

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

% RESERVED ON: MARCH 05, 2012
PRONOUNCED ON: MARCH 21, 2012

+ **RFA(OS) 69/2007**

ATUL LIMITED Appellant
Represented by : Mr.M.K.Pathak, Adv. for
Mr.Anil Seth, Advocate.
versus

NATIONAL RESEARCH AND DEVELOPMENT
CORPORATION OF INDIA Respondent
Represented by : Mr.B.B.Sawhney, Sr.Adv.
instructed by Mr.Sunil
Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J.

1. The appellant is aggrieved by judgment and decree dated 03.07.2007 in CS(OS) No.2080/1993 passed by learned Single judge whereby the suit filed by National Research and Development Corporation of India, respondent herein, seeking damages to the tune of ₹52.25 lacs was decreed with costs and future interest @ 6% p.a. from the date of filing of the suit till its realisation.

2. The facts leading to this long drawn litigation are that United Nations Industrial Development Organisation (hereinafter referred to as UNIDO), as part of its development plan, in agreement with United Nations Development Programme (hereinafter referred to as UNDP) and Government of Vietnam, wanted to set up plants for production of dyes and pigments. On 16.05.1989 UNIDO invited proposal No.89/30 – Project No.DP/VIE/85/001 – ‘Pilot

Production of Dyes and Pigments – Part-II’. UNIDO sent a communication to this effect to National Research and Development Corporation of India (hereinafter referred to as NRDC) inviting to submit written proposal/tender for setting up of two pilot plants on turnkey basis in Ho Chi Minh City, Vietnam. The invitation had provision for sub-contracting by NRDC.

3. The appellant Atul Products Ltd. (hereinafter referred to as ATUL) expressed its interest in the project and sought clarification about the nature and scope of the work. After discussion, ATUL was asked to expedite the issuance of budgetary offer regarding the project for onward transmission to UNIDO by 04.08.1989. ATUL vide its communication dated 29.07.1989, while sending the budgetary proposal expressed its capability to handle the project, claiming as under :-

*‘.....
Atul Products Limited (ATUL) and its associate companies from one of the largest chemical complexes of India producing 300 million (U.S.\$) worth of wide range of chemicals. ATUL has been in business of dyes, dye intermediates and industrial chemicals since 1949. Over the years ATUL has diversified into agrochemicals such as 2,4-D acid and its salts, Diuron, Isoproturon etc. and bulk drugs.*

*We have history of cordial collaborations with major multinationals like American, Cyanamid Company of U.S.A., Ciba-Geigy Limited of Switzerland and Imperial Chemical Industries PLC of U.K. We also have well knit marketing organisation all over the country. ATUL belongs to the Lalbhai Group, a leading business house in India.
.....’*

4. Relying on the budgetary proposal and the representation made by appellant, NRDC sent the proposal to UNIDO quoting the contract price \$ 3,22,340 for the natural dyes pilot plant and \$ 3,49,170 for synthetic dyes pilot plant, specifying a period of 15 months for completion and

introducing ATUL as its associate. UNIDO awarded the contract to NRDC vide its communication dated 03.10.1989 subject to acceptance by NRDC. The acceptance was sent by NRDC without any delay on 05.10.1989. Dr. M.K.Jain, General Manager (Planning and Project) of the appellant, representative of UNIDO and respondent – NRDC also participated in the meeting that took place at site in Vietnam on 20th and 21st November, 1989 wherein various issues were discussed in detail including requirement of conversion of dry powder to paste and also the requirement of chilled water plant. The minutes of the meeting formed part of the contract as well sub-contract.

5. NRDC pleaded that the contract with ATUL, to execute the projects awarded by UNIDO, concluded when ATUL sent to it the agreement of 3.11.1989, on stamp papers signed by Mr.S.S.Lalbhai, its Managing Director. The formal contract between UNIDO and NRDC was finally signed by UNIDO on 15.02.1990 and by NRDC on 12.03.1990.

6. It is further the case of NRDC that after receiving the communication dated 12.01.1990 regarding change of Project Incharge, a drastic change in the stand of ATUL was noticed by NRDC. On 03.02.1990 a telex message was sent conveying that the contract in its existing form was not acceptable to them and wanted incorporation of certain additional clauses and asked NRDC to keep the contract papers in abeyance. The meetings followed on 07.02.1990 and 09.02.1990 between the representatives of the parties but due to nature of changes sought to be included, matter could not be resolved. ATUL sent another letter dated 09.03.1990 specifying other additional clauses which became

progressively more drastic.

