(2021) 09 TEL CK 0065

In the Telangana High Court

Case No : Writ Petition No. 10490 Of 2021

M/S. Sri Vijaya Scientifics APPELLANT

Vs

State Of Telangana And Another RESPONDENT

Date of Decision : 27-09-2021

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2021) 09 TEL CK 0065

Hon'ble Judges : K.Lakshman, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. This Writ Petition is filed by the petitioner seeking to declare the inaction of the 2nd respondent in not releasing the amount due to the petitioner towards Invoice Nos.296 and 297, dated 12.11.2020 and 13.11.2020 respectively which pertain to the Purchase Order dated 12.11.2020 towards supply of two lakh COVID-19 Rapid Antigen Test Kits, (for short, 'RAT kits') despite receiving and using the same, as illegal and for a consequential direction to the 2nd respondent to release the said amount to the petitioner as sought for.

2. Heard Sri Vedula Srinivas, learned Senior Counsel representing Smt. Vedula Chitralekha, learned counsel for the petitioner, Sri P.Kishore Rao, learned Standing Counsel appearing for the 2nd respondent and learned Asst.Govt.Pleader for Medical, Health and Family Welfare appearing for the 1st respondent. Perused the record.

3. The petitioner herein, a proprietary concern is engaged in distribution of medical equipments and consumables to the 2nd respondent herein and also to similar bodies in various States throughout the country. The petitioner herein is also a distributor of products of M/s Mylab Discovery Solutions Private Limited (for short, 'Mylab') and the said company which is a start up MSME company claims to be the first company to get ICMR approval for Covid-19 Testing kits and

the said kits have been distributed to several State Government Organizations at Jammu and Kashmir, Delhi, Uttar Pradesh, Bihar, Karnataka, Maharashtra and Andhra Pradesh including the 2nd respondent herein. The petitioner being a distributor of those products has been contributing to the cause of fighting against the pandemic.

4. The 2nd respondent had called for tenders vide short Tender Notice No.4C2.2/ TSMSIDC/EQU/2020-21, dated 01.10.2020 for supply of Lab Reagents and Consumables and also for the procurement and supply of items like COVID-19 Rapid Antigen Testing Kits, (COVID-19 Rapid Kits) - Antibody Testing Kits, 1gG ELISA Test Kit, CLIA SARS - CoV-2 1gG Antibody Assay at cost per test, to all Government Hospitals/Government Medical Colleges for testing and treating Corona Virus in Telangana State.

5. The petitioner herein submitted its tender for supply of COVID-19 RAT Kits and there were some more tenderers. The tenderers had physically demonstrated the kits and also the manner of using it in front of Technical Team of the 2nd respondent and only after the due evaluation and approval by the Technical Team, the tender of the petitioner was accepted and the petitioner was issued with two Purchase Orders, dated 12.11.2020 and 13.11.2020 for supply of two lakh Test Kits and three lakh Test Kits respectively. The value of the said supplies are Rs.5,48,80,000/- and Rs.8,23,20,000/-respectively. The Purchase Orders contain various terms and conditions relating to the execution of the supply of Kits.

6. The petitioner had successfully supplied the kits under the above-mentioned Purchase Orders and the entire supplies were received and utilized by the 2nd respondent by way of distribution to the Government Hospitals and Government Medical Colleges etc. The petitioner had raised invoices as against the above-mentioned supplies vide Invoice No.297, dated 13.11.2020 and Invoice No.296, dated 12.11.2020.

7. On having received certain oral complaints pertaining to the quality of the kits supplied by the petitioner and which were manufactured by Mylab, the Technical Head of the said Manufacturer had personally demonstrated the kit before the Director of Public Health, Government of Telangana on 03.12.2020 and discussed the issue highlighted by the Technicians. The Director was fully satisfied after the practical demonstration of the manner of using the Test Kits was observed that the issue does not lie with the quality of the Test Kits supplied by the petitioner but not following the protocol of the Test Kits. The Technicians were adding more quantity of buffer than the required quantity of two drops, which resulted in inaccurate results. As being demonstrated to the Director of Health, the Test Kits supplied by the petitioner and manufactured by Mylab, were approved by the ICMR after successful evaluation of three batches. Even the batch supplied to the 2nd respondent was given Certificate of Analysis by the Quality Assurance Department. Various accredited labs have also given third party performance full evaluation report.

