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HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 470 of 2020

Judgment reserved on *02.03.2020*

Judgment delivered on *29.05.2020*

- Shri Jagannath Supply Company through The Proprietor Parag Kumar Agrawal S/o Jairam Agrawal, 36 Years Ramchandrapur Bazar, Jatri, Ramchandrapur Bazar, Jatri, District Khorda (Orissa).

----Petitioner

VERSUS

1. State of Chhattisgarh through- the Secretary, Co-operative Department, Mantralaya, Mahanadi Bhawan, Atal Nagar, Raipur, Distt. Raipur C.G.
2. Lauh Purush Sardar Vallabh Bhai Patel Co-operative Sugar Factory Limited through-The Managing Director, Pandariya, Distt. Kabirdham C.G.
3. The Chairman Lauh Purush Sardar Vallabh Bhai Patel Co-operative Sugar Factory Limited Pandariya Distt. Kabirdham C.G.

-------**Respondents**

For Petitioner	:	Mr. Prafull N. Bharat, Advocate
For Respondent No. 2 & 3	:	Mr. Jitendra Pali, Advocate
For Respondent-State	:	Mr. Amit Buxy, Panel Lawyer

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice

Hon'ble Shri Parth Prateem Sahu, Judge

CAV Order

Per Parth Prateem Sahu, J.

1. In this petition, the petitioner has initially challenged issuance of tender notification dated 16-01-2020 (Annexure P-1) by the Respondent No. 3. During the pendency of the writ petition, the petitioner amended the writ petition and also challenged the order dated 12-02-2020 (Annexure P-10) which is an order of cancellation of sale order/ letter issued in favour of the petitioner.

2. Facts of the case in nutshell are that the Respondent No. 3 issued a Notice Inviting Tender notification for sale of 6000 Metric Ton (M.T.) of molasses, last date for submission of bid by the interested tenderers was 15-10-2019 till 01:00 P.M. The petitioner is a proprietorship firm having its principle place of business at Talkhed Chhak, Ogalpada, Janla, Khurda (Orissa) deals with sale and purchase of molasses. Petitioner participated in tender proceedings initiated by Respondent No. 2 and 3 for sale of molasses along with others. The tender form submitted by the tenderers was opened on 15-10-2019 in which the highest rate quoted was of Rs. 4045 per M.T. Respondent No. 3 issued sale order/ letter in favour of the petitioner along with other selected tenderers. Sale order/ letter was issued on 01-11-2019 (Annexure P-5) allotting total 5000 M.T. of molasses for sale in favour of the petitioner. The sale order/ letter bears conditions from clauses 1 to 16 for sale of molasses. One of the clauses mentioned in the sale letter is that the total quantity of molasses is to be lifted by the petitioner on or before 31-03-2020. During the currency period of the sale order/ letter issued in favour of the petitioner, Respondent No. 3 has floated another tender notification on 16-01-2020 for Sugar S-30 and molasses. This tender notification was challenged by the petitioner by way of filing the writ petition on the grounds that the period mentioned in the sale order/ letter for uplifting the allotted quantity of 5000 M.T. of molasses is not yet completed, there is no violation of terms of purchase or sale of molasses as mentioned in the sale order/ letter dated 01-11-2019, the entire sale amount for total quantity of 5000 M.T. is deposited and the petitioner is having balance quantity of 3390.19 M.T. of molasses with Respondent No. 2 and 3 for lifting. The currency period of sale order/ letter issued in favour of the petitioner was up to 31-01-2019 but Respondent No. 3 again issued another short tender notification.