7. The communication exchanged between ATUL and NRDC and minutes recorded of various rounds of meetings, to resolve the issues, reveal that stand taken by ATUL was that scope of the contract has been enlarged due to change in the end project desired from paste to Powder which required changes in specifications/designs resulting in delay and cost escalation. As per NRDC, this was contrary to the representation made earlier by ATUL specifying that the manufacturing process would produce dry powder and that powder could be converted to paste by a step forward. ATUL wanted to pull out and in the meeting held at ATUL's place on 2nd and 3rd August, 1990 it was suggested that NRDC should obtain only knowhow and basic engineering from it and thereafter entrust work of procurement/erection and commission of plant to some other party.

8. NRDC, during meeting with Managing Director of ATUL on 2nd & 3rd August, 1990 pointed out that the quotations submitted to UNIDO was on the basis of quotations of ATUL, against stiff global competition and therefore, NRDC had to complete the project as it involved not only the name of NRDC but India as a whole. Though the Managing Director of ATUL agreed to stand by its commitments and contractual obligations, the draft of revised sub-contract sent by ATUL on 12.09.1990 indicated otherwise, which was not acceptable to NRDC. The tussle ultimately resulted in putting ATUL to notice vide letter dated 19.09.1990 that in case of its failure to fulfill its contractual obligations, NRDC would have no alternative but to get the project executed at their risk and cost. As anticipated, vide communication dated 01.10.1990,

ATUL desired to repudiate the sub-contract signed by it if the revised draft of sub-contract was not acceptable to NRDC. Finding no option, NRDC served the legal notice dated 25.10.1990 claiming damages for breach of the contract but liability was denied by ATUL vide its reply dated 06.11.990.

9. Completion of project being the question of national prestige, alternative arrangements were made by NRDC for implementing the agreement with UNIDO by utilizing the services of other associates/consultants, namely the Regional Research Laboratory (Jammu) and of the Council for Scientific & Industrial Research in relation to the synthetic dyes and pigments plant. After negotiating the sub-contract in March, 1991, the project commenced and completed on 09.05.1992 in respect of natural dyes plant and on 14.05.1993 in respect of synthetic dyes. But for completing the project the respondent had to pay heavy price and incurred additional cost of ₹52,25,000/-.

10. After this face saving exercise, it was time to make ATUL feel the heat for the reason that the project could be commissioned after spending a huge sum of ₹1,33,37,008.50p against the anticipated cost of ₹77 lacs. To claim this additional cost which the respondent had to incur just because of the breach committed by the appellant, CS(OS) No. 2080/1993 was filed.

11. In the written statement, the plea taken by ATUL in respect of contract of 03.11.1989 is not that of total denial. Though admitting its execution by Managing Director, its conclusiveness has been challenged on the ground that it was not signed by NRDC. Another plea taken is that even if it is treated to be a 'concluded contract' between ATUL and

NRDC, the back to back contract could not have been executed till execution of contract between UNIDO and NRDC which was signed by UNIDIO in February, 1990 and by NRDC in March, 1990. In the absence of any valid contract between NRDC and ATUL, neither a breach could have been committed nor damages could have been awarded.

12. The issues that arose for determination before learned Single Judge are :-

- ‘1. Whether this Court does not have jurisdiction to try and decide the suit?*
- 2. Whether the plaint is signed and verified by a duly authorized person?*
- 3. Whether the contract signed on behalf of the defendant by its Managing Director and handed over to the plaintiff is not binding on and enforceable against the defendant?*
- 4. Whether after signing of the contract referred to in issue No.3, the plaintiff materially varied and enlarged the scope of work as alleged in paras 8 and 9 of the written statement? If so, what is the effect?*
- 5. Whether the defendant committed breach of its contractual obligations and/or breach of duty of care towards the plaintiff in preparing and submitting budgetary offers?*
- 6. If the finding on issue No.5 is in the affirmative, whether the plaintiff is entitled to recover damages from the defendant for such breach? If so, the quantum thereof?*
- 7. Relief.’*

13. Learned Single Judge holding the Court at Delhi is vested with the territorial jurisdiction to decide the suit and that the suit has been instituted by duly authorized person, concluded that the contract signed on behalf of ATUL by its Managing Director and handed over to NRDC is binding and enforceable against ATUL. While returning finding on issue No.4 that the scope of work was not enlarged as claimed by ATUL and that ATUL had committed breach of its contractual obligation, the suit bearing CS(OS) No.2080/1993 filed by NRDC was decreed for a sum of ₹52.25 lacs with costs and

future interest @ 6% p.a. from the date of filing of the suit till its realisation.