8. The petitioner has been paid the value of supplies in respect of the Purchase Order dated 13.11.2020 relating to supply of three lakh Test Kits, whereas it has not been paid the amount pertaining to the supply made under the Purchase Order dated 12.11.2020 for two lakh Test Kits. On enquiries, the petitioner came to know that the same has been withheld due to certain complaints received at the field level relating to the quality of the Test Kits. The 2nd respondent had examined those complaints and also received a demonstration by the Technical Head of Mylab and got satisfied with use of the kits. The petitioner reliably came to know that the authorities of the 2nd respondent were also satisfied with the quality and working of the Kits and that the Technicians were not properly using the same and they required training sessions. He also found that the Technicians at the field level were using excess quantity of buffer which was resulting in inaccurate results and lead to suspicion over the quality of the Test Kits. Though at one stage, the 2nd respondent had decided not to procure the Test Kits of Mylab, after being satisfied with their quality, had the supplies made by the said company. The petitioner also came to know that the 2nd respondent had already informed the Director, Public Health, Hyderabad of the abovementioned issues and is awaiting a reply from him. However, so far the petitioner has not been paid in respect of two lakh Test Kits supplied by it which already used by the 2nd respondent. It has become difficult for the petitioner to conduct its operations. Huge amount of nearly Rs.6 Crores is not paid by the 2nd respondent despite several requests for the release of the said amount. The petitioner had also met the Managing Director of the 2nd respondent with regard to the said payment. Since there was no response from the 2nd respondent and payment was not made, the petitioner filed the present writ petition.

CONTENTIONS OF THE 2ND RESPONDENT:-

9. On the other hand, the 2nd respondent has filed a counter narrating entire facts and contended that the Director, Public Health, Telangana has requested the 2nd respondent for procurement and supply of COVID-19 RAT Kits as intensive testing is being carried out throughout the State of Telangana. It is also specifically mentioned about the advice of the Medical Supplies Procurement Committee and its approval for calling tenders. Accordingly, the Tender Notification dated 01.10.2020 was issued. The petitioner herein stood as L1. The details of the price quoted etc., by the other tenders including the petitioner herein was also specifically mentioned. The 2nd respondent further contended that the petitioner had made supplies against the Purchase Orders within stipulated time and the stocks were accepted by 2nd respondent and issued the same to the destinations requested by the Director, Public Health, Hyderabad as per the quantities provided in the distribution list. The petitioner had submitted the invoices for an amount of Rs.8,23,30,000/- on 22.11.2020 against the Purchase Order dated 13.11.2020 and the 2nd respondent had admitted the bills and passed the bills for an amount of Rs.7,13,83,200/- duly deducting the statutory deductions and withholding the performance security amount and transferred an amount of Rs.7,13,83,200/- into the petitioner's account on

27.11.2020. The petitioner had simultaneously submitted bills for the supplies made against the Purchase Order dated 12.11.2020 for an amount of Rs.5,48,80,000/- on 18.11.2020 and the 2nd respondent had admitted and processed the bills for an amount of Rs.4,85,68,800/- duly deducting the statutory deductions and withholding the performance security amount on 25.11.2020.

10. It is further contended by the 2nd respondent that on 28.11.2020 the Director, Public Health, Telangana, had informed the 2nd respondent about conducting of a Video conference and receipt of complaints against Mylab, the Manufacturer of the material, which are as follows:-

"Issues observed in newly supplied RAT kits from MYLABS:

1. If buffer solution added showing no result in the kit (No control line & No test result line).

2. "GHOST LINE'- Grey line appearing on the test line mistaken as positive,

3. False positives,

4. Insufficient quantity of buffer solution,

5. Supplied leaking buffer tubes."

In this regard, the Director of Public Health, Telangana, requested the 2nd respondent to supply good quality of RAT Kits as per the target and as per requirement of 33 districts and not to supply 'Mylab' COVID-19 Antigen Card Test Kits, which were showing significant errors in the testing process.

