

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **F.A.O. (OS) No. 15 of 2007**

% Reserved on: July 23, 2009
Pronounced on: July 27, 2009

M/S. DAISY TRADING CORPORATON Appellant
Through: Mr. Rajesh Banati, Advocate.

versus

UNION OF INDIA Respondent
Through: Ms. Jyoti Singh and Mr. Ankur
Chhibber, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

1. Whether Reporters of the local newspapers may be allowed to see the judgment? Yes
2. Whether to be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

NEERAJ KISHAN KAUL, J.

1. This appeal has been preferred against the decision of the learned Single Judge dated 10th November, 2006. Before the learned Single Judge, the appellant had challenged the Award dated 29th June, 2001. The learned Single Judge had affirmed the Award dated 29th June, 2001 and made the same rule of the Court.

2. Briefly stated the facts of the present case are that a risk purchase tender was floated by the respondent in the year 1987. The appellant/supplier submitted an offer. The offer was accepted by the respondent and unit price per tent was fixed at Rs.4,791/-.

3. Admittedly, supplies were not effected and within the stipulated periods governing the contract between the parties and a new tender was floated by the respondent styling the same as a "risk

purchase tender”. It was not disputed by the parties before the learned Single Judge that the contract stipulated that in case of breach committed by the supplier/appellant, the remedy of the respondent was to proceed to effect risk purchase and recover the loss to be determined on the differential price paid by the respondent.

4. At the second stage when risk purchase was resorted, a party named Ashok Tent Industries was the lowest bidder and the contract for the same number of tents was placed on the said party at a unit price of Rs.6,925/-. Thus, the total price at which the contract was awarded to the new supplier was Rs.7,27,125/-. The Union of India (for short ‘UOI’) sought to enforce the loss suffered by it and invoked arbitration. The UOI sought an award in its favour for a sum of Rs.2,33,033/- i.e. the differential price at which it actually purchased the goods. It also claimed interest @ 18% *per annum* on the said amount. The appellant claimed a sum of Rs.75,460/- alleging illegal termination of the contract and loss of profits. The appellant also contended before the Arbitration that the UOI had recovered Rs.2,33,033/- by withholding the said amount from other contracts in respect whereof payment had to be made by UOI to the appellant and accordingly the appellant claimed refund of the said sum along with interest. The learned Arbitrator rejected the claims of the appellant. The claim of the UOI/respondent for the sum of Rs.2,33,033/- was allowed. Interest was disallowed to the UOI for the reason as held by the learned Arbitrator that the UOI had already made the necessary recoveries. The appellant restricted their submissions before the learned Single Judge as also before us to the

award of risk purchase damages to the UOI.

5. It was contended on behalf of the appellant that it is settled law that where risk purchase has to be effected, terms of the risk purchase have to be identical to the terms of the original purchase. It was further contended that not only have the specification of the goods to remain the same, the other terms of the contract also have to be the same. Reliance was placed on certain decisions including the decision of the Delhi High Court in **UOI vs. M/s Daisy Trading Corporation** reported as **2006 (5) AD (Delhi) 290**. This judgment was subsequently affirmed by a Division Bench of this Court in **FAO(OS) No. 570 of 2006** decided on 15th September, 2006. As per the learned counsel for the appellant, there were three discrepancies in the tender as originally floated and the risk purchase tender; price paid whereunder has been treated as the measure to determine the damages. The three differences pointed out by learned counsel for the appellant are as follows:-

“A. In specification No.1 pertaining to the tender floated when petitioner made the offer, specification noted was ?IND/TC/0008 (J)? read with.....

In the tender at the risk purchase stage specification noted was: “IND/TC/0009 (J)”

B. Whereas, vide serial no.10, date of delivery notified to the petitioner was 2-3 months reckoned effective from one month after receipt of formal AT. In case of risk purchase tender delivery period was accepted to 6-9 months.

C. Whereas, vide serial no.11 of the contract of the petitioner, term of delivery was F.O.R. Bombay/Vasai. In case of the risk purchase tender term of delivery was F.O.R. N.Delhi/Noida.”

6. The learned Single Judge dealing with the first discrepancy took note of the fact that the learned Arbitrator had noted after perusing the original file that the specification was the same. The record of the Arbitrator which was perused by the learned Single Judge showed that photocopies of the AT placed on the petitioner/appellant as well as AT placed on M/s Ashok Tent Industries had been filed. Thus, the learned Arbitrator had fully satisfied himself that the specification of the two ATs was the same. The learned Single Judge had rightly held that the learned Arbitrator had recorded a finding of fact that he had seen the original record and there were no reason to disbelieve the learned Arbitrator.

