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

**Date of Decision: 18<sup>th</sup> February, 2022**

+ **O.M.P. (COMM) 60/2022 & I.As. 922-924/2022**

UNION OF INDIA AND OTHERS ..... Petitioners

Through: Ms. Monika Arora, CGSC.

versus

AHAAR CONSUMER PRODUCTS PVT LTD ..... Respondent

Through: Mr. Peeyoosh Kalra, Mr. Garvil Singh  
and Mr. Rohan Joshua Kapoor,  
Advocates.

**CORAM:  
HON'BLE MR. JUSTICE SANJEEV NARULA**

**JUDGMENT**

**[VIA VIDEO CONFERENCING]**

**SANJEEV NARULA, J. (Oral):**

**I.A. 923/2022 (seeking exemption for filing certified copies of the orders/  
documents and for filing dim and illegible documents)**

1. Exemption is granted, subject to all just exceptions.
2. The Petitioner shall file better copies of exempted documents, compliant with practice rules, before the next date of hearing.
3. Accordingly, the application stands disposed of.

**I.A. 924/2022 (for condonation of delay of around 57 days in refiling the  
petition)**

4. For the grounds and reasons stated there in, the application is allowed and delay in refiling the petition is condoned.
5. The application is disposed of.

**O.M.P. (COMM) 60/2022 & I.A. 922/2022 (for stay of Award)**

6. The present petition under Section 34 of the Arbitration and Conciliation Act, 1996 [*hereinafter*, “**the Act**”] is directed against the Award dated 26<sup>th</sup> June, 2021 passed by the learned Sole Arbitrator, whereby claims of the Petitioner (Respondent at arbitration) stood rejected and the claims of the Respondent (Claimant therein) were allowed in part to the extent of Rs. 2,78,96,798/- along with interest thereon.

**FACTS**

7. The Respondent *viz.* Ahaar Consumer Products Pvt. Ltd. [*hereinafter*, “**AHAAR**”], registered with Ministry of Defence, Union of India [*hereinafter*, *the “UoI”*] secured a contract through open tender for the supply of ‘Wheat Atta Whole Meal, Sujji, Maida and Dalia’ for 21 Sup Depots in Northern Command Zone for the financial years 2011-12 and 2012-13 [*hereinafter*, “**Agreement**”]. The scheduled quantity and value was different for each depot, due to its location & difficult reach.

**DISPUTE**

8. As per AHAAR, quantities as ordered, stood supplied. However, it is stated that the complete payment was not made. UoI controverts and contends that AHAAR failed to supply the food items on several occasions, and

consequently, local purchase(s) had to be undertaken by various supply depots, once in the year 2011-12 and 12 times in the year 2012-13 at their risk & expense.

AHAAR invoked arbitration, leading to the appointment of the Arbitral Tribunal on 7<sup>th</sup> October, 2018.

### AT ARBITRATION

9. At Arbitration, AHAAR made a claim of Rs. 6,69,01,680.90/- along with interest payable at 11% per annum from 1<sup>st</sup> April, 2013 amounting to Rs. 10,16,47,787/-. UoI, on the other hand, defended the claim and made a counter-claim for an amount of Rs. 1,31,01,201.28/-.

10. The parties led evidence, and on consideration thereof, the learned Arbitrator allowed the claims of AHAAR in part, and rejected the counter-claims of the UoI. Aggrieved with the award, UoI has filed the instant petition.

### CONTENTIONS ADVANCED

#### ON BEHALF OF UOI

11. Ms. Monika Arora, Central Government Standing Counsel, submits that the learned Arbitrator failed to take into consideration the documents and evidence placed on record during arbitration – which establish the counter-claim of the UOI. She submits that AHAAR did not make the complete supplies of the ordered goods and that the total payment made for the stock received on 2011-13 were as follows:

***“2(b) Total payment made for stocks received 2011- 2013:***

(i)	Total received stocks from AHAAR (value )	Rs 863867419.15
(ii)	Amount Paid by unit (95/ 100%)	Rs 809183857.00
(iii)	Amount paid Through CDA (5%)	Rs 26786764.17
(iv)	Total Amount Paid (Respondent Claims	Rs 83,59,70621.17
(v)	Balance Amount to be paid claimant (withheld due to recovery owing to Risk & Expense purchase)	Rs 2.78,96,797.98”

