested parties. As a matter of fact, it would appear that the petitioner in its show cause reply dated 15.09.2014 has already expressed its decision not to invest the huge sum required and to



withdraw from the proposed projects in view of the issues raised by the petitioner remaining unresolved.

15. The writ petition stands disposed with the aforesaid observations and directions.”

3. The petitioner herein had filed a review application before this Court bearing Civil Review No. 7 of 2019 (arising out of CWJC No. 15034 of 2014) for limited purpose to review the judgment and order dated 19.04.2016 passed in CWJC No. 15034 of 2014 (M/s Suraksha Diagnostic Pvt. Ltd. vs. The State of Bihar & Ors.) only to the extent wherein in para -11 of the said judgment the Hon'ble Court has refrained from deciding the merit of the issue relating to the legality of invocation and encashment of the Bank guarantees by the respondents with a liberty to the petitioner to take recourse to the provisions of Bihar Public Works Contract Dipustes Arbitration Tribunal Act, 2008 for seeking appropriate remedy and redressal of its grievances.

4. After hearing the parties, Learned coordinate Bench of this Court disposed of the Civil Review No. 7 of 2019 vide judgment dated 01.12.2021. The relevant part of the judgment is quoted hereinbelow as follows:



“9. In the above view of the matter, the relevant part of the judgment of this Court dated 19.04.2016 passed in CWJC No. 15034 of 2014 in which the petitioner has been granted liberty to take recourse to the provision of the Bihar Public Works Contract Disputes Arbitration Tribunal Act, 2008 for seeking appropriate remedy and redressal of its grievances, is hereby recalled.

10. The review application stands disposed of.

11. Let the writ petition be accordingly listed before the appropriate Bench according to roster.”

5. Accordingly, the Writ petition has been listed before this Court for deciding the issue of encashment of Bank guarantee.

6. Heard the parties.

7. The Writ petition is filed seeking direction to the respondents to refund the amounts of the Bank guarantees with interest.

8. The brief facts culled out of the petition are that the respondent State Health Society (for short “the Society”) issued a Request for Proposal (RFP) for design, installation, refurbishment, operationalisation and maintenance of imaging



centres in six Government Medical Colleges and Hospitals, 33 District Hospitals and in LNJP Ortho Hospital, Rajbanshi Nagar, Patna in Public Private Participation (PPP) mode.

9. It is contention of the petitioner that the petitioner participated and as required, furnished earnest money deposit in the form of five Bank guarantees for the five clusters in question, as follows :-

- a. BG No. 014 GT02141250004 dated 05.05.2014 of Rs. 30 lacs valid up to 01.11.2014.
- b. BG No. 014 GT02141250003 dated 05.05.2014 of Rs. 30 lacs valid up to 01.11.2014.
- c. BG No. 014 GT02141250002 dated 05.05.2014 of Rs. 30 lacs valid upto 01.11.2014.
- d. BG No. 014 GT02140770008 dated 18.03.2014 of Rs. 30 lacs valid upto 17.09.2014.
- e. BG No. 014 GT02140770010 dated 18.03.2014 of Rs.30 lacs valid upto 17.09.2014

10. It is further contended that a letter No. 3578 dated 15.05.2014 was received from the respondents accepting the proposal of the petitioner for clusters 1 and 2, and similarly, another letter No. 3646 dated 16.05.2014 was received accepting the proposal for cluster Nos. 3, 4 and 5. All the proposals were accepted by the petitioner vide letter dated



11.06.2014. A Memorandum of Understanding (MOU) was required to be executed between the parties, which, however, was still at the stage of negotiation. However, during such negotiations for finalization of the draft MOU, the respondent society invoked the Bank guarantees through its letter No. 6790 dated 22.08.2014 addressed to the HDFC Bank, and subsequently encashed them.

11. Learned counsel for the petitioner submits that the actions taken against the petitioner in terms of impugned letter No.7973 dated 06.11.2014 (Annexure-1/3 of I.A. No. 8952 of 2014) is completely arbitrary and without the authority of law. It is submitted that the Bank guarantees furnished by the petitioner were conditional in nature and only on the fulfillment of those conditions could the same have been invoked. The amounts covered under the Bank guarantees were contemplated to be forfeited only in the following two circumstances.

(i) In the event of withdrawal of the offer by the bidder as a condition within the validity period.

(ii) In the event of failure to furnish the valid contract performance guarantee by the bidder within one month from the receipt of the purchase order.