11. In view of the said adverse report received from the User Department i.e. Director, Public Health, Telangana, the bill processed against the Purchase Order No.373/350/TSMSIDC/DIAG-REAG/20, (10282002215) dated 12.11.2020 was withheld on the ground that the Test Kits supplied by the petitioner's firm are substandard. Mylab, the manufacturer of the kits, supplied by the petitioner, had submitted a detailed clarification to the Director, Public Health Telangana, about usage of kits etc., and the Director, Public Health, Telangana vide his office letter dated 09.02.2021 forwarded the same to take further action in the matter. The 2nd respondent is the nodal agency for procurement of drugs, surgical consumables, equipment and furniture etc., to all the HODs of the Health Department of Telangana as per the indents submitted by them.

12. In view of the same, the 2nd respondent addressed a letter dated 17.02.2021 to the Director, Public Health, Hyderabad to offer his specific remarks on the representation made by Mylab for taking further action in the matter and is awaiting a reply from the Director, Public Health, Telangana.

13. With the said submissions, the 2nd respondent sought to dismiss the present writ petition.

14. From the above said submissions, the undisputed facts are that the 2nd

respondent has issued tender notice dated 01.10.2020 calling tenders for supply of 4 diagnostic items with 10 lakhs COVID-19 RAT testing Kits. The petitioner has participated in the said tenders and stood as the successful bidder (L1). As per the tender conditions, it was found that the L2 and L3 bidders have quoted their price as 246/- and 260/-respectively. It was not more than 10% that of L1 who quoted of Rs.245/- and hence L2 and L3 bidders were eligible for splitting and L1, L2 and L3 bidders would be issued Purchase Orders in the ratio of 50%(L1), 30% (L2) and 20% (L3) and that L2 and L3 have to reduce their price for that of L1 only subject to submission of consent to match the L1 price which was in terms of the tender conditions. The matter was placed before the Bid Finalization Committee headed by the 1st respondent for approval of L.1's rate. The Bid Finalization Committee had approved the proposals and as per the consent given by L2 and L3 to match with the L1 price, splitting was allowed and Purchase Orders were issued to the petitioner for supply of their share of 5,00,000/- RAT kits under two different Purchase Orders dated 12.11.2020 and 13.11.2020 for supply of 2lakhs and the other for 3lakhs kits respectively. The petitioner had made supplies against the above said Purchase Orders within the stipulated time and the stocks were accepted by the 2nd respondent. The same were issued to destinations as per the request of the Director of Public Health, Hyderabad.

15. While so, the petitioner had submitted an invoice for an amount of Rs.8,23,20,000/- on 23.11.2020 against the Purchase Order dated 13.11.2020 and the 2nd respondent had admitted bills and cleared the same to a tune of Rs.7,13,83,200/-. The petitioner had submitted bills for the supplies made against the Purchase order dated 12.11.2020 for an amount of Rs.5,48,80,000/- on 18.11.2020. The 2nd respondent had admitted the said bills and processed the same for an amount of Rs.7,13,83,200/- duly making statutory deductions and withholding performance security amount and transferred an amount of Rs.7,13,83,200/- into the account of the petitioner on 27.11.2020. Thus, 2nd respondent had cleared the said amount towards the petitioner herein.

