IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN

THURSDAY, THE 5TH DAY OF FEBRUARY 2015/16TH MAGHA, 1936

WP(C).No. 37921 of 2008 (M)

PETITIONER(S):

MICHAEL & MICHAEL CHEMICALS
HAVING ITS HEAD OFFICE AT 3RD FLOOR
CARDOSO BUILDING, NEAR KADAMBA BUS TERMINALS
PANAJI-GOA 403 001
REPRESENTED BY ITS PROPRIETOR T.M.MICHAEL.

BY ADVS.SRI.SANTHOSH MATHEW
SRI.SATHISH NINAN

RESPONDENT(S):

1. STATE OF KERALA
REPRESENTED BY THE PRINCIPAL SECRETARY TO
GOVERNMENT, INDUSTRIES DEPARTMENT, THIRUVANANTHAPURAM.

2. THE MANAGING DIRECTOR
TRAVANCORE SUGARS AND CHEMICALS LTD, VALANJAVATTOM
THIRUVALLA 689 104.

R,R2 BY ADV. SRI.E.K.NANDAKUMAR
R,R2 BY ADV. SRI.A.K.JAYASANKAR NAMBIAR
R,R2 BY ADV. SRI.K.JOHN MATHAI
R,R2 BY ADV. SRI.P.BENNY THOMAS
R,R2 BY ADV. SRI.ANIL D. NAIR
R, BY ADV. GOVERNMENT PLEADER SHRI.K.K.SAIDALAVI
R BY SRI.E.K.NANDAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 05-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WPC 37921/2008

PETITIONER'S EXTS:

EXT.P1: PHOTO COPY OF THE NOTICE DT.23.11.2006 ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT

EXT.P2: -DO- REMINDER SENT BY THE PETITIONER ON 31.1.2007

EXT.P3: -DO- ON 10.12.2007

EXT.P4: -DO- CLARIFICATION LETTER DT.12.7.2007 SENT BY THE PRINCIPAL SECRETARY TO GOVERNMENT TO THE 2ND RESPONDENT

EXT.P5: -DO- SENT BY THE 2ND RESPONDENT TO THE 1ST RESPONDENT ON 23.7.2007

EXT.P6: -DO- LETTER DT.7.6.2008 ISSUED BY THE PRINCIPAL SECRETARY TO GOVERNMENT TO THE 2ND RESPONDENT

JJ /TRUE COPY/

P.S.TO JUDGE

K. SURENDRA MOHAN,J.

W.P(C) NO. 37921 OF 2008

Dated this the 5th February, 2015.

JUDGMENT

The petitioner has filed this writ petition seeking the following reliefs:-

> “a) To issue a writ of mandamus or any other appropriate writ, order or direction, commanding the respondents to disburse Rs.6,20,855 which is admittedly due to the petitioner.
>
> b) To issue such other appropriate writ order or direction which this Hon'ble Court may deem just and fit under the circumstances of the case”

2. The petitioner had entered into a supply contract agreement with the second respondent on 10.11.2003 for the supply of Extra Neutral Alcohol ('ENA' for short). The agreed firm price was Rs.23.477 per bulk litre. The validity of the agreement was up to 12.11.2004. The ENA was supplied by

the petitioner on the strength of export orders issued by the second respondent with due authorization to receive the order on behalf of the company. For the purpose of transporting the ENA, No Objection Certificate had to be obtained from the Excise Department. The petitioner used to supply various quantities of ENA on the basis of NOC's issued by the Excise Department, as stated above. The period of the contract was one year. After the expiry of the initial contract, a second contract was also entered into on 10.10.2005. The claim of the petitioner is that the petitioner was supplying the required quantities of ENA regularly and that there was no complaint from the second respondent regarding the nature of the supplies so made. Payments used to be made on the basis of supply by the petitioner periodically, though such payments used to be often delayed. It is the case of the petitioner that, an amount of Rs.6,20,855/- (Rupees six lakhs twenty thousand eight hundred fifty five only) is due and payable by the second respondent to the petitioner in respect of ENA supplied. The payment is due under the second contract. Since the amount is admittedly due and payable to the petitioner, it is contended that there is absolutely no justification for withholding the said amount. Therefore, the petitioner has sought for the issue of appropriate directions to disburse the said amount.

3. According to Mr.Arun Thomas who appears for the petitioner, supplies of the required quantities were made regularly by the petitioner without giving rise to any complaint from the second respondent at any time during the subsistence of the successive contracts. The period of the contracts entered into have expired and no objections have been raised with respect to the payment claimed by the petitioner. Therefore, it is only appropriate that the second respondent is directed to make the payment within a stipulated time. Reliance is placed on Ext.P5 copy of a letter issued by the second respondent containing specific replies to the queries raised in an inspection report, to point out that

there was no fault on the part of the petitioner at any time. In fact, according to the counsel, in Ext.P5 the second respondent has stated that the petitioner could not be found fault with on any count.

