

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
F-111 **(Not reportable)**
+ **CS (OS) No. 521A of 2007 & I.A. No.14335 of 2007**

UNION OF INDIA Plaintiff
Through: Ms. Geeta Sharma with
Mr. Anuj Aggarwal, Advocates.

Versus

M/S. DAISY TRADING CORPORATION Defendant
Through: Mr. Sunil Verma and Mr. Rajesh
Banati, Advocates.

And

F-112
+ **CS (OS) No. 707 of 2007**

M/S. DAISY TRADING CORPORATION Plaintiff
Through: Mr. Sunil Verma and Mr. Rajesh
Banati, Advocates.

Versus

UNION OF INDIA & ANR Defendants
Through: Ms. Geeta Sharma with
Mr. Anuj Aggarwal, Advocates.

CORAM: JUSTICE S. MURALIDHAR

ORDER
05.10.2012

1. CS (OS) No. 521A of 2007 was registered consequent upon receipt by the Court of the stamped and signed Award dated 9th March 2007. On 21st March 2007 notice was directed to the parties of filing of the Award. Notice was served on the Union of India ('UOI') on 25th October 2007 and on the Defendant in CS(OS) No.521A of 2007 M/s. Daisy Trading Corporation
I.A. No.14335 of 2007 in CS (OS) No.521A of 2007 & CS (OS) No. 707 of 2007 *Page 1 of 10*

(‘DTC’) on 23rd October 2007. Thereafter, the UOI filed I.A. No. 14335 of 2007 in CS (OS) No. 521A of 2007 on 26th November 2007 under Sections 30 and 33 of the Arbitration Act, 1940 (‘1940 Act’).

2. Independent of the above, DTC filed CS(OS) No. 707 of 2007 under Sections 14, 17 and 29 of the 1940 Act for a direction to the learned Arbitrator to file a copy of the original Award dated 9th March 2007 along with the proceedings of the Award and for making the Award rule of the Court.

3. The background to the present petitions is that UOI through the Director General of Supplies and Disposals (‘DGS&D’) had floated a tender on 14th September 1987 for purchase of 6084 water proof covers at a value of Rs. 68,22,384.66. DTC submitted its offer on the same date. The DGS&D by its letter dated 18th January 1988 conveyed the formal acceptance of DTC’s tender. The delivery period was fixed up to 30th June 1988 or any time prior thereto. Clause 19 (c) of the Schedule to tender required DTC to supply the stores/goods only after pre-inspection by the Inspecting Officer nominated by the DGS&D. DTC was not entitled to any increase in the price. The DGS&D could claim damages if the supplies were not made within the time as stipulated in the tender. Clause 17 provided that the Inspecting Authority would be the Chief Inspector (OFY Jabalpur). Prior to commencement of bulk manufacture, DTC was to supply an advance sample of each item to the Inspector, through the Director of Inspection for approval of workmanship and finish.

4. On 23rd January 1988 the DGS&D received one sample from DTC. On

19th February 1988 DTC was informed by Quality Assurance Establishment (Vehicle), DGS&D that “detailed procedure of inspection will be intimated on hearing from the AHSP, i.e., CIOFV Jabalpur and the trial sample also will be inspected after formulating the inspection procedure/parameters.”

5. On 4th April 1988 a letter was written by North Zone Representative Office, DTC to the DGS&D requesting as under:

“This is with reference to our letter No. DTC/GI/847 dated 3.2.88 regarding amendment of the payment clause and the re-fixation of the delivery period accordingly. The reply to our this above said letter is still being awaited.

We also beg to state that the inspection authorities’ representative in Bombay, when contacted by us, informed us that they have not yet received any instructions regarding the inspection of the material. It seems that they have not received the copy of the A/T.

We, therefore, request you to:

1. Refix the delivery period of the above A/T enabling us to start the production so that we may supply the goods as per our production schedule.
2. Please see that the relative inspection authorities receive the necessary instructions to carry out the inspection alongwith the copy of the amended A/T so that we may not find any difficulty at the time of inspection which may hamper the delivery schedule any more.

Your early and favourable action in these matters will be highly appreciated.”

6. Thereafter the disputes between the parties were referred to arbitration. An *ex-parte* Award was made on 1st August 1995 by the learned sole Arbitrator appointed by the DGS&D. The said Award was set aside by the

Court by an order dated 18th October 2001 in CS(OS) No. 2469A of 1995. The matter was remanded for a fresh decision to the learned Arbitrator.