12. Ms. Arora submits that since there was a shortfall in supplies, UoI was entitled to take recourse to the contractual stipulation – apropos the condition of risk and expense. She explains that the requirement for procuring such food items was urgent since it was for consumption of the defence forces. Since there was a shortfall, UoI was compelled to procure the deficient quantity from the open market – at a price higher than the agreed price. Hence, UoI is entitled to recover the amount expended on risk and expense. Besides, Ms. Arora submits that UoI is also entitled to liquidated damages, due to delayed delivery of supplies for the years 2011-12 and 2012-13. The details of the risk and expense and liquidated damages incurred by UoI are as follows:

**“3. Details of risk and expense (R&E) against M/s Ahaar 2011-2012 & 2012-2013**

Quantity Purchased for Risk and Expense	Amount Expended on Risk and Expense	Actual rate of items as per contract rate	Over and above contract value (Recoverable from Claimant)
5619.789 MT	Rs 13,61,22,673.50	Rs 9,52,21,361.28	Rs 4,09,01,312.22

**Details of Liquidated Damage (LD) due to delayed delivery against M/s Ahaar 2011 -2012 & 2012-2013**

Amount Receive in 2011-2012	Amount Receive in 2012 -2013	Total Amount (Recoverable from claimant)
Rs 67,325	Rs 29,362	Rs 96,687”

13. Relying upon the afore-noted tabulation, Ms. Arora emphasises that UoI is entitled to recovery of the risk and expense as well as liquidated damages amounting to Rs. 4,09,97,999.22/- (Rs. 4,09,01,312.22/- plus Rs. 96,687/-). She submits that this amount is liable to be set-off against the amount payable to AHAAR against the supplied quantity, and therefore, UoI is entitled to recover the net amount of Rs. 1,31,01,201.28/- (Rs. 4,09,97,999.22/- minus Rs. 2,78,96,797.98/-).

14. Ms. Arora also argues that the grievance of UOI is *qua* the findings rendered in paragraphs no. 89, 90 and 91 of the Award, whereby the claim of AHAAR was allowed, completely ignoring the material produced in arbitration. She explains that the procurement of the local purchase of the food items, at the risk and expense of AHAAR, was duly proved by way of affidavits *viz.* Ex. RW 1/II, Ex. RW 2 /II and Ex RW 3/II. She also places reliance upon warning letters issued by UOI to AHAAR for irregular and deficient supply. The statement of defence, the affidavits and documents placed on record clearly prove that the procurement was at the risk and cost of AHAAR, duly scrutinised by PCDA, Jammu. It is contended that the evidence was not appreciated by the learned Arbitrator. The procurement process, she explains, is through a Board of Officers and sanctioned through concerned Station Commander, prior to such procurement – all of which were meticulously followed. The risk and expense procurement thus, is in consonance with the terms of the Agreement and the resultant loss is liable to be compensated by AHAAR.

ON BEHALF OF AHAAR

15. Mr. Peeyoosh Kalra, counsel for AAHAR, defends the impugned Award and submits that UOI failed to prove its counter-claim before the Arbitral Tribunal, and thus, the findings of the learned Arbitrator warrant no interference. Mr. Kalra submits that the warning letters relied upon by UOI, were never referred to or proved in arbitration, rather, reliance was placed only upon certain tabulations and charts prepared by UOI – which, according to law, is no proof of the counter-claim. It is submitted that UOI was required to establish and prove, with cogent material and evidence, that procurement under the risk and expense clause was done in accordance with the terms of the Agreement. The learned Arbitrator analysed the material placed before her, however, did not find the stance of UOI to be credible. It is well-settled in law that the quality and quantity of evidence falls in the exclusive domain of Arbitrator and re-appreciation of the evidence is impermissible in the present proceedings. Mr. Kalra also submits that if UOI was indeed compelled to resort to the risk and expense clause, the same had to be done strictly in accordance with the terms of the Agreement, and the same cannot be at variance.

ANALYSIS

16. The Court has considered the contentions advanced by the counsel. Concededly, UOI has not made the entire payment to AHAAR for the quantity and stock supplied by them. The amount outstanding in respect thereof, is not in controversy – as UOI admits that there is a balance amount due in lieu of the quantities received. The defence of UOI is founded on adjustment, which is premised on the risk and expense clause and liquidated damages. The onus

thus, lay upon UOI, to prove its counter-claims. Therefore, before taking note of the findings of the learned Arbitrator, it would be apposite to take note of the clause in the Agreement *qua* risk and expense, which reads as follows:

*“5. Risk end expense clause*

*a. The officer to whom supplies of wheat atta whole meal/ Dalia /Suji / Flour are to be delivered, (in the contract re/erred to as the officer operating the contract, which expression shall include his duly authorized representative) may reject the supplies whole or in part if in his opinion they are not, in all respects, in accordance with the contract and Defence Food Specifications as applicable.*