4. Separate counter affidavits have been filed on behalf of respondents 1 and 2. According to the counter affidavit filed on behalf of the first respondent, though the petitioner had agreed to supply the required quantity of ENA within the validity period of the No Objection Certificates issued to him, he had not honoured his commitments. With respect to an NOC issued to the petitioner on 6.12.2003 for the supply of 2 lakhs bulk litres of ENA, it is alleged that only 84,000 bulk litres was supplied leaving a deficit of 1,16,000 bulk litres. Without supplying the balance portion within the validity period of the No Objection Certificate the petitioner had approached the second respondent for the issue of a fresh NOC. Though a fresh NOC was issued on 29.1.2004 only a quantity of 1.12 lakh bulk litres of ENA was supplied, again

leaving a deficit quantity. Though the petitioner had sought for an enhancement in the rate for supply of ENA an enhancement was granted for the supply of a single quantity of 2 lakh bulk litres more. According to the first respondent, as a result of the default on the part of the contractor, the second respondent had to issue fresh tenders and purchase 3.72 lakhs bulk litres of ENA at an enhanced price of Rs.34.25 even when the contract with the petitioner was subsisting. Consequently, it is alleged that the respondents have suffered a loss of Rs.42,26,160/-. In view of the huge financial liability that the respondents had to incur due to the default on the part of the petitioner an amount of Rs.6 lakhs has been withheld. Even after withholding the said amount an amount Rs.36,26,160/- is due from the petitioner. Therefore, it is contended that, no direction as sought for by the petitioner may be issued in this case.

5. According to the second respondent also, the petitioner had not honoured his commitment to supply the

required quantity of ENA, in terms of the agreement entered into. Therefore, there were instances where the company had to procure the required quantity of ENA at enhanced rates, by issuing fresh tenders. On one occasion when there was some delay in issuing NOC's to the petitioner the Board of Directors of the company had at its meeting held on 16.4.2004 permitted the petitioner to supply the required quantity of ENA at an enhanced rate of 24.72 per bulk litre. It was also decided to refund the security deposit of Rs.1 lakh and bank guarantee of Rs.5 lakhs furnished by the petitioner. According to the second respondent also, the amount claimed by the petitioner was not paid, for the reason that a substantial amount is due and payable by the petitioner to the second respondent for losses that the company had to incur by reason of default on his part.

6. The counsel for the petitioner in reply points out that, the delay had occurred due to the delay in issuing NOC's by the first respondent. The Excise Department had not

processed the NOC for which the second respondent had submitted an application, for the reason that the application for renewal of distillery licence of the second respondent was pending before the Government. Therefore, it is contended that the delay cannot be attributed to any default on the part of the petitioner. It is for the said reason that, the second respondent has stated in Ext.P5 that the petitioner could not be found fault with, for any reason. It is also contended that, the petitioner has not been put on notice regarding any default on his part at any time during the term of the contract or at any time thereafter. The objections have been put forward only to resist the claim of the petitioner in this writ petition. The counsel also places reliance on the decision of the Hon'ble Supreme Court in J.G.Engineers Pvt.Ltd. v. Union of India and another [(2011)5 SCC 758] and the decision of a Division Bench of this Court in Sriram Engineering Construction Co. v. Kerala State Industrial Development Corporation [2007(1) KHC 974] to contend that, there is no bonafides in the objections now raised against payment of the amount claimed by the petitioner.

7. Heard. It is clear from the contentions advanced before me by the counsel appearing for the respective parties that there are disputes regarding the amount claimed by the petitioner. It is true that, the petitioner has not been issued with any notice at any time during the currency of the successive agreements that he had entered into with the second respondent putting him on notice regarding any default in the performance of the contract. To a pointed question to the counsel for the second respondent in this regard the answer was that no notice of any default was issued to the petitioner at any time. Ext.P5 further shows that, the second respondent was trying to answer the queries in the inspection report without putting any blame on the petitioner. Even in Ext.P5 I do not find any statement alleging default on the part of the petitioner. However, the fact remains that, Messrs. Travancore Sugars and Chemicals Ltd. of which the

second respondent is the Managing Director, is a Government company. The Government have taken serious objections to the manner in which the second respondent has dealt with the petitioner. The first respondent has not initiated proceedings against the directors for recovery of the loss caused consequent to the delay in supply of ENA by the petitioner. According to the counter affidavit of the first respondent the total loss suffered is Rs.42,26,120/- (Rupees forty two lakhs twenty six thousand one hundred twenty only) and after setting off the amounts already withheld, the balance amount due from the petitioner works out to Rs.36,26,160/- (Rupees thirty six lakhs twenty six thousand one hundred sixty only). In the face of the stiff opposition mounted by the first respondent against payment of the amount claimed by the petitioner no direction as claimed by the petitioner could be issued at this stage. The sustainability of the objections raised would have to be adjudicated, as reiterated by the Hon'ble Supreme Court in various decisions on the point including J.G.Engineering Pvt. Ltd. v. Union of India (supra). Only an adjudication by a competent authority could reveal whether the objections raised are tenable or not. Such an adjudication is not possible within the limits of the summary jurisdiction exercised by me under Art.226 of the Constitution. The above being the situation, no direction as sought for by the petitioner could be issued at this stage. It is for the petitioner to move the appropriate forum for an adjudication of his claim in the light of the objections raised by the first respondent. Only after such an adjudication it can be said that the amount claimed is actually due and payable to the petitioner. For the foregoing reasons, this writ petition is dismissed but without prejudice to the rights of the petitioner to seek an adjudication of his claim in appropriate proceedings.

Sd/-
K. SURENDRA MOHAN
Judge

jj /True copy/