

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT :**

**THE HONOURABLE MR. JUSTICE C.T.RAVIKUMAR**

**THURSDAY, THE 30TH SEPTEMBER 2010 / 8TH ASWINA 1932**

**WP(C).No. 24293 of 2009(F)**  
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**PETITIONER(S):**  
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**VARGHESE PHILIPKUTTY,  
SRUTHI TEXTILES,  
OPP.KSRTC, BUS STAND, THIRUVALLA,  
PATHANAMTHITTA DIST.**

**BY ADV. VARGHESE PHILIPKUTTY(PARTY-IN-PERSON)**

**RESPONDENT(S):**  
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**1. DIRECTOR OF DAIRY DEVELOPMENT  
DEPARTMENT, PATTOM, THIRUVANANTHAPURAM.**

**2. MANAGING DIRECTOR,  
THIRUVANANTHAPURAM REGIONAL CO-OP.MILK  
PRODUCERS UNION, THIRUVANANTHAPURAM.**

**R1 BY GOVT.PLEADER SRI. M.A. ASIF  
R2 BY ADVS. SRI.K.ANAND (A.201), SC  
SMT.LATHA KRISHNAN**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD  
ON 30/09/2010, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:**

**SVS/**

**WP(C).No. 24293/2009(F)**

**APPENDIX**

**PETITIONER'S EXHIBITS:**

- P1: COPY OF THE AWARD PASSED BY THE ARBITRATOR IN ARC 12/1994.**
- P2: COPY OF ORDER IN R.P. 76/2007 PASSED BY THE KERALA CO-OPERATIVE TRIBUNAL THIRUVANANTHAPURAM.**
- P3: COPY OF THE ROUTE TIME SCHEDULE ISSUED BY THE 2ND RESPONDENT IN THE WRIT PETITION DATED 04/11/1990.**
- P4: COPY OF THE APPROVED DISTANCE OF THE ROUTE DATED 05/01/1991 ISSUED BY THE 2ND RESPONDENT.**
- P5: COPY OF THE REVISION PETITION FILED BY THE 2ND RESPONDENT BEFORE THE KERALA CO-OPERATIVE TRIBUNAL AS R.P.NO.76/2007.**

**RESPONDENT'S EXHIBITS NIL**

**/TRUE COPY/**

**P.A. TO JUDGE**

**SVS/**

**C.T. RAVIKUMAR, J.**

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**W.P.(C). NO.24293 OF 2009**  
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Dated this the 30<sup>th</sup> day of September, 2010

**JUDGMENT**

The petitioner was a contractor of the second respondent to procure and transport milk from various milk societies in Thiruvananthapuram district. An agreement was entered in between the petitioner and the second respondent on 2.11.1990. A time schedule was issued to the petitioner for the purpose of collection and transportation of milk from the milk societies. The contention of the petitioner is that based on the time schedule dated 14.11.1990, he had been collecting and transporting milk from various milk societies from 1.12.1990 till 31.1.1991. Going by the said schedule, he was collecting milk from Uzhamalakkal milk society by reaching there at 7.18 a.m and leaving the society by 7.21 a.m in the morning session and respective timings in the evening session were scheduled at 3.47 and 3.50 p.m. Later, on 30.1.1991, another time schedule was brought in by the respondents with effect from 1.2.1991. As per the said schedule, the petitioner was to procure and transport milk from Uzhamalakkal society in the morning session only by reaching there at 7.18 a.m and leaving the society by 7.21 a.m. In terms of the new

schedule, the petitioner started collecting and transporting milk from 1.2.1991 till 31.12.1991. However, he was not given payment for reckoning the distance covered. The contention of the petitioner is that in terms of the first schedule, he was to travel an additional 6 kms. per day for a period of two months and in terms of the second time schedule, he was to travel additional 3 kms. per day for a period of 11 months. He has made several representations before the authorities for effecting payment by reckoning the additional distance covered by him. But no action was taken by the authorities. Thereupon, the petitioner was constrained to move the arbitrator by filing A.R.C.No.12/1994. Ext.P1 is the award passed in A.R.C.No.12/1994. As per the said award dated 17.1.2007, the claim of the petitioner was allowed in part and he was permitted to realise the amount for additional distance travelled to Uzhamalakkal society and also for distribution to various agencies, with 12% interest till date of award and thereafter at the rate of 6% till realisation, from that day. The amount awarded as per Ext.P1 is Rs.3847.20/- . An amount of Rs.336/- was allowed towards cost. Feeling aggrieved by Ext.P1 award, the second respondent preferred a revision, viz., R.P.No.76/2007 before the Kerala Co-operative Tribunal. Ext.P2 is the award passed by the Tribunal in the said revision petition. As per the same, Ext.P1 award was modified and