14. The impugned judgment and decree has been challenged by ATUL mainly on the ground that there was no concluded contract between the parties. The back to back contract could have been entered into only after execution of contract between UNIDO and NRDC which was executed on 12.03.1990. The contract dated 03.11.1989 signed by Managing Director of ATUL was only a 'draft agreement' which is clear from the fact that it has not been signed by both the parties. Subsequently, there was another modified agreement signed by NRDC only and not by the appellant. So the agreements remained 'draft agreements' only and contract remained inconclusive. The learned Single Judge could not have awarded the damages on the strength of inconclusive sub-contract especially when the agreement by the principal i.e. NRDC with UNIDO was executed on 12.03.1990.

15. As reflected by us in the proceedings dated 05.03.2012, during hearing, we did not get assistance from learned counsel for the parties, thus opportunity was given to file written submissions.

16. Written submissions have been filed on behalf of the parties. The appellant filed written submissions on issues No.3 to 6. It has been urged that learned Single Judge failed to note that no agreement was executed despite various meetings as parties could not agree to the conditions of the contract. The agreement was signed by the appellant alone and not by the respondent as it was not acceptable to it. During the meetings held on 20.11.1989 and 21.11.1989 in

Vietnam, the draft list of specifications alongwith tender specifications including basic equipment drawings of the equipment list for synthetic dyes and pigments was handed over to Dr.Atal of UNIDO for his study and comments and EEDP stated it was interested in 'powder' and not 'paste'.

17. The grievance of the appellant is that learned Single Judge failed to consider that during the various meetings held from time to time, the consensus could not be arrived at and the agreement did not finalize. The undated draft agreement signed by the respondent and forwarded to the appellant reveal that conditions therein are different from the conditions of the agreement signed by the appellant. It has been urged that the learned Single Judge failed to take into consideration the documents dated 07.11.1989, 20.11.1989, 21.11.1989, 03.05.1990, 03.02.1990, 07.02.1990, 09.03.1990, 12.04.1990, 26.04.1990, 27.04.1990, 08.05.1990, 22.05.1990, 30.05.1990, 31.05.1990, 07.07.1990, 17.07.1990, 27.07.1990, 02.08.1990, 03.08.1990, 12.09.1990, 19.09.1990. These documents make it clear that parties were not ad-idem on the conditions and different draft agreements were prepared but not agreed by both the parties and no agreement was signed and executed by both the parties. Their conduct made it clear that they wanted to proceed only after execution of the agreement and no advance payment was released by the respondent to the appellant. Learned counsel for the appellant has relied upon AIR 1999 SC 504 Rickmers Verwaltung Gimb H. Vs. Indian Oil Corporation Ltd., AIR 1991 Allahabad 343 Satya Prakash Goel Vs. Ram Krishan Mission, AIR 1996 SC 1373 U.P.Rajkiya Nirman Nigam Ltd. Vs. Indure

Pvt. Ltd., AIR 2006 SC 871 Dresser Rand S.A. Vs. M/s Bindal Agro Chem Ltd. & Anr., (1975) 1 SCC 199 The Godhra Electricity Co. Ltd. Vs. The State of Gujarat and Anr. and AIR 1962 SC 366 Murlidhar Chiranjilal Vs. Harish Chandra Dwarkadar, in support of his submissions.

18. The entire controversy revolves around the agreement executed by Sh.S.S.Lalbhai, Managing Director of ATUL and delivered at the office of NRDC. As the appellant is claiming it to be a 'draft agreement', of 03.11.1989 which did not constitute a 'concluded contract' between the parties, we also propose to note only such evidence that would be relevant for discussion on the points raised in the appeal.