3. Respondent No. 2 and 3 submitted reply to the writ petition mentioning that the Respondent is a Co-operative Society engaged in manufacturing and sale of

sugar and its by-products. Manufacturing of sugar is a seasonal work which starts from the month of November and concludes in the month of May, cane crushing capacity of sugar factory is about 25000 M.T. per day which generates approximately 5% to 6% of molasses of the total quantity of cane crushed. The tender notification upon which the sale order/ letter dated 01-11-2019 has been issued in favour of the petitioner was processed in the month of September 2019 and from that proceedings the bid submitted by the interested tenderers was opened on 15-10-2019. The production of molasses continues till the month of May and therefore another tender notification was issued well in advance on 16-01-2020 for further sale of molasses for the month of April and May. Apprehension of the petitioner that due to issuance of another tender notification, the rights of the petitioner under the sale order/ letter dated 01-11-2019 will be curtailed is not correct. The storage capacity of molasses is much less i.e. 5000 M.T. only and if the molasses is not lifted within the prescribed time then it will cause great hardship for Respondent No. 2 and 3 to continue the manufacturing process. In pursuance to the tender notification Annexure P-1, the tenderers have submitted their bids and the H-1 price quoted and finalized was Rs. 10,200/- per M.T. and the sale orders (Annexure R-2/1) were also issued in favour of the selected candidates. The petitioner has not complied with the conditions mentioned in the sale order/ letter of depositing the entire sale amount for 5000 M.T. of molasses within the period of 30 days as stipulated in condition No. 2 of the sale order/ letter. The minimum fix quantity to be lifted per month i.e. 25% of the total quantity allotted was also not complied with and the petitioner has lifted only 891.68 M.T. of molasses in the month of December 2019 and 887.22 M.T. in the month of January 2020 out of 1250 M.T. per month (i.e. 25% of total quantity). In reply submitted by Respondent No. 2 and 3, it is also mentioned that the sale order/ letter issued in favour of the petitioner was cancelled *vide* order dated 12-02-2020 (Annexure P-10).

4. The petitioner filed an application for amendment of writ petition which was allowed. The petitioner by way of amendment of writ petition has challenged the cancellation of the sale order/ letter dated 01-11-2019 *vide* order dated 12-02-2020 on the ground that the show-cause notice issued on 28-01-2020 was pre-determined, the entire amount of molasses to be sold in favour of the petitioner has been deposited within 15 days from the date of starting of supply/ sale of the molasses but in a very arbitrary and illegal manner the sale order/ letter issued in favour of the petitioner was cancelled on 12-02-2020. The reason assigned for cancellation of sale order/ letter by mentioning that the petitioner failed to comply with the clauses/ conditions mentioned in the sale order/ letter is also erroneous because the petitioner deposited the amount within the prescribed time, there was shortage of supply of the molasses on the part of the Respondent No. 2 and 3 which restricted the petitioner from lifting 25% of the total allotted quantity molasses per month, there was no proper stock of molasses available with Respondent No. 2 and 3 to allow the petitioner for lifting the molasses, the delivery of molasses was started from 16-12-2019 instead of first week of November 2019 and further in the month of January 2020 also, supply was stopped.

5. The Respondent No. 2 and 3 submitted an additional reply to the amended writ petition and mentioned that there is statutory alternative remedy available with the petitioner under Section 64 of the Chhattisgarh Co-operative Societies Act, 1960. The dispute projected in the writ petition before this Court involves disputed question of facts and the same cannot be decided in the writ petition and can be decided in a proceeding as mentioned in Annexure P-5. The petitioner is required to deposit the total sale value of the molasses allotted to the petitioner for sale within a period of 30 days from the date of issuance of Annexure P-5 but within the prescribed period, the petitioner has deposited only Rs. 25 Lacs and not the entire sale amount. The petitioner has not lifted 25% of the allotted quantity of

molasses which comes to 1250 M.T. per month but within a period of 2 months, the petitioner lifted only 891.68 M.T. of molasses in the month of December 2019 and 887.22 M.T. in the month of January 2020. The production was started from the first week of month of December 2019 and the same was intimated to the petitioner along with other tenderers telephonically and one of the tenderers namely *Narayan Udyog* lifted the molasses on 07-12-2019, the supply of the molasses was stopped only from 03-01-2020 to 10-01-2020 and thereafter the contractors were provided all the seven days and 24 hours for lifting the molasses. The show-cause notice was issued before passing order dated 12-02-2020 i.e. the cancellation of the sale order/ letter to which the petitioner submitted reply which was found to be not satisfactory thereafter the order dated 12-02-2020 cancelling the sale order/ letter issued in favour of the petitioner was passed. The balance amount out of the amount deposited by the petitioner and other tenderers towards the molasses was returned to them by depositing the same in their bank account on 22-02-2020.

