IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

WEDNESDAY, THE 25TH DAY OF FEBRUARY 2015/6TH PHALGUNA, 1936

WP(C).No.27272 of 2009 (D)

PETITIONER:

M/S.SURICE TRADING PET LTD,
101 CECIL STREET,11-09,TONG ENG BUILDING,
SINGAPORE-069533,A COMPANY INCORPORATED IN SINGAPORE,
REP.BY ITS AGENT BHADRESH MEHTA,PARTNER,
M/S.BHADRESH TRADING CORPN,205,
MAJESTIC SHOPPING CENTRE,144JSS ROAD,
GIRAGUM,MUMBAI-400004.

BY SRI.K.JAYAKUMAR (SENIOR ADVOCATE)
ADVS.SRI.T.R.RAJAN
SRI.K.S.BHARATHAN

RESPONDENT'S:
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1. THE KERALA STATE CASHEW DEVELOPMENT CORPN.LTD,
CASHEW HOUSE,PB.NO.13,KOLLAM-691 001,
REP.BY ITS MANAGING DIRECTOR.

2. THE MANAGING DIRECTOR,
KERALA STATE CASHEW DEVELOPMENT CORPN. LTD,
CASHEW HOUSE,PB.NO.13,KOLLAM-691 001.

BY SRI.M.R.RAJENDRAN NAIR (SENIOR ADVOCATE.)
BY SRI.C.UNNIKRISHNAN, SC, KSCDC LTD.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1:TRUE COPY OF THE TENDER NOTIFICATION DATED 22.3.2000 FLOATED BY THE SECOND RESPONDENT.

EXT.P2:TRUE COPY OF THE CONTRACT DATED 22.6.2000 ENTERED INTO BETWEEN THE PETITIONER AND THE FIRST RESPONDENT.

EXT.P3:TRUE COPY OF THE CONTRACT DATED 17.7.2000 ENTERED INTO BETWEEN THE FIRST RESPONDENT AND THE PETITIONER.

EXT.P4:TRUE COPY OF THE NOTICE DATED 21.12.2001 ISSUED TO THE RESPONDENTS BY THE PETITIONER'S LAWYER.

EXT.P5:TRUE COPY OF THE REPLY GIVEN TO THE PETITIONER BY THE RESPONDENTS DATED 5.2.2002.

EXT.P6:TRUE COPY OF THE JUDGMENT DATED 19.12.2003 IN O.P. NO.8157/2002 OF THIS HONOURABLE COURT.

EXT.P7:TRUE COPY OF THE ORDER DATED 29.3.2004 DISMISSING R.P NO.201/2004 IN O.P. 8157/2002 PASSED BY THE SINGLE BENCH OF THIS HONOURABLE COURT.

EXT.P8:TRUE COPY OF THE INTERIM ORDER PASSED BY THE DIVISION BENCH OF THIS HONOURABLE COURT ON 2.12.2004.

EXT.P9:TRUE COPY OF THE ORDER IN S.L.P NO.1126/2005 PASSED BY THE HONOURABLE SUPREME COURT DATED 4.2.2005.

EXT.P10:TRUE COPY OF ORDER DATED 11.7.2007 IN WRIT APPEAL NO.941/2004 OF THIS HONOURABLE COURT.

EXT.P11:TRUE COPY OF LAWYER NOTICE DATED 14.7.2009 ISSUED BY THE PETITIONER'S LAWYER TO THE RESPONDENTS.

EXT.P12:TRUE COPY OF THE COMMUNICATION, SENT BY THE 2ND RESPONDENT DATED 3.8.2009 TO THE PETITIONER'S LAWYER.

EXT.P13:A TRUE COPY OF THE SIAD PROCEEDINGS DATED 2.8.2004 BEARING NO-CDC/COM/IRN/C3/3/2000-2001.

EXT.P14:TRUE COPY OF THE AFFIDAVIT FILED BY THE THEN MANAGING DIRECTOR OF THE RESPONDENT CORPORATION ON 6.8.2004 BEFORE THIS HONOURABLE COURT IN W.A. NO.941/2004.