19. The respondent while giving sequence of events, supported the impugned judgment contending that respondent was constrained to carry out its contractual obligations towards UNIDO by making expeditious and alternative arrangement and utilized the services of other associates/consultants, namely the Regional Research Laboratory (Jammu) and of the Council for Scientific & Industrial Research in relation to the synthetic dyes and pigments plant. After negotiating the sub-contract in March, 1991, the project commenced and completed on 09.05.1992 in respect of natural dyes plant and on 14.05.1993 in respect of synthetic dyes. Due to breach of contract by the appellant, for completing the project the respondent incurred additional cost of ₹52,25,000/- which has rightly been awarded by learned Single Judge.

20. From the rival pleadings of the parties, it could be gathered that the main disputes are :

- (i) Whether the agreement signed by Sh.S.S.Lalbhai, Managing Director of ATUL and delivered in the office of NRDC at Delhi was a draft/model agreement or a concluded contract;
- (ii) Whether the back to back contract between NRDC and ATUL could be entered into before execution of formal agreement between UNIDO and NRDC;
- (iii) Whether the scope of contract was enlarged by UNIDO and NRDC to such an extent that without revision of the contract, it could not have been executed; and
- (iv) Whether the appellant has committed breach of contract thus making it liable to pay damages under the default clause No.4.07 of the agreement signed by Mr.S.S.Lalbhai, Managing Director of ATUL.

21. The contract signed by Sh.S.S.Lalbhai, Managing Director of ATUL is on a stamp paper purchased on 21.09.1989 running into 23 pages. The heading of the contract is given as :-

*'CONTRACT
between
NATIONAL RESEARCH DEVELOPMENT CORPORATION
and
M/S ATUL PRODUCTS LIMITED
for the
provisions of services relating to the
establishment of pilot plants for the production
of selected synthetic dyestuff and pigments
and selected natural dyes and pigments
in
VIETNAM'*

This contract contains all the details of the project and in this contract, ATUL has referred itself as Sub-Contractor. It further incorporates that NRDC had informed UNIDO about the sub-contractor engaged as associate for implementing the project in Vietnam.

22. On page 2 of the contract, the opening lines are:-

'WHEREAS the SUB CONTRACTOR has expressed his readiness and willingness to provide the services and perform all work as detailed hereinafter.'

23. Clause No.4.01 is material for our purpose and the same is extracted hereunder :-

'4.01 Entry into Effect of the Contract

This Sub Contract shall be deemed to be effective from 3rd November 1989 which was the date of the Contractor's confirming acceptance of the Corporation's award.'

24. It is admitted case of the parties that this contract duly signed by Managing Director of ATUL, was left at the office of NRDC by ATUL in November, 1989 before leaving India to attend the meeting in Vietnam.

25. The disputed point, whether the agreement signed by Mr.S.S.Lalbhai, Managing Director of ATUL and handed over to the respondent was a draft agreement, has been dealt with by learned Single Judge discussing issue No.3 in para 22 to 36 of the impugned judgment. While referring to the communication dated 06.07.1989 and 29.07.1989 alongwith budgetary proposal by the appellant as well as award of the contract by UNIDO to NRDC, acceptance of the award of contract by NRDC, learned Single Judge held that contract stood completed between NRDC and UNIDO. Learned Single Judge, after perusal of the letter, observed that parties were ad-idem as far as execution of contract was concerned. Even appellant's representative attended the meeting in Hanoi, Vietnam on 20th and 21st November, 1989 and minutes were duly signed by Project Incharge Dr.M.K.Jain who also raised the point that chilled water plant was not within the scope of the contract. It was only after the appellant sent duly

executed contract that representative arranged for the air fare, stay of the representative of the appellant and bore the expenses incurred during their visit to Vietnam. The reasoning given by learned Single Judge is that not only the correspondence between the parties which spells out the intent of the parties, it is also the action of the parties as a consequence to this correspondence which makes it abundantly clear that the parties were ad-idem on the question that a contract was concluded between the parties and the project of establishing pilot plants for manufacturing of dyes and pigments was on.

26. Legal position in this regard is well settled. We find it apposite to refer Kollipara Srivamulu Vs. T.Aswathanarayana (Supra), wherein it was held:-

A mere reference in a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed.; The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement. (1857) 6 HLC 238 and (1912) 1 Ch 284 and (1878) 3 AC 1124 and AIR 1933 PC 29 Bel on.