7. The learned Single Judge, in our view, has correctly observed that identity in the specifications has to be not literally construed. It has to be near identity. Trivial differences would make no difference. As correctly observed by the learned Single Judge what is required to be considered is that the second stage of supply could be evaluated on objective parameters with the parameters of the first purchase for only then it could be ascertained that the price at the second stage of purchase is comparable with the offer at the first stage.

8. The learned Single Judge dealing with the second discrepancy, namely, the time granted to effect supplies being different i.e. two to three months reckoned after the first month of placement of AT upon the appellant and six to nine months granted to Ashok Tent House correctly observed that the said discrepancy was of no consequence as it had no bearing on the unit price quoted.

9. Dealing with the third discrepancy, the learned Single Judge observed that at the time of the first tender as also the second tender, it was clearly notified that the term of delivery would require the supplier/appellant to pay the freight for the goods being delivered to the notified place but the freight had to be reimbursed. Thus, the learned Single Judge has correctly observed that the price quoted would clearly be linked to the supply price and would exclude the freight element. The two prices would, therefore, be predicated on the same factors. The learned Single Judge, thus, rightly came to the conclusion that the so-called discrepancy alleged by the appellant pertaining to the term/place of delivery was, therefore, of no consequence.

10. In our view, the learned Single Judge has correctly observed in the impugned judgment that only where there is a variance of a material kind i.e. objective parameters being different resulting in objective evaluation being rendered impossible or at least difficult, comparability would be lost and, therefore, price at the risk purchase stage will not form the measure to determine the loss suffered.

11. In the present case, the appellant has failed to show what was the material variance between the terms of the two tenders. Even in the counter statement filed before the learned Arbitrator, the appellant had not set out any variance of a material kind to establish that the objective parameters were different between the two tenders and thus there could be no objective evaluation and that comparability had been lost and, therefore, the price at the risk purchase stage could not form the measure to determine the loss

suffered. Except for simply setting out the three discrepancies, no factual basis was made out before the learned Arbitrator to aver that these so-called discrepancies amounted to variance of a material kind which would, in turn, effect the basis for determining the loss suffered. Even during the course of hearing before us the counsel for the appellant was unable to bring out any variance of a material kind.

12. The learned Arbitrator has specifically given a finding that the terms and conditions of the risk purchase tender was the same as those of the original purchase. The learned Single Judge has rightly concluded that identity in the terms and conditions does not have to be literally construed. Trivial differences would make no difference as long as the variance is not of a material kind. Neither before the learned Arbitrator nor before the learned Single Judge or before us has the appellant been able to make out any case of variance of a material kind between the terms and conditions of the original tender and the terms and conditions of the subsequent risk purchase tender.

13. The learned counsel for the appellant has relied on the decision of the Delhi High Court in **UOI Vs. M/s Daisy Trading Corporation's** case (*supra*) which was affirmed by a Division Bench of this Hon'ble Court. The relevant paras of the said judgment are reproduced hereinbelow:-

“6. A perusal of the award shows that the arbitrator tried to put cart before the horse and first considered the issue of risk purchase. The arbitrator on consideration of the legal pleas came to the conclusion that since the respondent had failed to participate in the risk

purchase advance tender, despite the judgments cited of different courts by the respondent, it was not necessary to compare the terms and conditions of the original purchase order and the risk purchase.

7. In my considered view this is contrary to law and is not even seriously disputed that in order for the risk purchase to be upheld, the terms and conditions of the two tenders should be more or less similar. It may however, be noticed that the arbitrator thereafter proceeds to state that on comparison of the terms and conditions he finds no major difference. There is no comparison recorded in the award of what terms and conditions were material and identical and if there were some "minor difference" what was the same. The award certainly suffers from absence of reasons on this account.

8. The arbitrator thereafter proceeds to record that since the respondent failed to supply the material, the petitioner was within its rights to make risk purchase. The arbitrator was required to consider the plea of the respondent whether the petitioner had not followed the terms of the original contract, calling upon the respondent to do certain things which were not envisaged in the original contract and thus the same amounted to novation of the contract. This plea of the respondent has not at all been considered. No finding has been recorded in respect of the same. Thus the award does suffer from absence of reasons even on this account."

14. However, the facts of that case were entirely different. That was a case where the learned Arbitrator on consideration of legal pleas came to the conclusion that since the respondent therein had failed to participate in the risk purchase advance tender, despite the judgments cited of different courts by the respondent, it was not necessary to compare the terms and conditions of the original purchase order and the risk purchase. It was in this background

that the learned Single Judge held the approach of the learned Arbitrator to be incorrect and contrary to law. The learned Single Judge in the said judgment, thus, held that the Arbitrator was required to consider the plea of the respondent whether the petitioner therein had not followed the terms of the original contract calling upon the respondent to do certain things which were not envisaged in the original contract and thus the same amounted to innovation of the contract.

