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**(2006) 05 DEL CK 0130**  
**In the Delhi High Court**  
**Case No : CS (OS) No. 446-A of 2005**

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|---------------------------|----|------------|
| Union of India (UOI)      | Vs | APPELLANT  |
| Daisy Trading Corporation |    | RESPONDENT |

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**Date of Decision :** 12-05-2006

**Acts Referred:**

Arbitration Act, 1940 — Section 30, 33

**Citation :** (2006) 130 DLT 471 : (2006) 89 DRJ 24

**Hon'ble Judges :** Sanjay Kishan Kaul, J

**Bench :** Single Bench

**Advocate :** Jaswinder Singh, for the Appellant; Rajesh Banati, for the Respondent

**Final Decision :** Allowed

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## Judgement

Sanjay Kishan Kaul, J.

IA.No.3574/2005 (under Sections 30 and 33 of the Arbitration Act, 1940)

1. The respondent was awarded contract for supply of tents and the petitioner carried out the risk purchase at the cost of the respondent and recovered the amount by adjusting the same against amount due to the respondent from other contracts. This gave rise to dispute between the parties and in view of the existence of the arbitration clause between the parties, the matter was referred to the Sole Arbitrator Shri Ram Bahadur. Shri Ram Bahadur rendered an ex parte award which was set aside by this Court by an Order dated 18.10.2001, remitting the matter for reconsideration. Thereafter Shri Brijendra Singh Meena, Additional Legal Adviser of the Government of India was appointed as the Sole Arbitrator by the Director General of Supplies and Disposals. Shri Meena entered upon a reference and made and published the award dated 28.12.2004 upholding right of the petitioner to recover the amount of risk purchase and rejecting the counter claim of the respondent.

2. Learned counsel for the respondent conscious of the limitations of the powers

of this Court under Sections 30 and 33 of the Arbitration Act, 1940 (hereinafter referred as "the said Act"), confines the submissions to the error apparent on the face of the record on account of non-consideration of the plea of the respondent absence of reasons and the award being contrary to law.

3. Learned counsel for the respondent has drawn the attention of this Court to the counter statement of facts to point out the pleas raised by the respondent. The dispute apparently starts from the stage when the respondent having submitted one sample as per specification for approval from the inspector as per the terms of the contract, received a response after about one month whereby the inspecting authority intimated the respondent that the detailed procedure for inspection will be intimated on hearing from the authority at Jabalpur and trial samples would be inspected after formulating the inspection procedure/parameters. It may be noticed that the supplies had to be made within five months of the approval of the samples. The respondent approached the Chief Inspector of Vehicles, Jabalpur soon thereafter. On 23.3.1988 the respondent received a communication from the Senior Quality Assurance Officer, Mumbai, informing them to get their capacity to manufacture cover waterproof assessed from them. The contention of the respondent was that this was totally de hors the contract since if the capacity of the respondent had to be assessed, the same should have been done prior to entering into contract and at least no provision was made in the contract for such assessment of capacity. On a protest from the respondent the petitioner thereafter informed that instructions had been issued to the concerned authority to accept the tested advance sample and that the delivery period would be re-fixed after the approval of advance sample. Thus according to the respondent the petitioner by their own conduct showed that time was not essence of the agreement and that the breach was committed by the petitioner.

4. The matter did not rest at this since the terms and conditions of contract were sought to be amended as per the plea of the respondent in terms of the letter of the petitioner dated 28.4.1988. The petitioner is stated to have issued a letter dated 9.6.1988 being another amendment letter making approval of two advance samples as a condition precedent to the commencement of bulk manufacture. This was again stated to be a variation of the original terms of the contract and the respondent did not agree to the same. The respondent made a representation dated 2.8.1988 pointing out alleged breaches of the petitioner and stating that they treated acceptance of contract as cancelled without financial repercussion on either side.

5. The aforesaid facts have been set out to show that the controversy which had arisen before the arbitrator was whether the petitioner had sought to vary the original terms and conditions of the contract which would entitle the respondent to close the contract. In case the arbitrator found in favor of the petitioner the next question to be examined was whether the risk purchase had been carried out by the petitioner validly or not.

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.

9. It has been noticed above that there is not only absence of reasons but legal infirmity in the approach of the arbitrator. The arbitrator has misconducted himself in law by not appreciating and considering the legal pleas advanced by the respondent. The arbitrator ought to have proceeded to first consider the aspect of whether the petitioner had changed the terms and conditions of the original contract and if a finding had been arrived at in favor of the petitioner, thereafter proceeded to determine whether the risk purchase was carried out in accordance with law. The arbitrator has failed to do all these things.

10. It must be noticed that this is the second round of litigation in this behalf being a second award which is now being set aside. The disputes are referred to Legal Officers in the Department who proceeded to make award without any reason and contrary to law. An arbitrator is not required to write a Judgment like a Judge but certainly the pleas are required to be considered and thought process of the arbitrator must be disclosed. All these aspects are absent in the present case. The amount is being detained by the petitioner and thus it is the respondent who is suffering loss on account thereof. The matter has now dragged on from 1988 till now for almost 18 years.

11. I am of the considered view that this is a fit case where an arbitrator be

appointed by this Court to enter upon reference and to adjudicate upon the disputes of the parties, so that a proper award is rendered and the parties know the fate of their respective pleas.

12. Learned counsel for the parties state that the matter is only to be finally heard on the basis of the material already placed on record by the parties and the matter will not take more than 2 to 3 hearings. It is agreed that Justice R.C.Chopra (Retd.) be appointed as the Sole arbitrator to adjudicate upon the dispute between the parties. In view of the limited nature of dispute the fee of the arbitrator is fixed at Rs. 50,000/- to be shared equally between both the parties.

13. The application is accordingly allowed and the award is set aside and the matter is remitted for fresh adjudication by the new arbitrator in terms thereof. The suit stands disposed of.

14. The parties to appear before the Arbitrator on 3.6.2006 at 11:00 a.m.

15. The arbitral record be collected by learned Counsel for the petitioner and handed over to the new arbitrator.

16. A copy of the Order be sent expeditiously by the Registry to the Arbitrator well before the next date of hearing.

17. dusty to learned Counsel for the parties.