27. Preparation of formal contract was a ritual to be performed in due course but the contract between NRDC and UNIDO concluded on 05.10.1989 when NRDC conveyed its acceptance for this award of contract.

28. The communication exchanged between the parties through letters, telex, meetings, nowhere indicate even remotely that the appellant had ever given the impression explicitly or impliedly that a binding contract would be only on execution of formal written contract between NRDC and UNIDO. In view of the legal position discussed above, the agreement signed by the Managing Director of the appellant company could neither be termed as 'draft agreement' nor as 'model contract'.

29. The existence of conclusive contract between ATUL and NRDC was never in dispute. The minutes of meeting held at ATUL's place on 2nd and 3rd August, 1990 admit this fact as is clear from the portion extracted hereunder:-

"RECORD NOTE OF DISCUSSIONS HELD AT ATUL FROM
AUGUST 2 – 3, 1990

Present:

1. Dr.A.Venkateshwarlu, GM, Atul.
2. Shri A.R.Ranadive, Atul.
3. Shri J.D.Shah, Atul.
4. Shri Rajeshwar Dayal, C.E., NRDC.

1. At the outset, Atul Team informed that they do not have people to spare for going to Vietnam for the erection work and neither they are geared up to take this kind of work. **They desired to know whether NRDC and Atul can come out of the Contract? If not, then matter could be discussed to find a way out to carry on the job.**

2. NRDC informed that the Contract has been obtained **on the basis of the quotation of Atul and the basic contract duly signed by MD, Atul** conveying various financial and technical aspects and with the help of various Government machinery.....

.....
.....

It was pointed out to him that the quotations submitted by NRDC was on the basis of the quotations received from APL

and against a stiff global competition, the orders were procured by NRDC using various channels and, therefore, NRDC has to complete the project as it involves not only the name of NRDC but India as a whole."

30. The above discussion in the meeting lead to only one conclusion that meeting presupposed that there existed a contract between the parties.

31. Now we deal with the contention that back to back contract with Sub-Contractor could not have been executed till execution of formal contract between NRDC and UNIDO which was completed on 12.03.1990. The argument has no legs to stand as the budgetary proposal sent by appellant to UNIDO through NRDC was accepted by UNIDO. The communication in this regard was made to NRDC on 03.10.1989 which is extracted as under :-

*'.....
Pleased to advise that NRDC of INDIA has been approved by UNIDO for award of contract for reference project Part-1 and 2 at a total cost of United States Dollars five hundred and seventy-six thousand five hundred and ten (US\$ 576,510) based on UNIDO Terms of Reference dated 15 March, 1989 and terms of your proposal dated 8 August 1989:*

*.....
.....
Subject to your acceptance of this award and **pending preparation of formal contract, this telex constitutes your full authority to being implementation of a project up to Unites States Dollars five hundred and seventy-six thousand and five hundred and ten (US\$ 576,150)**. You may submit your first invoice on acceptance. Please refer to contract No.89/139/GYL in all future correspondence.'*

32. Its acceptance by NRDC vide communication dated 05.10.1989 cleared confusion, if any, in the mind of sub-contractor about conclusiveness of the negotiation. The contract concluded when acceptance was communicated and dispatched to UNIDO by NRDC on 05.10.1989. The relevant portion of this communication reads as under :-

‘.....

*Thank you for award of contract for setting up pilot plant for production of dyes and pigments in Vietnam at a total cost of US\$ 576,510 in response to our proposal dated 8th August, 1989. **We are glad to accept this award of contract for the above pilot plants. We are initiating action on the implementation of the project.** Our first invoice for the initial payment of US\$ 120,000 would be sent to you shortly. In case you have any specific invoice format, kindly fax the same to us. Please also let us know when the formal contract would be ready for signing.*

Assuring you of our best attention at all times.

With my warmest regards.’

33. We now deal with the reasoning of learned Single Judge that scope of contract was not enlarged. Rather NRDC agreed to bear the cost of chilled water plant during the meeting held on 20.11.1989 and 21.11.1989 in Vietnam.