7. Thereafter, Mr. Bajinder Singh Meena, Additional Legal Advisor, Government of India was appointed as sole Arbitrator. He passed an Award on 28th December 2004 holding that DTC had failed to supply the goods which resulted in breach of the contract, thus entitling the DGS&D to resort to risk purchase. After noting that the DGS&D had suffered a loss of Rs. 17,75,192 on account of risk purchase, the learned Arbitrator held that DGS&D could withhold the said amount in connection with other bills of DTC.

8. Aggrieved by the said Award dated 28th December 2004 DTC filed objections under Sections 30 and 33 of the 1940 Act. By its order dated 12th May 2006 in CS(OS) No. 446A of 2005 this Court upheld the objections and set aside the said Award and appointed a former Judge of this Court as a sole Arbitrator to adjudicate the disputes between the parties. It was further directed that only final arguments would be heard “on the basis of material already placed on record by the parties.”

9. The learned Arbitrator in the impugned Award dated 9th March 2007 came to the following conclusions:

- (i) In a contract for the sale of goods, ordinarily time for payment is not the essence of contract but time for delivery of goods must be *prima facie* taken to be the essence of the contract and in a case seller failed to deliver goods within the stipulated time the buyer may avoid the contract and vice versa. Section 53 of the Indian Contract Act,

1872 also stated that where reciprocal promises are made by a party, which prevents the other party from performing its part of contract, the first party runs the risk of getting the contract avoided.

(ii) It was strange that although a tender was floated in September 1972 and finally accepted in January 1988 the DGS&D had not even finalized the procedure or parameters for inspection of sample.

(iii) The decision of the DGS&D to assess the manufacturing capacity of DTC by its letter dated 23rd March 1988 reflected “a totally indifferent and callous approach of the claimant to the contract” and suggested “a calculated move to make it impossible” for DTC to complete the manufacturing and supply of the stores within the time schedule which was to expire on 30th June 1988. The request for assessing the manufacturing capacity of DTC had to be made prior to the acceptance of the tender.

(iv) Even though the period fixed in the contract for completing supplies had expired, the DGS&D had not inspected the sample which was submitted by DTC within a week of placement of order.

(v) On 30th August 1988 the DGS&D had made one more amendment to its proposal dated 9th June 1988 and asked for submission of one advance sample to the Inspecting Office by 15th September 1988 despite the fact that one sample had already been sent by DTC on 23rd January 1988. The plea of the DGS&D that DTC did not send any advance sample by 15th September 1988 was therefore “false and

frivolous”.

(vi) The DGS&D had no right to keep the inspection of the sample in abeyance after receiving it within about a week of the acceptance of the tender. The DGS&D had also no right to unilaterally change the condition that instead of one, two samples should be submitted. The DGS&D by its unilateral variation of the terms of the contract afforded a right to DTC to avoid the contract. DTC had in exercise of that right rescinded the contract by writing a letter dated 4th April 1988.

(vii) The DGS&D which was guilty of breach of the contract had no right to go in for risk purchase and ask DTC to compensate it for the loss. The DGS&D itself was to be blamed for frustrating the contract and providing good grounds to DTC to rescind the contract.

10. Consequently, Claim ‘A’ of the DGS&D was rejected. Claims ‘B’, ‘C’ and ‘D’ towards interest, costs and other relief were also rejected. The counter-claim of DTC for release of Rs. 17,75,192 that had been withheld by the DGS&D was directed to be released immediately. DTC was also held to be entitled interest @ 9% per annum on the aforesaid sum from 20th January 1989 up to the time of actual payment.

11. It is submitted by Ms. Geeta Sharma, learned counsel for the UOI that on 4th April 1988 DTC wrote two letters. By the first letter sent by North Zone Representative Office of DTC, a request was made for re-fixing of the delivery period as per production schedule. A request was also made for

issuing instructions to the inspection authorities to carry out the inspection alongwith the copy of the amended advance tender so that there would be no difficulty at the time of inspection. By the second letter dated 4th April 1988 under Reference No. 044/88/126 by registered AD addressed to the DGS&D, DTC stated that since the DGS&D's Inspector had failed to inspect the material within a reasonable time, "we treat your above A/T as cancelled without any financial repercussion on our side."