16. As per the Purchase Order dated 12.11.2020 and 13.11.2020 issued by 2nd respondent, the bidder shall acknowledge the Purchase Order and submit dated acknowledgment letter in token of having received the Purchase Order, within 5 days from the date of issue of the Purchase Order, failing which the Purchase Order shall be deemed cancelled in accordance with tender conditions. The bidder has to supply within 10 days on receipt of the Purchase Order. There is also a penalty clause according to which 5% of the value of goods supplied late will be levied for each day's delay or part thereof upto 7.5% of value of late delivered goods. Once 7.5% is reached, purchase order is deemed to be cancelled for undelivered goods. No payment shall be made for goods delivered under the deemed cancelled Purchase Order. It is also specifically mentioned in the Purchase Order that 90% of the payment will be made on receipt of the Material Received Certificate (MRC) from the concerned CMSs/Invoices, stock entry page number of the concerned Hospitals and the remaining 10% will be released on receiving of no adverse report from the user departments within

three months or after three months if no adverse report has been received from the user department, it will be treated as non-adverse performance report automatically with or without receiving the report.

17. In the counter, the 2nd respondent has stated that on 28.11.2020, the Director, Public Health, Telangana on whose request, the RAT Kits were procured and supplied, had informed the 2nd respondent about the complaints received by him with regard to the supplies made by the petitioner during video conference and requested to supply good quality of RAT Kits as per the target and as per requirement of 33 districts and not to supply 'Mylab' COVID-19 Antigen Card Test Kits, which were showing significant errors in the testing process.

18. In view of the adverse report received from the user department, the bill processed against the Purchase Order dated 12.11.2020 was withheld by the 2nd respondent. Mylab, the manufacturing company of the said Kits, supplied by the petitioner had addressed a letter dated 31.12.2020 to the Director, Public Health, Telangana, who sought certain clarifications with regard to quality issues raised by the user department. The Technical Head of the said company had demonstrated their kits in the Chambers of the Director of Health and discussed the issues highlighted by the Technicians in detail and the Director, after fully being satisfied with the practical demonstration, found that the issue was not with the quality but with regard to not following of the protocol of the Test Kits, supplied by the petitioner. While using the Test Kits, the technicians were adding more quantity of buffer which resulted in inaccurate results whereas only two drops of buffer should be added. The same was practically shown by the user department to the 2nd respondent including the District Surveillance Officer (DSO), Medchal and they were convinced and therefore, Mylab requested the 2nd respondent and the user department to re-consider the same. The Director of Public Health, Telangana vide his letter dated 09.02.2021 by duly enclosing a copy of the representation dated 31.12.2020 submitted by the Manufacturing Company, requested the 2nd respondent to take further action in the matter.

19. The 2nd respondent is the Nodal Agency for procurement of drug etc., to all the HODs of Health Department as per the indent submitted by them. The User Department itself has informed the 2nd respondent about the standard of the Kits supplied by the petitioner. the 2nd respondent had addressed a detailed letter dated 17.02.2021 to the Director, Public Health, Hyderabad to offer his specific remarks on the representation submitted by Mylab for taking further action in the matter and a reply is awaited from the Director of Public Health.

20. In the letter dated 17.02.2021 addressed by the 2nd respondent, the 2nd respondent had specifically mentioned that the Technical Head for RAT Kits from Mylab representing Labcare Diagnostic India Private Limited, visited the 2nd respondent to address the issues/clarifications sought by the user department and also the 2nd respondent. He satisfactorily demonstrated the use of the kits as per the IFU supplied with the kit. His explanation was sticking to the scientific principle and the 2nd respondent was satisfied with the explanation as well as

the quality and working of the Kit. The 2nd respondent and also agreed to arrange Zoom training session for their technicians and replace the empty pouches/kits.

21. In the report, dated 27.11.2020, the DMHO, Bhadradri Kothagudem District, has informed that the Technical Head of Mylab visited the 2nd respondent to address the issues/clarifications and explained to the 2nd respondent by demonstration, the right use of the kits as per the IFU supplied with the kit. His explanation was sticking to the scientific principle and the 2nd respondent was satisfied with the explanation as well as the quality and working of the Kits and also agreed to arrange a Zoom training session for their technicians and replace the empty pouches/kits of the RAT Kits. Thus, there was a satisfactory report dated 27.11.2020 by DMHO, Bhadradri Kothagudem district.