EXT.P15:TRUE COPY OF THE AFFIDAVIT FILED BY THE THEN MANAGING DIRECTOR OF THE RESPONDENT CORPORATION ON 30.10.2004 BEFORE THIS HONOURABLE COURT IN W.A. NO.941/2004.

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EXT.P16:TRUE COPY OF THE AFFIDAVIT FILED BY THE THEN MANAGING DIRECTOR OF THE RESPONDENT CORPORATION ON 27.12.2004 BEFORE THIS HONOURABLE COURT IN W.A. NO.941/2004.

EXT.P17:TRUE COPY OF THE ORDER PASSED BY THIS HONOURABLE COURT DATED 17.3.2010 IN CONTEMPT OF COURT CASE NO.306/2010.

RESPONDENT'S EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

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C.K.ABDUL REHIM, J.

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W.P.(C). No.27272 OF 2009

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Dated this the 25th day of February, 2015

JUDGMENT

The petitioner company was successful in getting a tender floated by the respondent Corporation for supply of 3,500 MTs of dried Raw Cashew Nuts, for which Ext.P2 contract was executed. A subsequent contract was also executed for import of 4000 MTs of Raw Cashew Nuts, as per Ext.P3. As per terms of the contract, 90% of the value of goods already supplied were paid to the petitioner company. The balance 10% was retained in accordance with terms of the contract, which will be due for payment on receipt of certificates of approved surveyors nominated by the 1st respondent at the Ports concerned. According to the petitioner the amount remaining payable from the 1st respondent is a sum of US$ 4,51,383.77. The petitioner claimed payment of the said amount through Ext.P4 lawyer notice caused to the 1st respondent Corporation. In Ext.P5 reply the Corporation had informed that they have incurred heavy loss due to fall in the price of kernel in the international market and under such circumstances the Board of Directors had taken a decision to settle the matter with respect to payment of undrawn balance due on imports made during the year 2000. But pursuant to a change occurred in the ruling Government, the Chairman and the Board of Directors have resigned, and a reconstitution of the Director Board is pending consideration before the Government. On constitution of the new Board the question of payment of undrawn balance will be considered on holding negotiations to arrive a settlement, is the reply. Quantification of the claim was also disputed on certain aspects.

2. After receipt of Ext.P5 reply the petitioner had approached this court in a writ petition, O.P. No.8157/2002, seeking direction commanding the 1st respondent to effect payment of an amount of US$ 4,51,383.77, within a time frame to be fixed by this court. Inter alia, direction was sought against the 1st respondent to effect payment of an amount of US$ 7,946.51 as admitted in Ext.P5, as per the claim made in Statement No.1 appended to Ext.P4 notice.

The said writ petition was disposed of through Ext.P6 judgment. This court observed that if there is no dispute about the amount payable. There is no reason as to why the petitioner is not paid with the value of goods purchased. It was submitted on behalf of the 1st respondent that the claim need to be verified with reference to the Books of Accounts of the respondent. Therefore the writ petition was disposed of on the following terms:-

> *"O.P. is disposed of with direction to the Corporation to make payment due in two instalments, the first of which will be paid within one month and the balance will be paid within two months thereafter. Since the petitioner is getting payment without any dispute being raised by the Corporation, the petitioner undertakes to accept payment with four per cent interest. However, if there is default in payment beyond the time stipulated above, then it is open to the petitioner to claim higher rate of interest".*

3. The respondents filed a review petition against Ext.P6 judgment, which was disposed of through Ext.P7 order. This court clarified that the direction in the judgment was to make payment of the admitted amount. It was observed that, it would be open to the Corporation to issue proceedings declining payment if according to the Corporation the amount claimed is not payable. However the