the claim towards the distance covered to supply milk to various agencies was allowed. It is aggrieved by the said order whereby Ext.P1 was modified to the above extent that this Writ Petition has been filed.

2. The second respondent has filed a counter affidavit in this Writ Petition. It is stated thereunder that as per the agreement between the second respondent and the petitioner dated 2.11.1990, the petitioner was to cover a total distance of about 242 km per day. The specific contention of the second respondent is that when the time schedule was issued to the petitioner, it was made clear that milk need not be collected from societies including Uzhamalakkal society. The further contention is that such a specific instruction was given to the petitioner taking into account the fact that supply of milk by the said society was less than 40 litres. According to the respondent, the claim of the petitioner for Rs.3847.20 is nothing but vague and hypothetical for an imaginary extra distance. There is nothing on record to show how the figure of Rs.3847.20/- was arrived at, it is contended. The further objections with respect to the claim of the petitioner had been detailed in paragraph 11 of the counter affidavit as hereunder:-

“It is clear from the facts narrated above that the claim put forth is baseless and not supported by any

evidence. The claim alleged in the invoice dated 28.8.1991 covers the period of transportation of milk to the Nedumangad and Palode Hospital from 1.12.1990 to 15.8.1991, for the additional 1Km said to have been travelled. The bill dated 5.1.1992 is only a reminder in which claim for the balance period of 4 ½ months, since 15.8.1991 also is claimed, making the total claim to Rs.1,108.80 including the claim of Rs.722.40 included in the invoice dated 28.8.1991. The claim preferred for the period from 1.12.1990 to 31.12.1991 dated 5.1.1992 for Rs.1108.80 is inclusive of the claim covered in bill dated 28.8.1991 and therefore is a duplication.

Based on such averments, it is contended that the claim of the petitioner is absolutely unsustainable. In fact, it is admitted thereunder that the special condition for transport of milk that formed part of the agreement contains a penalty clause for loss or damage due to improper working, non-adherence to instructions of the respondents and any amount so quantified would be recoverable from the contractor. Clause 18 thereunder provides for a penalty of forfeiture of security, in the event of failure to fulfil the contract in accordance with the terms and conditions. It is contended that the

security amount was returned to the petitioner on termination of the contract period. The allegation of the petitioner that deduction have been made from the security deposit is not true, it is further contended . In fact, the petitioner had remitted Rs.478/- to the respondents towards the dues pending against him as per NLC No.To.pdnl 12 92-93. In short, the contention is that there is absolutely no basis for claiming for Rs.3847.20/-. The case of the respondents is that appropriate instructions were issued to the petitioner to the effect that he should not collect milk directly from certain societies wherein the supply of milk was less than 40 litres per day. In the case of such societies, according to the respondents, the petitioner was specifically instructed not to procure milk from the concerned societies and such societies were to bring their stock of milk to the nearest collection centre.

3. In the context of the rival contentions, it is relevant to refer to Ext.P3. In fact, Ext.P3 contains both the schedules ie., time schedule which was brought into force with effect from 1.12.1990 and thereafter with effect from 1.2.1991. Evidently, as per the first schedule, the petitioner was to procure and transport milk from Uzhamalakkal society both in the morning and evening sessions and timings were scheduled thereunder specifically. In terms of the second schedule, the petitioner was