34. While returning finding on issue No.4, in paras 37 to 44 of the impugned judgment, the learned Single Judge rightly dealt with all the aspects projected as enlargement of scope of contract. After referring that EEDP wanted only in powder form and only when it was to be converted in paste form, that required extra step to be taken. For chilled water plant NRDC agreed to bear the burden. The capacity of plants to be set up, remained the same. The five ton capacity was with respect to chilled water plant, cost of which NRDC agreed to bear. We concur with the reasoning and finding delivered on this aspect by learned Single Judge.

35. We have enough material to sustain the finding of learned Single Judge that ATUL had breached the contract and under the default clause no.4.07, liable to pay the damages suffered by NRDC for getting contractual obligation performed through other agencies paying huge amount of ₹1,33,37,008.50p.

36. While NRDC was taking all steps to release the payment to the appellant on bank guarantee, the project incharge was busy in sending the communication indicative of repudiating the contract. The contents of communication dated 03.02.1990 and 05.02.1990 sent by telex are similar.

"The subject contract in its present form is not acceptable to atul as we notice some serious shortcomings (.). There exists a need for incorporation of certain clauses to make it expedient with the scope of project work envisaged (.). Therefore, please keep the contract papers in abeyance until revisions are incorporated (.)."

It is best that we meet and discuss the issues first hand any date during feb. 5 – 10, 1990 (.). Dr. Bibhas ray of our delhi office will get in touch with you to fix timings for such a meeting (.). Regards."

37. To trace the breaches, we have already extracted the minutes of meeting held at ATUL's place on 2nd and 3rd August, 1990. In the meeting, ATUL desired to know how to come out of the contract.

38. While NRDC was communicating with UNIDO in respect of funds for hot oil unit to be provided by UNDP, the situation at home front was getting from bad to worse, true colours were shown by ATUL. Mr.N.K.Sharma, Managing director of NRDC wrote to the Managing Director of ATUL and we find it relevant to extract the contents of that letter to reflect upon the issue :-

"Dear Shri Lalbhai,

It was a pleasure to have met you during my visit to your plant on 7th and 8th September, 1990.

I explained to you, our deep concern at the delay in signing of the sub-contract agreement between Atul and NRDC. I hope that I have clarified all the points raised by you and your colleagues to your full satisfaction. I am sure that you appreciate our point of view that it is not possible to agree to any major revisions in the sub-contract agreement. However,

we would definitely consider some of the minor points which you had raised. I shall be grateful if you could fax the revised agreement as was indicated by you, by 11th September, 1990".

39. The response of ATUL was in the form of communication dated 12.09.1990 Ex.PW3/B sending the revised contract. The reaction on the revised contract sent by ATUL can be gathered from another letter dated 19.09.1990 by Mr.N.K.Sharma, Managing Director of NRDC to Sh.S.S.Lalbhai, Managing Director of ATUL. Paras 1 and 2 of first page and contents on page 3 of the letter make the situation clear. The relevant portion of the letter is as under :-

'Dear Shri Lalbhai,

Sub : Pilot Plants for Natural & Synthetic dyes at Vietnam under UNIDO Project.

I was utterly dismayed on going through the revised draft contract in respect of the above project sent by your Dr.Venkateshwarlu, General Manager on 12th September 1990. This does not reflect the discussions that we had during my visit to Atul on September, 7 & 8, 1990.

We would once again like to reiterate that it is highly improper for Atul to go back on the commitments made earlier to the Corporation vide your offer dated 29th July 1989, on the basis of which NRDC had quoted to UNIDO and later signed the contract.

.....

.....

May I also draw your attention to Clause 4.07, "Default by the Sub-Contractor" in the sub-contract agreement, signed by you, which clearly specifies that the "sub-contractor shall be solely responsible for any reasonable costs of completion, including such costs which are incurred by the Corporation over and above the originally agreed Contract price stipulated hereinbefore." We therefore, propose to proceed with the project on our own, with or without other suitable sub-contractors at your risk and cost without any further reference to you. This letter may be treated as a notice of default under Clause 4.07 of the sub-contract.

While we are initiating legal action against your company both for damages and for failure to perform as per commitment made, I would implore you once again to reconsider the matter and to respond positively by 30th September, 1990, failing

which we will presume that M/s. Atul does not wish to abide by the commitments made regarding this sub-contract.

This letter is issued without prejudice to our rights and claims in law.

With my kind regards.'