*b. Seller shall not charge or be paid for supplies rejected as per provisions contained therein, and such supplies shall be removed by seller at his own expense.*

*c. xxxxxxxx*

*d. xxxxxxxx*

*e. xxxxxxxx*

*f. In the event of:*

*(i) Rejection of supplies of Wheal Atta Whole Meal / Dalia / Suji / Flour, as described above, or on account of seller' s failing, declining, neglecting or delaying to comply with any demand or requisition or otherwise not executing the same in accordance with the terms of the contract , the officer operating the contract or his successor in office shall be at liberty (without prejudice to any other remedy the Government may have on account of any claim or compensation against loss and inconvenience caused by such breach or non-performance of the contract) to purchase or to procure or to arrange from Govt. stocks or otherwise, at seller's risk and expense, such supplies / services as may have been rejected or that seller may have failed, declined, neglected or delayed to supply, or such authorized substitutes thereof as specified and approved by the officer operating the contract or his successor in office and any excess cost so incurred over the contract price (together with all incidental charges and expenses) incurred in purchasing, procuring or arranging for such supplies / services or their authorized substitutes and in case where issues in replacement are made from Government stocks or supplies , the cost or value of such stocks or supplies (together with all incidental charges or expenses) shall be recoverable from seller on demand.*

*(ii) Extra expenditure on account of risk, and expense purchase made by the Government as above, will be deducted out of seller' s 100% payment of bills ex-Supply Depot / PCDA, due to seller or from the performance security deposit as the case may be pertaining to the said contract. In the event of any dispute of reasonableness of the accrual amount recovered from seller it will only be resolved at seller / buyer instance under arbitration / settlement of disputes clause in this contract.*

*(g) xxxxxxxx.”*

17. The entire case of UOI is centred around the afore-noted clause, and

therefore, it would be appropriate to note the pleadings in the counter-claim. Therein, apart from referring to the afore-noted clause of the Agreement, no mention is made as to how UOI is entitled to the counter-claims. The counter-claim only gives a summary of the supply made by AHAAR and the payment and liabilities thereof, but gives no factual basis. There is no foundation as to how the procurement carried out by them, ostensibly under the risk and expense of AHAAR – falls within terms of above-extracted clauses. The learned Arbitrator has taken note of the contractual clauses and the evidence produced by the parties, but found no co-relation. The opinion expressed by the learned Arbitrator reads as follows:

*“84. As could be seen Ex. RW1/II, Ex. RW 2/II and Ex. RW3/II are the three documents which are filed by the Respondent No. 2 to establish the amount spent towards local purchase and the amounts to be recovered from the Claimant under risk and expense clause. **In the cross-examination all the three witnesses stated that they are not concerned with the actual supplies made under the risk purchase. They were not aware of the details of the stocks available at the relevant point of time and the alleged failure of the Claimant to make the required supplies. They could not even give the details from where the local purchases were made and whether the quotations were called from different traders before resorting to local purchase. To the specific queries made during the cross examination the witnesses stated that they were not looking after the food purchases for the Army and that their job profile pertains to placing the demand for supply of material and preparation of documents relating to payment.** It is also stated that the demand for supply of material used to be placed as per the instructions received from the Senior Officers, **They were also not aware of the storage capacity of the godowns at the respective Supply Depots for storing atta so as to show there was shortage of the commodity. More particularly, all the witnesses stated that they did not have any role to look into supply of atta either during the contract period or as of today.** It was also added that the local purchases are made by Board of Officers and that they are not involved in the said exercise. Though it was stated that the decision of Board of Officers with regard to making a local purchase is duly documented, no such document has been exhibited before this Tribunal. Similarly with*

regard to die market survey required to be done before making the local purchases there is no document. No other witness who actually dealt with the local purchases has been examined. **It is also relevant to note that the quality of the wheat atta required to be supplied under the contract shall correspond to the food specification No. 5C - 5D. Self Certificate shall be provided by the Claimant on each date of supply as per the format enclosed to the contract. The delivered supplies shall be subject to random inspections and approval by the MG ASC Northern Command or Contract Operator Officer concerned or other Officers as mentioned in Clause 9 of Part - IV. Clause 5 (f) of Part - IV further shows that the Respondent No. 2 is at liberty to make local purchases invoking risk and expense clause from Government stocks or otherwise or such authorized substitutes thereof as specified and approved by the officer operating the contract.** The Officer operating the contract has not been examined nor there is any evidence to show that an attempt has been made in the first instance to procure from Government stocks. **There is also no evidence to show that the stock allegedly purchased under risk and expense clause was of the same standards as was prescribed under the contract with the Claimant.**