6. The petitioner submitted rejoinder to the reply submitted by the Respondent No. 2 and 3 and again pleaded that till 15-12-2019, the Respondent No. 2 and 3 were not having any molasses for the supply. The molasses was made available only on 16-12-2019 due to which 25% of total alloted quantity of molasses could not be lifted in the month of December 2019 and in the month of January 2020 as well, the supply of molasses was stopped for a period of 9 days which shows that there was a lapse on the part of the Respondent No. 2 and 3 and not on the part of the petitioner. From 04-12-2019, there was no telephonic communication or information by any other mode intimating the availability or supply of molasses by the Respondent No. 2 and 3. The petitioner has not suppressed any material fact.

7. Mr. P.N. Bharat, the learned counsel for the petitioner submits that the petitioner has complied with all the terms and conditions as mentioned in the sale order/

letter in its words and spirit, the petitioner has deposited the entire amount of sale within the prescribed time. The Respondent No. 2 and 3 have given the first delivery to the petitioner only on 16-12-2019 which shows that prior to 16-12-2019, the Respondent No. 2 and 3 were not having any molasses for the purpose of sale and delivery. Even in the month of January 2020, the supply/ delivery of the molasses was stopped by the Respondent No. 2 and 3 for a period of about 9 days and the petitioner was not permitted to lift the molasses during that period. He also submitted that even the trucks sent by the petitioner for uplifting the molasses were kept standing outside for days together and even some of the trucks returned back empty without any molasses. When there was no molasses available in stock for delivery or supply then the fault of the Respondent No. 2 and 3 cannot be attributed to the petitioner and the petitioner cannot be held guilty of violating the conditions of not lifting 25% of the allotted quantity of the molasses in each month as mentioned in the sale order/ letter dated 01-11-2019. The learned counsel further contended that the entire amount of sale of molasses has been deposited with Respondent No. 2 and 3 by the petitioner and out of total quantity of 5000 M.T. of molasses, the Respondent No. 2 and 3 had supplied or permitted to lift was only 1609.81 M.T. of molasses and still the major portion of the quantity of the molasses i.e. 3390.19 M.T. of molasses is remaining for lifting. The issuance of fresh tender notification in the month of January 2020 for sale of molasses itself shows that the Respondent No. 2 and 3 were pre-determined to cancel the sale order/ letter issued in favour of the petitioner allotting 5000 M.T. of molasses for sale and issuance of show-cause notice is only a formality and eyewash. He further argued that merely mentioning of the dispute redressal forum in the agreement itself will not curtailed the rights of the petitioner to approach this Court and looking to the facts and circumstances of the case, particularly, the arbitrary and illegal action of the Respondent No. 2 and 3, this Court can very well decide the *lis* / dispute raised by the petitioner in this writ petition without relegating the petitioner for availing the alternate remedy. He places reliance on the judgment passed by Hon'ble Supreme Court in the matter of ***<u>Union of India v. Tantia Construction (P) Ltd.</u>*** reported in **2011 (5) SCC 697**. In view of the above, he submits that the order dated 12-02-2020 i.e. the order of cancelling the sale order/ letter executed in favour of the petitioner is liable to be set aside.