review petition was dismissed observing that the direction was only to make payment of the admitted amount and there is no scope for review. The matter was again taken up in appeal by the respondents before the Division Bench. In Ext.P8 interim order passed in Writ Appeal No.941/2004 this court directed the respondents to make the payment of an amount of Rs.25,00,000/- within one month. The Corporation had taken up the interim order in challenge before the hon'ble Supreme Court. In Ext.P9 order passed by the Supreme Court in the Special Leave Petition the respondents were given relaxation of time stipulated for payment of the said amount. It is stated that, subsequently the amount of Rs.25,00,000/- ordered by this court was paid. Thereafter the respondents have withdrawn the writ appeal based on a Memo filed by the counsel appearing, as evidenced from Ext.P10 judgment. It is revealed that the respondent Corporation had failed to make payment of any further amounts. Hence the petitioner had moved this court in a Contempt proceedings. But this court had disposed of the Contempt of Court Case vide Ext.P17 judgment, observing that in Ext.P6 judgment this court has not stated as to what was the amount payable by the respondent and therefore there is no scope for entertaining the Contempt case. The Contempt of Court case was closed by leaving freedom to the petitioner to claim whatever balance due from the respondent Corporation.

4. In the meanwhile the petitioner had caused a lawyer notice as per Ext.P11 claiming payment of the balance amount. But in Ext.P12 the Corporation responded that the matter is entrusted with their legal advisor and a reply would be sent within a period of two weeks. But the payment was not made even after lapse of considerable time. In Ext.P13 proceedings issued by the 2^{nd} respondent on 2.8.2004 they have clearly admitted liability for payment of the balance amount of 10%. It is pointed out that even according to the respondents they have admitted in Ext.P13 that the undrawn balance due is calculated as US$ 2,93,129.20. But even the said amount was not paid. Under such circumstances, this writ petition is filed seeking declaration to the effect that non-payment of the admitted amount due to the petitioner on the basis of Exts.P2 and P3 contracts is arbitrary, illegal and unjustified. Inter alia the petitioner sought for a

direction commanding the 1st respondent to make payment of US$ 3,94,014.71 as claimed in Ext.P11.

5. In support of the contentions the petitioner had produced Exts.P14 and P15 which are affidavits filed by the respondents in the earlier writ appeal. It is pointed out in Ext.P15 that the 1st respondent Corporation had admitted that, as per the accounts maintained by the Corporation the amount due to the respondent is only US$ 2,93,129.20. Therefore it is contended that there is a clear admission on the part of the respondents with respect to the liability and it is necessary to issue directions for payment of the amount admitted by the respondents. Learned counsel for the petitioner contended that the admission made through pleadings filed in the earlier litigations has got more evidentiary value and it is justified to issue a direction for payment of the said amount. The petitioner had placed reliance in this regard on the decision of the Hon'ble Supreme Court in Nagindas Ramdas v Dalapatram Ichharam alias Brijram And Others[(1974) 1 SCC 242]. In the said case it is observed by the Hon'ble Supreme Court that admissions in pleadings are judicial admissions, admissible under

Section 58 of the Evidence Act, which stands on a higher footing than evidentiary admissions and such admissions are fully binding on the party which makes them and constitute a waiver of the proof, in contra distinction with evidentiary admissions which are receivable at the trial as evidence, which are not conclusive.

6. The respondents have filed counter affidavit contending that the Director Board of the 1st respondent Corporation held on 11.3.2010 has taken a decision to request the State Government to order an enquiry with respect to Ext.P1 contract, since it is suspected that there occurred some shady deals, causing huge loss to the public exchequer. It is pointed out that the contract was awarded after a series of negotiations with various tenderors. But it is noticed that the petitioner was awarded with contract above the lowest offer, giving undue preference to them. It is also contended that the 2nd contract was materialised on the basis of clandestine deals which had taken place with the connivance of the petitioner. Further it is stated that there existed a dispute with respect to the quality and quantity of the goods supplied, which was not taken up during

appropriate time due to negligence and inaction on the part of persons responsible. It is alleged that Ext.P13 was prepared by persons who were involved in such clandestine deals. The respondents have taken a further contention that the present writ petition is not maintainable as barred by principles of res judicata, because it is filed for the very same reliefs sought for in the earlier writ petition. According to the respondents the petitioner had to establish their rights in appropriate legal proceedings under civil law and the short cut method chosen to file this writ petition is not permissible.