12. Learned counsel for the petitioner submits that



the impugned order discloses that the solitary reason for invoking the Bank guarantees was that the validity thereof was to expire on 17.09.2014, and as such the Society decided to encash them. It is submitted that such action which is wholly unauthorized on the very terms of the Bank guarantees, has caused serious prejudice and detriment to the petitioner. Reliance in this regard is placed on the decision of a co-ordinate Bench of this Court in the case of **Hindustan Steel Works Construction Ltd. vs State of Bihar & Others [2009 (2) PLJR 909]**, as partially affirmed by a Division Bench of this Court in **State Bank of India & Others vs Hindustan Steel Works Construction Ltd. [2012 (1) PLJR 54]**. That apart, Learned counsel for the petitioner also points out that the Society could not have invoked the Bank guarantees in absence of any such contemplation in the RFP. Furthermore, the MOU had not been entered into between the parties, and the same could not therefore come to the aid of the Society to support its manifestly arbitrary and illegal action.

13. Learned counsel for the petitioner also questioned the legality of the impugned action by way of cancellation of RFP, forfeiture of Earnest Money Deposit and blacklisting, on the ground of violation of natural justice. It is



pointed out that the show cause as contained in letter No. 7128 dated 11.09.2014 (Annexure-E to the counter affidavit) discloses that the Society had made up its mind to take the impugned actions against the petitioner at the stage of the show cause itself, rendering the issuance of the show cause a mere eye wash and an idle formality. Attention is invited to para 10 of the show cause wherein it has been stated that the “SHSB decided to have them encashed.” It was argued that the Society has proceeded with a pre-determined notion, which renders such action contrary to the law laid down in **Oryx Fisheries Pvt. Ltd. vs The Union of India and others [(2010) 13 SCC 427]**.

14. As regards the delay alleged against the petitioner in entering into agreement with the Society, it is submitted that the same is completely baseless and misconceived. By its letters dated 15.05.2014 and 16.05.2014 (Annexures 5 and 6), the Society had informed the petitioner that he would be provided a draft of the MOU proposed to be signed by the parties. The petitioner had responded by filing its reply on 11.06.2014 (Annexure-7), accepting the offer to enter into a mutually agreed MOU. The Society sent the draft MOU by e-mail dated 11.08.2014. The petitioner thereafter sent a list by e-mail dated 19.08.2014 raising no less than 15 points by



way of initial observations and objections to the draft MOU, along with proposed changes. One of the main objections was that clause 3.2.3 of the draft MOU constituted a condition in restraint of trade, having the effect of prohibiting the petitioner from engaging in any business at Patna for a period of two years after the termination of the contract. It is submitted that such condition could not legally have been imposed, being in violation of Section 27 of the Contract Act. This was one of the main points of negotiation, and the Society could not lay blame at the door of the petitioner for the delay in signing caused by the disagreement on this point. This in effect meant that the Society was demanding compliance as if the petitioner was bound to accept all the conditions sought to be imposed in the draft MOU whether or not the same were in accordance with law. Finalisation of the agreement was dependent upon the petitioner's absolute and unqualified acceptance and free consent, which was justifiably not forthcoming in the above circumstances.

15. Learned counsel for the respondent Society, on the other hand, vehemently opposed the writ petition, submitting that the same is devoid of merit and is liable to be dismissed as such.



16. Learned counsel for the respondent Society averred that no fault can be found with the actions taken against the petitioner in view of the gross delay on the part of the petitioner in entering into the agreement and in starting the work. It is submitted that public interest has greatly suffered as the imaging centers in a large number of institutions covered under the RFP could not be made operational by reason of delay attributable solely to the petitioner.

17. Learned counsel for the respondent Society contended that despite the Society's repeated endeavors to get the MOU finalized and the work started, the petitioner failed to visit the sites and kept delaying the matter. Even though the Society sent the draft MOU by e-mail dated 11.08.2014 and proposed the same to be signed by the parties on 12.08.2014, the petitioner failed to comply and instead sent a list of proposed amendments to the draft MOU more than a week later on 19.08.2014, thus delaying the matter. It is further submitted that even though the petitioner visited the Society on 27.08.2014 and after discussions, gave an assurance to visit again on either 02.09.2014 or 03.09.2014 to finalize the terms of the MOU so that the same could be signed by the parties on 09.09.2014, he failed to turn up. An e-mail was sent on 03.09.2014 by the



Society but the same was ignored and the petitioner did not visit the Society.

18. Heard the rival contentions of the Learned counsel for the petitioner as well as the Learned counsel for the respondents.