15. In the present case, the Arbitrator has compared the terms and conditions of the two tenders and found them to be the same. Further, no doubt that in the judgment of **UOI Vs. M/s Daisy Trading Corporation's** case (*supra*), it was observed that the Arbitrator therein had not recorded the comparison as to what terms and conditions are material and identical and if there were some minor differences, what were the same. Ordinarily, the comparison of the terms and conditions should be contained in the decision. However, in the present case, the respondent themselves failed to set out in their counter statement any variance of a material kind between the earlier tender and the subsequent risk purchase tender. The learned Arbitrator on comparison of the terms and conditions found them to be the same. No infirmity can be seen in the said finding of the learned Arbitrator. Moreover, as explained by the learned Single Judge the appellants have failed to make out a case of any material variance between the two tenders. The judgments in **UOI Vs. M/s Daisy Trading Corporation's** case (*supra*) or that of Division Bench of this Court in **FAO(OS) No. 570 of 2006** affirming

the said decision do not state that the terms and conditions of the two tenders have to be identical and there cannot be any minor/trivial differences between the same. What is important is that there should be no variance of a material kind which in turn would effect the price at the stage of risk purchase tender not forming the correct measure to determine the loss suffered.

16. The learned counsel for the appellant also relied on the judgment of the Hon'ble Supreme Court in **M/s. Murlidhar Chiranjilal vs. M/s. Harishchandra Dwarkadas & Anr.**, reported as **1961 (1) SCR 653**, the relevant part of which reads as follows :-

“The two principles on which damages in such cases are calculated are well-settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed; but this principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps: (*British Westinghouse Electric and Manufacturing Company Limited v. Underground Electric Railways Company of London* (1912) A.C. 673, 689). These two principles also follow from the law as laid down in s. 73 read with the *Explanation* thereof. If therefore the contract was to be performed at Kanpur it was the respondent's duty to buy the goods in Kanpur and rail them to Calcutta on the date of the breach and if it suffered any damage thereby because of the rise in price on the date of the breach as compared to the contract price, it would be entitled to be re-imbursed for the loss. Even if the respondent did not actually buy them in the market at Kanpur on the date of breach it would be entitled to damages on proof

of the rate for similar canvas prevalent in Kanpur on the date of breach, if that rate was above the contracted rate resulting in loss to it. But the respondent did not make any attempt to prove the rate for similar canvas prevalent in Kanpur on the date of breach. Therefore it would obviously be not entitled to any damages at all, for on this state of the evidence it could not be said that any damage naturally arose in the usual course of things.”

17. We fail to understand how this judgment has any relevance to the facts of the present case. This was a case where one of the question which arose for consideration was the taking of reasonable steps to mitigate the loss consequent on the breach. The Hon’ble Supreme Court in the said case has held that even if the respondent did not actually buy the goods in the market on the date of the breach, it would still be entitled to damages on the proof of the rate for similar goods prevalent in the market on the date of the breach if that rate was above the contracted rate resulting in loss to it. But since the respondent in that case did not make any attempt to prove the rate for similar goods prevalent in Kanpur on the date of the breach, it was held that he was not entitled to any damages at all. This was a case which dealt with mitigation of losses and not with a risk purchase tender. Moreover, the facts of the said case or the decision rendered therein have no bearing on the case at hand. The learned Single Judge has correctly distinguished **M/s. Murlidhar Chiranjilal’s** case(*supra*). The learned Single Judge has rightly observed that in the instant case, risk purchase tender was opened to all eligible suppliers throughout the territories of India and the prices received would reflect the prices offered by various suppliers.

This, the learned Single Judge has correctly held would include the suppliers at Delhi, Nasik and Vasai.

There can be no quarrel with the proposition that the material conditions of the two tenders cannot be at variance if the price of the risk purchase tender is to form the basis of the measure of the loss suffered. However, the appellant has failed to make out any case of variance of a material kind between the two tenders. Minor differences or differences which have no bearing, whatsoever, on the price in the risk purchase tender cannot be considered to be a variance of a material kind.

18. We find no infirmity in the impugned judgment. This appeal is accordingly dismissed.

NEERAJ KISHAN KAUL
[JUDGE]

MUKUL MUDGAL
[JUDGE]

JULY 27, 2009
sb/RS