22. Referring to the representation dated 31.12.2020, the Director, Public Health and Family Welfare vide letter dated 09.02.2021 informed the 2nd respondent that Mylab has submitted a representation to consider their request as the Director had requested not to supply RAT Kits of the State Government to districts due to quality issues. Thus, the Director of Public Health requested the 2nd respondent to consider the said representation and take further necessary action. Therefore, referring to the said facts, the 2nd respondent, vide letter dated 17.02.2021, requested the Director of Public Health and Family Welfare, Hyderabad to give specific remarks/merits, if any, on the firm i.e. Mylab, the Manufacturing Company. The 2nd respondent is awaiting the approval of the user department i.e. Director, Public Health and Family Welfare.

23. The above stated facts would reveal that there is no dispute with regard to the supply of the material by the petitioner against the Purchase Order dated 12.11.2020 and the receipt of the same by the 2nd respondent. It is also not in dispute that 2nd respondent has accepted the said material and distributed the same to the destinations as requested by the user department i.e. Director, Public Health, Telangana as per the quantities provided by the distribution list. There was no dispute till 28.11.2020. There was no complaint whatsoever with regard to the quality of the material supplied by the petitioner. It was only on 28.11.2020 when the Director, Public Health had a video conference with the District Medical and Health Officers and DSOs, he raised certain issues with regard to the supplies made by the petitioner. Therefore, the user department requested the 2nd respondent not to supply Mylab COVID-19 RAT Kits. Thereafter, the Technical Head of the said Manufacturing Company, approached the 2nd respondent and also the user department for clarifications, more particularly, with regard to quality issues raised by them. The Technical Head of the Manufacturing Company demonstrated the use of kits supplied by it in the Chambers of the Director, Public Health and discussed the issues highlighted by the Technicians in detail. The Director, Public Health, had expressed satisfaction after detailed explanation and practical demonstration. The issue was not with regard to quality but with regard to not following the protocol of the said Kits.

While using the same, the Technicians were adding more quantity of buffer leading to bad results where only two drops of the buffer should be added. The same was practically shown to the Director, Public Health and also the Technicians present there along with the DSO, Medchal, and they were convinced.

24. It is also relevant to note that Mylab is start up MSME company. It is the first company to get commercial license from ICMR and approval for COVID-19 Test Kits. They were approved by the ICMR after successful evaluation of three batches. Thus, Mylab and also the petitioner herein have produced the said ICMR approval. Based on the ICMR approval, the companies are allowed to sell the products and are also given with Certificate of Analysis by the Quality Assurance Department and various accredited labs have also given third party performance full evaluation report. Mylab, the manufacturing company has also enclosed the Quality Assurance Department Certificate of analysis report of the products to the 2nd respondent and also third party performance full evaluation report from an NABH Accredited lab for the very same batches of RAT Kits that they were supplying throughout India.

25. The Medical Superintendent (COVID Officer) OF Singareni Collieries Company Limited (for short, 'the SCCL') has received complaints from all SCCL area hospitals and the same were specifically mentioned in a letter dated 17.02.2021. The said issues were clarified by the Technical Head of the Mylab. Thereafter, the said Medical Officer of SCCL has submitted a satisfactory report dated 28.11.2020.

26. Referring to all the said issues, the 2nd respondent had addressed a letter dated 17.02.2021 to the Director, Public Health and Family Welfare, Telangana with a request to give specific remarks/merits if any on Mylab, the manufacturing company. There was no reply from the user department.

27. Thus, the above stated facts would also reveal that neither the 2nd respondent nor the user department issued any letter either to the petitioner or to the said Mylab manufacturing company informing them about the quality issues of the material supplied by the petitioner. On the other hand, on coming to know about the issues raised with regard to the quality of the material supplied, the Technical Head of the said manufacturing company approached the user department and also the DSOs and clarified the said issues. The problem was also identified. The DSOs and also Technicians were present at the time of practical demonstration. In the letter dated 17.02.2021, the satisfactory report of SCCL, DMHO and DSO, Bhadradri Kothagudem District were specifically mentioned. Thus, there were no issues with regard to quality of the material supplied by the petitioner which was manufactured by Mylab. The user department i.e. Director, Pubic Health, Telangana cannot sleep over the representation dated 17.02.2021 submitted by 2nd respondent and the 2nd respondent cannot withhold the payment due to the petitioner on the ground that it is yet to receive a reply from the User Department though it has addressed a letter dated 17.02.2021.