40. The minutes of the meeting held at ATUL's place on 2nd and 3rd August, 1990 are admitted documents. The relevant portion of the discussion of Mr.Rajeshwar Dayal, Chief Engineer with Mr.S.S.Lalbhai is extracted as under :-

"The undersigned again met Shri Sunil Lalbhai after the discussions were over on 3rd August, 1990, when he was informed that since Atul desires drastic changes in the basic points on which our quotation to UNIDO was based. NRDC is not able to accept either the suggestion that it should find out a Sub-Contractor for procurement of the equipment and erection at Vietnam nor the escalation in the equipment cost or giving total export benefits to Atul, as all these points were the basis of the initial agreement between Atul and NRDC, which was signed by Shri Sunil Lalbhai.

After a brief discussion, Shri Sunil Lalbhai said that he would try to contact Dr.M.K.Jain, who is no longer in their service, but may like to work for Atul to complete this project and he would talk to NRDC by 7th August, 1990 after discussing with Dr.M.K.Jain. He also said that Atul would go ahead with this project irrespective of whether there is loss or profit.'

41. The response of the appellant was in the form of communication dated 01.10.1990 repudiating the contract. When Atul backed out of the contract despite being put to notice and attention being drawn to default liability, the respondent had no option but to get the project completed through other agencies which NRDC could ultimately achieve. The alternative arrangement had to be made by NRDC on war footing under tremendous pressure from UNIDO and UNDP as can be inferred from the communication Ex.PW2/31

to 35 between UNIDO and NRDC. The learned Single judge has rightly awarded the damages to the tune of ₹52.25 lacs which was the amount actually spent over and above ₹77 lacs quoted by ATUL. There is no illegality or infirmity in the impugned judgment. Resultantly, the appeal fails.

42. Before bringing down the curtain on issues, we need to note that change of Project Incharge at the crucial stage by ATUL was one of the major factor for non-performance of the contract. It not only spelled financial doom but also loss of face and credibility at national and international level.

43. We are at pain to note that during the meeting dated 2nd and 3rd August, 1990 at ATUL's place, Sh.S.S.Lalbhai, Managing Director of ATUL assured to contact Dr.M.K.Jain, the earlier Project Incharge who had left the company by that time, to revive the ties and get the project completed but failed to honour the commitment. The positive attitude of Dr.M.K.Jain, earlier Project Incharge, who had already left ATUL, but expressed willingness to get the project completed has been referred in the minutes of meeting and extracted here :-

'The undersigned (Mr.Rajeshwar Dayal) met Dr.M.K.Jain at Bombay and discussed the matter in details with him. Dr.Jain said that he views the Vietnam project as his personal commitment and is prepared to complete the job as a Consultant to NRDC and he shall be able to get all the works done and hand over the plant to Vietnamese authorities.'

44. The proposal by UNIDO from NRDC was invited vide communication dated 16.05.1989. There is communication dated 06.07.1989 by ATUL, a company based in Gujarat, referring their undated discussion and the proposal. It is not the case of NRDC that any notice inviting tender was published or made public through any mode. Who was the

link behind this undated discussion prior to sending proposal dated 06 July, 1989 from ATUL, remains unidentified.

45. It appears that ATUL, after having the contract from UNIDO served in a platter through its link, resorted to arm twisting to maximize the profit as there was no competitor in sight. This can be gathered from the various letters exchanged between the parties. Till Dr.M.K.Jain remained the Project Incharge, representative of ATUL were making rounds of NRDC to discuss the issues. But when Dr.A.Venkateshwarlu, General Manager (R&D) was made the Project Incharge, he started throwing bouncers to NRDC through communications to either revise the contract on their dictate or call it off. The situation became so ugly that the Managing Director and Chief Engineer of NRDC had to pay 'Courtesy Visit' and hold meetings at ATUL's place to somehow make them agreeable to perform. Record reveals that there was no 'Due Diligence' exercise by NRDC to assess the capability and track record of ATUL prior to handing over the project of such magnitude and national importance. The tall claims made by ATUL were taken on their face value resulting in such disastrous situation that cost of the project became secondary and saving face at international forum became primary.

46. Noting as above, the appeal is hereby dismissed with cost.

PRATIBHA RANI, J.

PRADEEP NANDRAJOG, J.

March 21, 2012

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