19. Learned counsel for the petitioner drawn attention of this Court on some judgments of Hon'ble Supreme Court as well as Hon'ble Division Bench of this Court, which are **Oryx Fisheries Private Limited Vs. Union of India and Ors.** reported in **(2010)13 Supreme Court Cases 427** (paragraph nos. 23, 24, 27, 31, 32, 33, 35 and 38) , **Gorkha Security Services Vs. Government (NCT of Delhi) & Ors.** reported in **(2014) 9 Supreme Court Cases 105** (Paragraph Nos. 21, 26 and 29), **Suresh Kumar Wadhwa Vs. State of Madhya Pradesh & Ors.** reported in **(2017) 16 Supreme Court Cases 757** (Paragraph Nos. 23, 26, 27, 29 to 32, 37, 40 and 45), **Union of India & another Vs. Millenium Delhi Broadcast LLP & Ors.** reported in **(2022) 7 Supreme Court Cases 67** (paragraph Nos. 6, 7, 10, 13, 14 and 15) and **Ramadhar Sah Vs. The State of Bihar & Ors.** passed in **CWJC No. 5589 of 2024** (Paragraph Nos. 2, 5 and 6) .

20. The Hon'ble Division Bench of this Court in



Ramadhar Sah (supra) vide judgment dated 08.05.2024 held as follows:

7. We do not find ourselves persuaded to uphold the forfeiture of EMD on the basis of a letter which was not incorporated in the NIT. If the conditions in the letter was incorporated in the NIT, definitely the consequence of forfeiture could have visited the petitioner. Clause 16.6 as we extracted from the NIT does not contemplate a situation of false representation resulting in forfeiture of the EMD.

“8. On the above reasoning, we find the forfeiture to be illegal and not in consonance with the NIT. Annexure-P-10 order to the extent it forfeits the EMD is set aside. The petitioner shall be returned the EMD within a period of one month from today, failing which interest @ 6% shall be levied.”

21. Learned counsel for the petitioner submits that the MOU is not applicable as the same was not signed by the parties and hence not binding. Further MOU is not part of Request for Proposal. MOU is not applicable as there is no unilateral application of the same. MoU is also not applicable as Bank guarantee is separate contract to be govern by its own.

22. Learned counsel for the petitioner further submits that SBD is not applicable, as SBD was not the part of RFP and hence cannot be adopted now and SBD does not relate



to present work, but works contract.

23. Learned counsel for the petitioner also submits that Clause 30(vi) of the Bihar Finance Rule does not have application as the respondents themselves delayed beyond 21 days after conditional acceptance of petitioner. It is further submitted that the delay was not attributable to petitioner as already held in para 12 of the earlier judgment dated 19.04.2016. For better appreciation, para 12 of the judgment dated 19.04.2016 is necessary to be quoted:

“12. As regards the order of blacklisting of the petitioner, this Court is of the view that the same cannot be upheld. A bare perusal of the order makes it evident that the same has been made perpetual in nature and is thus contrary to the well settled law laid down in M/s Kulja Industries’ case (supra). Moreover, such order could also not have been passed in absence of any concluded contract as the MOU had not been executed between the parties. The RFP did not also authorize the respondents to pass an order of blacklisting against the petitioner. Moreover, this Court is of the view that the Society must at least partially share the responsibility for delay in finalizing the MOU. It is a matter of record that in response to the Society’s e-mail dated 11.08.2014, the petitioner had submitted a list of objections and changes proposed therein about a week later by e-mail dated 19.08.2014. It appears that such



proposals were rejected by the Society after a lapse of over two months by its letter No. 294 dated 21.10.2014 (Annexure-12), and that too only after the petitioner submitted its show cause reply (Annexure-F to the counter affidavit). It cannot therefore be said that the petitioner had acted negligently or with any express intention of deliberately delaying signing the MOU, more so when the terms of the draft MOU were being objected to by the petitioner on grounds which cannot outright be termed frivolous or irrelevant.”

24. Annexure-1 relates to the notice inviting Request For Proposal. It is clear from the contents that Earnest Money Deposit was mentioned at Clause No. V: Submission for Requirement and it also discloses that the Earnest Money Deposit or Bank guarantee of Rs. 30,00,000/- in favour of State Health Society Bihar payable at Patna. For the purpose of 5 clusters, the petitioner paid $5 \times 30,00,000/- = \text{Rs. } 1,50,00,000/-$. The details of the Bank guarantee are already mentioned supra. Annexure-2 are conditional Bank guarantee dated 18.03.2014 wherein it is specifically mentioned as follows:-

“As an irrevocable Bank Guarantee for an amount of Rs. 30,00,000/- (Rs. Thirty lakhs only) valid for 180 days from 18.03.2014 is required to be submitted by the



*Contractor/Supplier which amount is liable to be forfeited
by the purchaser in the event of*

*(1) the withdrawal of the offer by the
Bidder as a condition within the validity period.*

*(2) failure to furnish the valid contract
performance guarantee by the bidder within one month
from the receipt of the purchase order.”*

Admittedly, such situation did not come into
existence.