to procure and transport milk from Uzhamakkal only in the morning session and in the evening, the obligation was on the society to bring milk to the Kulapada Main road and the petitioner need to collect it only from there. According to the petitioner, the schedules mentioned above would make it clear that in respect of societies included in Ext.P3, he had to procure and transport milk from all societies strictly in terms of the time schedule and the manner in which it has been specified in the said schedule. Apart from the time schedule, it is evident from Ext.P3 series that no other specific instructions were given in writing to the petitioner showing the names of the societies from where milk need be procured directly from the society. The specific contention of the petitioner is that he had procured milk and transported it from the societies enlisted in Ext.P3 series strictly in accordance with the schedule and the demand now made is also strictly in terms of the same. In other words, according to him, he had procured and transported milk during the morning and evening sessions only during the period covered as per Ext.P3 and thereafter only in the morning session in terms of Ext.P3 and the demand was also made strictly in accordance with the same. It is to be noted that the second respondent has yet another specific contention. According to the second respondent, in respect of certain societies such as Uzhamalakkal, even

during the morning session, the petitioner should not have been gone to such societies for the purpose of procuring the milk as they could procure only less than 40 litres from such societies. However, no documents were produced by the second respondent showing that the specific instruction specifying the names of such societies, to support and sustain the said contention before the arbitrator, the Tribunal and also before this Court. In short, in the absence of any specific instructions in terms of Ext.P3 schedule, the petitioner was bound to procure milk from all societies enlisted in Ext.P3 series strictly in accordance with the schedule. In that context, the petitioner contends that any failure on his part to reach the society enlisted thereunder would have resulted in imposition of penalty in terms of the specific conditions under the agreement. Having gone through the counter affidavit filed by the second respondent and the materials produced in support of the contentions raised thereunder, I cannot find any specific contention or any document carrying a specific instruction to the petitioner showing the names of the societies wherein he should not have gone during the morning sessions or in the evening sessions on the specific ground that such societies were procuring only less than 40 litres of milk. In fact, in respect of such societies specifically shown in Ext.P3 series, the petitioner had procured milk only

from such centres in terms of the schedule. The respondents could not bring to my notice any document produced before the arbitrator or Tribunal for substantiating the said contention. I am of the view that having issued a schedule as is obvious from Ext.P3 series as also Ext.P4 and incorporating a condition of penalty clause in the agreement, the second respondent cannot be heard to contend that the petitioner should not have been gone to certain societies on the ground that such societies were able to procure milk only less than 40 litres of milk per day. If that be so, the second respondent should have issued specific instructions to the petitioner specifically showing the names of such societies and instructions not to procure and transport milk from such societies. As already noticed, I do not find any such specific instructions issued by the second respondent. The petitioner could not have made a guess to identify such societies. I am of the view that it was after considering all such contentions and looking into the evidence adduced by both sides that Ext.P1 award was passed. Merely because there was no supply of prescribed quantity of milk from certain societies, the petitioner could not have been saddled with the liability. Going by the schedule, he was to reach the societies to procure and transport milk. Any deviation from the schedule would have resulted in imposition of penalty on the petitioner. In

this context, it is to be noted that at no point of time, the petitioner was issued with any memo or any intimation that he was not adhering to the schedule or deviating from the schedule. After consideration of the issues involved in this case, I do not find any justification on the part of the Tribunal in interfering with Ext.P1 award. Even according to the respondents, as per the schedule, the petitioner was to travel a distance of 242 kms per day for the purpose of procuring and transporting milk. Having engaged the petitioner to do so and made him to work according to the schedule issued by them, there is no justification on the part of the respondents to contend that the petitioner should not have made a claim to the tune of Rs.3847.20/- on the ground that he was not required to reach certain societies that supplied less than 40 litres of milk. Having failed to identify such societies and let it known to the petitioner and giving specific instructions to that effect, the respondent cannot take advantage of the situation and merely on account of the failure on the part of the certain societies to supply milk less than the prescribed quantity, the petitioner cannot found fault with. Having undertaken the journeys for the sole purpose of procuring and transporting milk, the petitioner cannot be denied the benefits payable to in terms of the agreement on account of the failure on the part of the certain societies to supply milk less than the prescribed

quantity. In short, I am of the view that there is nothing in Ext.P1 award calling interference and the findings on facts should not have been interfered with the Tribunal in the absence of fresh materials. Accordingly, this Writ Petition is allowed. The petitioner will be at liberty to realise the amount covered as per Ext.P1 less the amount which he had already received in terms of the award.

**(C.T. RAVIKUMAR, JUDGE)**

**spc**

**C.T. RAVIKUMAR, J.**

**JUDGMENT**

**September, 2010**