8. Per contra, Mr. Jitendra Pali, the learned counsel appearing for Respondent No. 2 and 3 submits that the contention of the petitioner that the supply/ delivery of the molasses started from 16-12-2019 only is not correct. The production was started since 04-12-2019 and on that day the molasses was also available for supply but no one appeared on the day for uplifting the molasses as mentioned in the sale order/ letter issued in favour of the different tenderers. He submits that the contention of the petitioner that Respondent No. 2 and 3 were not having the production of molasses prior to 16-12-2019 is also not correct on the ground that one of the tenderers namely *Narayan Udyog* has lifted the molasses on 07-12-2019. He argues that looking to the stoppage of supply due to unavoidable circumstances, the Respondent No. 2 and 3 permitted lifting of molasses round o'clock 24x7 to the tenderers in whose favour sale orders/ letters were issued. The petitioner was required to deposit about more than Rs. 2,50,00,000/- against the allotted molasses within a period of one month from the date of issuance of sale order/ letter dated 01-11-2019 in favour of the petitioner, within specific period the petitioner has only deposited Rs. 25 Lacs towards it which is much less than the amount required to be deposited as per the conditions mentioned in the sale order/ letter. The petitioner has not lifted the minimum quantity of molasses i.e. 25% per month of the total quantity allotted in favour of the petitioner either in the month of December 2019 or January 2020. There is violation of conditions of the sale order/ letter dated 01-11-2019 issued in favour of the petitioner. He submits that as per clause 15 of the sale order/ letter, the dispute redressal cell has been mentioned as the competent Court, district Kabirdham. Respondent

No. 2 and 3 are registered Co-operative Society, the alternative remedy is available to the petitioner to raise a dispute under Section 64 of the Co-operative Societies Act, 1960. He further contended that no adverse action has been taken against the petitioner for violation of conditions of the sale order/ letter instead the balance amount out of the deposit made by the petitioner towards the purchase of the molasses has been returned back on 22-02-2020 in the petitioner's bank account amounting to Rs. 1,12,92,311/-. The petitioner has raised disputed facts which cannot be decided in the writ jurisdiction. In view of the above, he submits that the instant writ petition be dismissed.

9. We have heard learned counsel for the respective parties and also perused the record.

10. So far as the initial challenge in writ petition to the issuance of NIT dated 16-01-2020 to be illegal and bad, is concerned, notification dated 16-01-2020 mentions about purchase of several machines, sale of Sugar S-30 and also molasses. The petitioner could not be able to demonstrate before us as to how and in what manner the petitioner's right under sale order/ letter issued in his favour is affected. In fact, the learned counsel for Respondent No. 2 and 3 submitted categorically that the Notice Inviting Tender dated 16-01-2020 will not affect the sale order/ letter of petitioner in any manner. The tender notification is for sale of molasses which is a continuous production from December 2019 up till May 2020 as pleaded and submitted by the learned counsel for Respondent No. 2 and 3 and the same was not controverted. It is not a case that it is only the quantity of molasses which can be produced for which the sale order/ letter has been executed in favour of the successful tenderers in the month of November 2019. The Respondent No. 2 and 3 have also pleaded and submitted before this Court that they are having the cane crushing capacity of 25000 M.T. per day and out of which about 5% to 6% of the quantity is an outcome as molasses which comes about 1500 M.T. per day. The sale order/ letter was executed on 11-02-

2020 in favour of the tenderers submitted their bid documents in pursuance to the tender notification dated 16-01-2020. The petitioner has not placed on record any material to show that merely issuance of tender notification or execution of the sale order/ letter in favour of the other successful tenderers for sale of molasses would in any manner effect his right. The petitioner has even not arrayed the successful bidders of tender notification dated 16-01-2020 as party respondent. In view of above, challenge made to tender notification dated 16-01-2020 is not sustainable.

11. So far as the second challenge made by the petitioner in the writ petition i.e. seeking quashment of Annexure P-10 which is an order of cancellation of sale order/ letter dated 01-11-2019 is concerned; we have perused the sale order/ letter executed in favour of the petitioner on 01-11-2019 (Annexure P-5). Perusal of the condition No. 2 mentioned in Annexure P-5, would show that the tenderer/ allottee is required to deposit the total sale amount of the entire allotted quantity of molasses within a period of 30 days from the date of issuance of sale order/ letter. The period prescribed for uplifting the total allotted quantity of molasses was up to 31-03-2020. Clause 5 is one of the important clauses of the sale order/ letter which mentions that the tenderer is required to lift 25% of the total allotted quantity of molasses mandatorily each month. The pleading in writ petition with regard to deposit of entire amount of allotted quantity of molasses in time was refuted by Respondent No. 2 and 3 by mentioning that within a period of one month from the date of issuance of sale order/ letter till 31-11-2019, the petitioner has deposited Rs. 25 Lacs only towards the sale amount which shows that the petitioner has not complied with condition No. 2 of the sale order/ letter. The petitioner in this writ petition has pleaded that in the month of December 2019, he lifted 891.68 M.T. of molasses and in the month of January 2020, he lifted 887.22 M.T. of molasses instead of 1250 M.T. per month but this was on account of the fault of Respondent No. 2 and 3 as instead of starting the production from the last week of November