85. In the light of the terms and conditions of the Contract, it appears to me that the **Respondent No. 2 cannot make any deduction under the risk and expense clause from the Claimant as a matter of Course. In my considered opinion, it is necessary for the Respondent No. 2 to establish by producing acceptable evidence to show that the local purchase under risk and expense clause was made under the compelling circumstances specified in the contract and more particularly there was failure on the part of the Claimant to make supply as per demand.**

86. xxx.....xxx.....xxx

87. xxx.....xxx.....xxx

88. **It is clear from the above, that there is lot of variance in the figures pleaded in the Statement of Defence and the evidence and the figures ultimately put forth by the Id. Counsel for the Respondents in the arguments. None of the above figures tally with Ex. RW1/II, Ex. RW2/II and Ex. RW3/II. It is noticed that even Ex. RW1/II, Ex. RW2/II and Ex. RW3/II are summary sheets and tables prepared at the office of the Respondent No. 2 which are not authenticated by any authority.** No other document could be produced by the Respondents showing the actual amounts allegedly spent towards local purchase invoking the risk and expense clause.

89. There is also no material to show that there was a breach on the

*part of the Claimant of the terms and clauses of the contract in making the supplies which compelled the Respondent No. 2 to opt for local purchases. There is also no evidence to show that the Respondent No. 2 had taken all reasonable steps for the mitigation of the loss allegedly resulted on account of local purchases.*

*90. For the aforesaid reasons, I am of the view that the Respondents have miserably failed to establish the amounts allegedly spent towards the local purchases under risk and expense clause. As pointed above, even the figures in the Statement of Defence and the documents produced do not tally which gives rise to a serious doubt about the authenticity of the claim made by the Respondent No. 2 invoking risk and expense clause.”*

[Emphasis Supplied]

18. The afore-said extract clearly elucidates the reasoning of the learned Arbitrator in rejecting the plea of UOI. The learned Arbitrator takes note of several discrepancies in the statements of the three witnesses produced by UOI, wherein they stated that they were not concerned with the actual supplies made under the risk and purchase clause, and moreover, no other witness were examined on this issue. The quality of evidence produced in arbitration was found to be improbable and unbelievable. That apart, the learned Arbitrator has interpreted the terms and conditions of the Agreement – in holding that UoI cannot make any deduction under the risk and expense clause from the AHAAR as a matter of Course. This interpretation of the terms of the Agreement, which fell within the domain of the Arbitrator, is found to be reasonable and in consonance with the contractual stipulation and no ground is shown to set-aside the same. Thus, it emerges that the pleadings in the counter-claim were flimsy and insubstantial UOI failed to prove its claim in arbitration as the evidence produced did not substantiate the counter-claim. The Court, therefore, does not find any infirmity in the view taken by the learned Arbitrator, apart from the fact that it is purely a factual determination,

rendered on the basis of evidence produced in arbitration, re-appreciation whereof is beyond the scope of interference under Section 34 of the Act.

19. Besides, if the Court were to analyse the risk and expense clause as extracted above, it can easily be noted that the same prescribes for a detailed procedure. Before taking recourse to the same, it was fundamental to ascertain whether the demand raised by UOI was within the scope of the contractual average quantity agreed to be supplied per month. It was, imperative for UOI to show: the stock holding capacity and rotational stock quantity maintained at each depot; details of stocks available at the depot when the demand was raised; whether the quantity demanded was actually required at the depot and if there was a genuine need of the same; documents showing the availability of stock, as against the demand raised etc. However, UOI has made no effort to prove its case or attempt to justify its recourse under risk and expense clause.

20. It may also be relevant to state that along with their statement of defence, UOI had placed copies of some warning letters, which are relied upon by Ms. Arora during the course of arguments; however, such letters and summary sheets alone are not sufficient to prove this claim and UOI ought to have produced cogent evidence to justify risk and purchase claim. In absence of fulfilment of the parameters as contemplated in the Agreement, the risk and purchase claim cannot sustain.

21. Therefore, the view taken by the learned Arbitrator does not call for any interference.

22. In view of the above, the present petition stands dismissed along with the pending application.

**SANJEEV NARULA, J**

**FEBRUARY 18, 2022**

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*(corrected and released on 05<sup>th</sup> March, 2022)*

HIGH COURT OF DELHI



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