12. Ms. Sharma contended that the aforesaid two letters dated 4th April 1988 of DTC were contradictory. She submitted that since DTC had terminated the contract even before the expiry of the supply period, the DGS&D was entitled to claim reimbursement of the costs and risk purchase which was thereafter undertaken by it. On its part, DGS&D also cancelled the contract by its letter dated 12th October 1988. Ms. Sharma pointed out that prior thereto, a number of letters were written by DGS&D inviting DTC for meetings. However no effort was made by DTC to complete the supplies within the stipulated time.

13. The above submission has been considered. It is seen that the DGS&D did not respond to the first letter dated 4th April 1988 written by the North Zone Representative Office of DTC asking for re-scheduling of the inspection. On the other hand on 27th April 1988 DGS&D responded to DTC's second letter dated 4th April 1988 and stated: "cancellation of contract not possible repeat not possible." It was further stated that the Inspector QAE (Vehicle), Vikroli, Bombay and CQA (OFV) Jabalpur had been instructed to expedite testing of advance sample. By its letter dated 26th May 1988, DTC informed the DGS&D that it was no longer interested in

completing the supply because “your Inspector failed to attend our inspection call within reasonable time inspite of our repeated reminders to all concerned.”

14. The learned Arbitrator has analysed the evidence on record as well as the relevant clauses of the contract. His conclusion that the DGS&D had made it impossible for DTC to complete its supplies within the period ending on 30th June 1988 was correct in light of the correspondence exchanged between the parties. It appears that there was a lack of coordination between the various departments and the DGS&D which brought about a situation where DTC could possibly not complete the supplies within the stipulated time. The learned Arbitrator also correctly concluded that DGS&D provided good grounds to DTC to rescind the contract.

15. The learned Arbitrator has in the impugned Award referred to the fact that DTC had in fact rescinded the contract by writing a letter dated 4th April 1988. The other letter dated 4th April 1988 by which North Zone Representative Office of DTC asked the DGS&D to reschedule the date of delivery by itself did not make much difference to the fact that DGS&D had made it impossible for the delivery of the supplies to be completed. Consequently, the learned Arbitrator was right in conclusion that the DGS&D had committed a breach of the contract and had no right for go in for risk purchase. The learned Arbitrator held that the demand of security from DTC by DGS&D disabled DTC from participating in the risk purchase tender. Also, there were variations in the terms of the risk purchase tender.

16. Ms. Sharma lastly submitted that the original Award is engrossed on a

stamp paper of Rs. 80 which is inadequate in terms of the Indian Stamp Act, 1899 ('ISA'). She relied upon the decision of the Supreme Court in ***Rikhabdass v. Ballabhdas* AIR 1962 SC 551** and decision of the Madhya Pradesh High Court in ***Radha Madhav Engineering Enterprises, Begumpet, Hyderabad v. General Manager, NTPC, Korba* 2000 (4) Raj 258 (MP)** and submitted that the Court should refer the Award to the Collector of Stamps for assessment of the proper stamp duty.

17. In ***Rikhabdass v. Ballabhdas*** the Supreme Court explained that "Section 17 of the Stamp Act requires that stamping should be at the time of execution." It was held that inadequacy of the stamp paper on which the Award was drawn up did not affect the legality of the Award. Accordingly, this Court holds that as far as the impugned Award is concerned, DTC as the Decree Holder will take the necessary steps to pay the deficit stamp duty and penalty, if any, assessed by instituting the appropriate proceedings under the ISA and pay the amount so assessed before seeking execution of the impugned Award.

18. For all the aforesaid reasons, this Court finds no error in the impugned Award of the learned Arbitrator rejecting DGS&D's Claim 'A' and consequently its claim for interest under Claim 'B'. The impugned Award to the extent it holds that DTC is entitled to release of the withheld amount of Rs. 17,75,192 together with simple interest at 9% per annum from 20th January 1989 up to the time of payment is upheld. DGS&D's objections are rejected. The impugned Award is made rule of the Court. Decree sheet up drawn up accordingly.

19. I.A. No. 14335 of 2007 filed by the DGS&D is dismissed and CS(OS) Nos.521A and 707 of 2007 are disposed of in the above terms.

S. MURALIDHAR, J

OCTOBER 05, 2012

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