28. As stated above, there are timelines in the Purchase Orders for supply of the material and there are penal provisions for non-supply of the provisions within the stipulated time. There are also conditions for making payments. As per the Purchase Order, payment of 90% shall be made on receipt of the material and MRC from CMSS/Invoices. Balance 10% shall be paid on receiving no adverse reports to the user department within three months or after three months of adverse report will be received by the user department. No adverse performance report is received, therefore, automatically they have to clear the bills.

29. The petitioner has supplied the material in terms of the said Purchase Orders. It is the obligation of the 2nd respondent to make the said payments to the petitioner herein. It is also relevant to note that the petitioner herein is only a proprietary concern. Huge amount is withheld by the 2nd respondent on flimsy grounds. Therefore, 2nd respondent cannot wait for the approval of the user department. There is no persuasion, much less serious persuasion by 2nd respondent from the user department for clearing said dues. The 2nd respondent herein, being the Head of the Department, is also silent on the said issue. Thus, the respondents, even after receiving the said material from the petitioner, cannot withhold the said amount.

30. As discussed above, there are no disputed facts much less serious disputed facts. It is also a settled principle that in contractual matters, writ petitions are maintainable. The said principle is laid down by the Hon'ble Apex Court in Joshi Technologies International Vs. Union of India 2015 (7) SCC 728. In the said judgment, the Hon'ble Apex Court has relied on its principle laid down in ABL International Ltd. Vs. Export Credit Guarantee Corporation of India (2004 3 SCC 553 wherein the Hon'ble Apex Court held that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the Court entertaining a petition under Article 226 of the Constitution of India is not always bound to relegate the parties to a suit; and that in an appropriate case, writ Court has jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact. It held that merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a Civil Suit against a Public Body.

31. In Popatrao Vynkatrao Patil Vs. State of Maharashtra and others in C.A.No.1600 of 2020 dated 14.02.2020, a three Judge Bench of the Hon'ble Apex Court, held that when a petition involves disputed questions of fact and law, the High Court would be slow in entertaining the petition under Article 226 of the Constitution of India. However, it is only a rule of self-restraint and not a hard and fast rule. Even if there are disputed questions of fact which fall for consideration but if they do not require elaborate evidence to be adduced, the High Court is not precluded from entertaining a petition under Article 226 of the Constitution of India.

32. With the said findings, the Hon'ble Apex Court held that in a contractual matters, writ petition is maintainable and High Court can go into the disputed questions of fact while considering a writ petition under Article 226 of the Constitution of India. The said principle was held by Division Bench of this Court in Agni Aviation Consultants, Bangalore Vs. State of Telangana 2020(5) ALD 561 (TS)(DB).

33. In view of the above said settled principles and also above said discussion, this Writ Petition is liable to be allowed and the petitioner is entitled for the amounts claimed by it towards Invoice Nos.296 and 297, dated 12.11.2020 and 13.11.2020 pertaining to the Purchase Order dated 12.11.2020 towards supply of two lakh COVID-19 Rapid Antigen Test Kits. The respondents are liable to pay the said amounts to the petitioner herein.

34. In the result, this Writ Petition is allowed with the following directions:-

i) The respondents are directed to release amount to the petitioner as against the invoice Nos. 296 and 297, dated 12.11.2020 and 13.11.2020 pertaining to the Purchase Order dated 12.11.2020 towards supply of two lakh COVID-19 Rapid Antigen Test Kits within two months from the date of receipt of a copy of this order.

ii) The petitioner is also entitled for interest at the rate 7.5% p.a. on the said amount from the date of due till the date of realization, and

iii) There is no order as to costs.

35. Consequently, miscellaneous petitions, if any, shall stand closed.