7. There is no dispute that the issue agitated in this writ petition pertains to a claim arising out of a contract. Normally the dispute has to be resolved by the competent civil court or other appropriate forum based on the evidence to be adduced. But in the case at hand there is a history that the petitioner had filed an earlier writ petition seeking direction for payment of amounts under demand. In Ext.P6 judgment this court directed payment of the amounts due to the petitioner, in two instalments. However, the said judgment was clarified in the review petition stating that

what was directed in the judgment was only to make payment of the admitted amount. A writ appeal filed against the said judgment was withdrawn by the respondents. Therefore it remains that the direction for payment of admitted amount had attained finality. It is true that a Contempt proceedings initiated was closed by this court observing that since the direction was not for payment of any specific amount quantified, there arose no contempt. The relief sought for in the present writ petition is basically for a direction to make the payment of the admitted amount. The petitioner had placed heavy reliance on the statements contained in Ext.P13 proceedings of the 2nd respondent, as well as on the pleadings contained in Ext.P15 affidavit filed by the respondents in the writ appeal. In both those documents it is mentioned that the accounts maintained by the Corporation had revealed that an amount of US$ 2,93,129.20 is due to the petitioner. But learned counsel appearing for the respondents contended that, the amount mentioned as due for payment as per the Books of Accounts, is not the amount admitted as due for payment to the petitioner. Attention of this court is drawn to the statements contained in Ext.P13 to the affect that the Corporation had decided to have further negotiations with the party for effecting further discount/reduction. It is pointed out that the financial condition of the 1st respondent Corporation is highly precarious and the Government have intervened in the matter and discussions are going on with the banks to discharge the huge liability pending.

8. On the facts revealed as above, question posed is as to whether any relief can be granted to the petitioner in this writ petition. First of all it is contended on behalf of the respondents that the reliefs sought for in the present writ petition are hit by the principle of res judicata, because the same cause of action was agitated earlier. Learned counsel relied on the decision of the hon'ble Supreme Court in Kopargaon S.S.K. Ltd. v State of Maharastra and Others [(2009) 3 SCC 273] in order to point out that the principles of res judica will apply in writ proceedings also. Referring to various earlier decisions the hon'ble apex court held that it is no longer 'res integra' that the principle of res judicata will apply in writ proceedings. In another decision of the hon'ble apex court in State of Punjab and Another v Varinder Kumar

[(2005) 12 SCC 435] it is reiterated that the High Court is precluded from entertaining any writ petition seeking to re-agitate the issue which is once decided. It is further contended that a writ petition cannot be entertained with respect to a claim for money and the remedy in such case is to file civil suit. In support of such contention Learned counsel for the respondent had placed reliance on the decisions in Eastern Coalfields Limited v Ravi Udyog and Others [(1994) Supp (2) SCC 467], Haryana Urban Development Authority And Another v Anupama Patnaik [(2000) 10 SCC 649], Equipment Conductors And Cables Ltd. v Haryana State Electricity Board And Another [(2002) 10 SCC 210] and Central Bank of India v Rooplal Bansal [(1999) 9 SCC 254]. In all these cases dictum contained is to the effect that no writ petition is maintainable with respect to commercial transactions and that the claim for payment of money is the subject matter which normally to be agitated in civil suits, and that the High Court shall not entertain writ petitions on such issues.

9. On the question of 'res judicata' it is to be noticed that the earlier writ petition (O.P.8157/2002) was filed with a

specific relief seeking direction for payment of a sum of US$ 4,51,383.77 and an amount of US$ 7,946.51 as mentioned in the statements attached alongwith Ext.P5 reply. As already observed, the above writ petition had culminated in a judgment of this court directing the respondents to make payment of the admitted amounts. In the present writ petition the petitioner company is seeking declaration to the affect that non-payment of admitted amounts is arbitrary and illegal and is seeking a consequential direction for payment of amounts claimed in Ext.P11. Eventhough the claim relates to the very same transaction there is difference in th reliefs sought for. The present writ petition emerges as an off-shoot of the earlier judgment directing payment of the admitted amounts. Basically the arguments raised is with respect to payment of the amounts admitted in Exts.P13 and P15. Therefore this court is of the considered opinion that the writ petition cannot be discarded as hit by principle of res judicata.