25. The contents of Annexure-5, which is
addressed by the Secretary, Health – cum – Executive Director
to the petitioner Company clearly disclose that shortly the
petitioner would be provided with the draft of the MOU
proposed to be signed between the representatives of
petitioner agency and that of the Department of Health/State
Health Society, Bihar. The MOU will be signed separately for
each cluster/Health Institution.

26. On perusal of the record, it is evident that the
parties did not enter into MOU till the date. Annexures -5 and 6
deal with the details of Clusters 1 to 5. In Annexure-6 also it is
informed by the Secretary, State Health Society, Bihar to the
Managing Director of the petitioner that draft MOU shall be



provided by the respondents. Annexure-7 is the letter of conditional acceptance given by the petitioner Company in favour of the Secretary, Health -cum-Executive Director wherein it is specifically mentioned that “we hereby accept your offer and agree to enter into mutually agreed Memorandum of Understanding”. The word “mutually agreed” has to be read along with MOU. The record also reveal that after two months, the draft MOU was sent by the Secretary, Health-cum-Executive Director to the petitioner through e-mail i.e. dated 11.08.2014. The counter affidavit of the respondents also disclose that the Society vide e-mail dated 11.08.2014 sent the draft MOU proposed to be signed between the parties on 12.08.2014. To that effect the petitioner was requested to confirm by e-mail for which the petitioner Company has given a reply vide Annexure-7 contending that “*Before entering into MOU, you will be requested to earmark the proposed space after mutual technical & patient facility evaluation within the respective institutions*”. It is the contention of the respondent that the petitioner failed to response the aforesaid request for entering into the MOU . On perusal of Annexure-C, the e-mail sent by the State Programme Officer, State Health Society to the petitioner disclose that the e-mail was sent on 11th August,



2024 at 16:10 hours directing the petitioner to get MOU signed by 3 PM of 12 August, 2014. Admittedly, the petitioner is the resident of Calcutta, even 24 hours time was also not given to the petitioner to come down from Calcutta to Patna to sign the MOU. The petitioner has given a reply to the e-mail of the respondent i.e. Annexure-8, the e-mail is dated 19th August, 2014 at 1.14 PM. Wherein it is referred that “*please find attached our initial observations on the draft MOU sent by you. Please let us know your comments on the same.*” In spite of making the objection for MOU by the petitioner, the respondents have encashed the Bank guarantee of the petitioner on 22 August, 2014 and later a notice was sent to the petitioner on 11.09.2014. The letter addressed by Dr. A.K.Shahi to the Branch Manager, HDFC Bank Patna clearly disclose that respondents have encashed three Bank guarantee dated 05.05.2014 and the proceeds were being credited in the Allahabad Bank, Sheikhpura, Patna in Account No. 20244462130 of State Health Society, Bihar. Annexure-E addressed by the Executive Director to the petitioner clearly disclose that the Bank guarantees will expire on 17.09.2014 and as the petitioner has delayed or avoided to get the MOU signed and they have encashed the Bank guarantee. The condition



between the parties is that the MOU shall be signed between them for mutually agreed terms and conditions. As to how the respondents has encashed the Bank guarantee by forfeiting the amount of the petitioner is not all properly explained by the respondents. Admittedly, the previous order of this Court clearly disclose that the order dated 21.10.2014 passed by the respondents in blacklisting the petitioner was set aside. Therefore, this Court opines that the respondents themselves have delayed in sending the draft MOU and that the terms and conditions are not mutually agreeable and therefore, the petitioner replied through an e-mail making his objections. Further the respondents, without considering them in the proper perspective have forfeited the amount of the petitioner by encashing the Bank guarantee and thereafter, blacklisted the petitioner. This Court is of the considerable opinion that the action of the respondents in encashing the Bank Guarantee is illegal and arbitrary in nature and hence, the respondents are directed to refund the amounts of the Bank guarantee along with 9% simple interest to the petitioner, from the date of encashment.

27. In result, the Writ petition is allowed setting aside the impugned order dated 06.11.2014 passed by the



Executive Director, State Health Society, Bihar (Annexure-I/3).

28. Interlocutory application(s), if any, shall stand
disposed of.

(G. Anupama Chakravarthy, J)

Spd/-

AFR/NAFR	NAFR
CAV DATE	09.07.2024
Uploading Date	14.08.2024
Transmission Date	NA