2019, the Respondent No. 2 and 3 started production of molasses and allowing the petitioner to lift the molasses from 16-12-2019 and further in the month of January 2020, the Respondent No. 2 and 3 stopped the supply of molasses for a period of 9 days. Therefore, the deficiency in lifting the molasses from the fix minimum quantity cannot be attributed to the petitioner, but it is the fault of Respondent no. 2 and 3. However, this submission was refuted by the Respondent No. 2 and 3 and submitted that the production was started from 4 December 2019 which was telephonically communicated to the tenderers in whose favour sale orders/ letters were issued and further the document submitted along with reply shows that one *Narayan Udyog* has lifted the molasses on 07-11-2019 which shows that the contention of the petitioner about the date of production and supply is not correct. It is also the contention of the learned counsel for Respondent no. 2 and 3 before this Court that looking to the stoppage of the supply in the month of January 2020, they have permitted lifting of the molasses in all seven days round o'clock but even then the petitioner failed to lift the minimum quantity of molasses as mentioned in Annexure P-5.

12. Looking to the pleadings and submissions made by the learned counsel for the respective parties, it appears to this Court that the disputed fact is involved in the writ petition which cannot be gone into or considered by this Court in its extraordinary writ jurisdiction. The dispute requires all the evidence to be produced before the competent forum for its redressal. Respondent No. 2 and 3 in their reply have specifically pleaded that the balance amount out of the deposit made by the petitioner towards the purchase of molasses has been returned back to his bank account which was not controverted by the petitioner, in specific terms, accepting the submission that this action on the part of Respondent No. 2 and 3 is unilateral exercise.

13. So far as the submission made by the learned counsel for the petitioner that there is no bar in exercising writ jurisdiction under Article 226 of Constitution of India is

concerned, we are aware that there is no absolute bar, but it depends upon facts of each case. Hon'ble Supreme Court in number of cases has held that the Courts should not exercise extraordinary writ jurisdiction where there are cases of breach of conditions of contract and the issue raised in the writ petition requires evidence for its determination.

14. The Hon'ble Supreme Court in the matter of ***State of Bihar and others v. Jain Plastic and Chemicals Ltd.*** reported in **2002(1) SCC 216** has held that writ is not the remedy for enforcing contractual obligations and when an alternative and equally efficacious remedy is open to the litigant, he should be relegated to pursue that remedy and not to invoke the writ jurisdiction of the High Court. Hon'ble Supreme Court further held that the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226. Hon'ble Supreme Court also held in Para-7 thus:

> "7. In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matters could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the appellants would justify breach of contract by the respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative or issuing writs."

15. The dispute in this case is whether there is violation of conditions of the sale letter/ order. The date of production, availability of molasses for supply and the fact that respondent No. 2 and 3 permitted lifting of molasses for all the seven

days and round the clock. These are disputed facts which can be proved by placing cogent evidence.

16. The case law relied upon by the learned counsel for the petitioner is on different facts. In that case, the dispute was that the tenderer/ contractor was not accepting the offer to do the additional work and not the case of breach of terms and conditions.

17. For the foregoing reasons, we are refraining ourselves from entertaining the writ petition as it involves the disputed question of facts which cannot be decided by this Court in a writ jurisdiction. The writ petition is liable to be and is hereby dismissed. However, the petitioner will be at liberty to approach the appropriate forum by filing appropriate proceedings as per clause 15 of the conditions of the sale order/ letter dated 01-11-2019 for redressal of his grievance, if any.

18. Resultantly, the writ petition is dismissed with the aforesaid liberty.

Sd/-	Sd/-
(P.R. Ramachandra Menon)	**(Parth Prateem Sahu)**
Chief Justice	Judge

Pawan