10. Further, question arises as to whether a writ petition can be maintained for relief which is in the nature of executing an earlier judgment. Settled legal precedents are to the effect that constitutional courts exercising powers under Article 226 are not precluded from issuing any further directions in achieving fulfillment of its earlier judgments/orders. In the case at hand it is evident that a Contempt of Court case filed by the petitioner was not proceeded observing that there was no direction for payment of any specific amount contained in Ext.P6 judgment. Now the petitioner is agitating the cause based on the admissions contained in Exts.P13 and P15. Therefore this court is of the opinion that there is no bar to entertain this writ petition, because it is more or less in the nature of seeking execution of an earlier judgment. Hence the petitioner need not be relegated to the remedy of civil suit.

11. But there remains a crucial question as to whether there is any clear admission on the part of the

respondents with respect to the liability, as contained in Exts.P13 and P15 documents. Ext.P13 is a proceedings issued by the 2nd respondent after Ext.P6 judgment, during pendency of Writ Appeal No.941/2004. The relevant portion contained in Ext.P13 is extracted below:-

> "As per assurance given by the party, the corporation is entitled to discount for the balance 6319.808 MT of raw nuts. Towards discount, which the corporation is entitled for the remaining quantity of 6319.808 MT, an amount of USD1,57,995.20 (6,319.808 x USD . 25) is to be deducted for the undrawn balance of USD 4,51,124.40 (which was computed without giving credit to the discount) initially calculated and the undrawn balance due is only as USD.2,93,129.20. Considering the huge loss sustained by the corporation under the contract with the party the corporation feels that the discount now granted by the party is very meager. The corporation therefore decided to negotiate with the party for further discount/reduction".

12. While evaluating the above statement it is evident that there is a clear admission that after all deductions there is an undrawn balance due to the extent of US$ 2,93,129.20. But the Corporation contended that they have decided to have further negotiation for more discount/reduction. In Ext.P15

also, which is an affidavit filed by the 2nd respondent in Writ Appeal No.941/2004 before the Division Bench, it is stated as follows:-

> "In this connection it may be kindly be noted as per the accounts maintained by the Corporation, it is revealed that after the reduction of US$ 25/MT, the amount due to the respondent is only US$2,93,129.20".

13. It is mentioned that the Corporation had suffered huge loss due to steep decline in the price of kernels in the international market, and that the Corporation had invited the respondents for negotiation for further reduction on the amount. From Ext.P6 judgment it is evident that while disposing the writ petition the Corporation had submitted that the claim of the petitioner need to be verified with reference to the Books of Accounts of the respondents. It is on that basis the writ petition was disposed of by directing the Corporation to make the payment of amounts due, in 2 instalments. It is true that the judgment was subsequently clarified stating that, what was directed is

only payment of admitted amounts. Going by the contens of Exts.P13 and P15 extracted above it is evident that the Corporation had admitted that the amounts due as per the Books of Accounts, is a sum of US$2,93,129.20. Therefore merely because the Corporation had stated that they are intending to have further negotiations it cannot be accepted that the above said amount is not the admitted amount as per the Books of Accounts, in view of the directions contained in Ext.P16 judgment which remained clarified subsequently, which is binding on the respondent Corporation. It cannot be said that the Corporation is not liable for payment of the said amount. As the relief claimed in this writ petition is limited only to extent of payment of the admitted amounts, this court finds no justification to deny such claim. The contentions with respect to principles of res judicata or the availability of remedy under general law will not preclude this court from granting such relief, is the considered opinion.

14. Under the above mentioned circumstances, this writ petition is allowed to the limited extent directing the respondents to make payment of the amount of US$2,93,129.20 to the petitioner Company, at the earliest possible. At any rate payment in this regard shall be made within a period of three months from the date of receipt of a copy of the judgment.

C.K.ABDUL REHIM, JUDGE

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