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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment Reserved on : 27th February, 2012*
Judgment Pronounced on: 14th March, 2012

+ FAO(OS) 325/2000

KEI INDUSTRIES LTD. Appellant
Represented by: Mr.B.Mohan, Advocate and
Mr.S.K.Jain, Advocate.

versus

D.V.B. (SINCE RENAMED 'DELHI POWER SUPPLY COMPANY')
& ORS. Respondents
Represented by: Mr. Jayant Nath, Senior Advocate
instructed by Mr. B.C. Pandey and
Mr. Udit Gupta, Advocates.

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

PRADEEP NANDRAJOG, J.

1. The agreement between the parties having an arbitration clause, claim raised by the appellant and counter-claim by the erstwhile Delhi Vidyut Board was referred to an arbitral tribunal consisting of three members and the claim of the appellant was in sum of ₹2,06,10,961.64. As per the appellant a contract concluded between the parties on August 10, 1993 when appellant's offer as per Notice Inviting Tender was accepted. The appellant was to supply 760 km cable within the period

prescribed under the contract. It was pleaded by the appellant that it could not commence the supply of cables within the prescribed period on account of delay on part of respondent No.1 in approving the cables to be supplied. It was further pleaded that payment had to be secured by opening a Letter of Credit which was not opened in spite of the appellant writing a letter on January 13, 1994 requiring an irrevocable Letter of Credit to be opened. It was the case of the appellant that thereafter till January 09, 1995 it sent 32 reminders on the subject and in spite of the respondent not opening a letter of credit in its favour, the appellant supplied 7 lots of cables on 27.01.1994, 24.06.1994, 08.07.1994, 19.07.1994 and 08.08.1994. Since a letter of credit was not opened till August 08, 1994, it was constrained to suspend further supply. That thereafter, vide letter dated November 01, 1995 the respondent illegally cancelled the contract between the parties and sought to encash the 3 bank guarantees which were furnished by the appellant to secure the performance of the contract. Subsequent thereto, the appellant filed an application under Section 41 of Arbitration Act, 1940 before a learned Single Judge of this Court seeking injunction to restrain the respondent from encashing the bank guarantees, which application was dismissed on August 07, 1995 and thus the bank guarantees were encashed. The appellant claimed a sum of ₹2,06,10,901.64 together with interest @19.75% per annum under following heads from the respondent:-

<i>Claim No.</i>	<i>Particulars</i>	<i>Amount</i>
1.	Refund of advance adjusted from running bills together	₹8,62,104.78 (principal) +

	with interest @19.75% per annum	₹83,033.68 (interest) = ₹9,45,138.46
2.	Refund of amount of 3 bank guarantees encashed by DESU together with interest @19.75% p.a.	₹53,13,996/- (principal) + ₹5,11,817/- (interest) = ₹58,25,813.88
3.	Loss of profit on account of breach of contract by DESU together with interest @19.75 % p.a.	₹34,74,659/- (principal) + ₹4,62,510.43 (interest) = ₹39,37,169.43
4.	Increase in price of cables on account of delay in commencement of supply caused by DESU together with interest @ 19.75% p.a.	₹30,799.79/- (principal) + ₹6,749.58 (interest) = ₹37,549.37
5.	Refund of deduction made by DESU in the bills raised by the appellant together with interest @19.75 % p.a.	₹8,92,205.71 (principal) + ₹2,13,810/- (interest) = ₹11,06,015.71
6.	Interest @21.75% p.a. on the delayed payment made by DESU	₹5,81,141.09
7.	Payment of 5% of ex-works value of the supplies made by the appellant together with interest @ 19.75% p.a.	₹4,31,008.04 (principal) + ₹97,553.06 = ₹5,28,561.10
8.	Compensation on account of breach of contract by DESU together with interest @ 19.75% p.a.	₹10,96,929.60 (principal) + ₹1,04,782.75 (interest) = ₹12,01,712.35
9.	Loss on account of overheads in maintenance of labour, staff, travelling and other staff caused due to breach of contract by DESU	₹60,52,583/-

10.	Loss of reputation on account of breach of contract by DESU	₹5,00,000/-
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2. Being relevant for our decision, pleadings in paras 11, 13 and 14 of the Claim Petition filed by the appellant need to be noted. They read as under:-

“11. Under para 7.1 (iii) of the Award, which forms a part of the Contract Agreement, eighty five percent of the ex works price shall be paid through irrevocable Letter of Credit on presentation of the Material Dispatch Clearance Certificate (MDCC) by the purchaser, amongst other documents. On January 14, 1994 Respondent consultant under the Contract Agreement, NTPC, issued to the Claimant the MDCC for the first lot of the ten kilometers of control cables. On January 13, 1994 the Claimant had already written to Respondent for establishing a letter of credit as per para 7 of the Award clause since a small scale industry must cover the risk of its production investment for a client. However, Respondent gave the MDCC for its Bawana sub-station on January 27, 1993 without opening any letter of credit. Thirty two reminders were given to Respondent from January 13, 1994 to January 9, 1995 without Respondent complying with the contract terms to open a letter of credit. Meanwhile the Claimant dispatched seven lot of control cables duly inspected by Respondent against the MDCCs issued on January 27, June 24, July 8, July 19 and August 8, 1994 for Respondent Bawana and Bamnauli sub stations. The lots have been signed as duly received at these stations by Respondent as shown by the Joint Verification Report.

....

13. After duly compliance as mentioned above, the Claimant was entitled for the release of 5% advance payment, however, by letter dated 19.2.1994 the Respondent wrote that the “request for L.C. opening will be put up separately later on as we are not in a position to open L.C.s” The Claimant had already

made the request to the Respondent for opening the L.C. as far back as 13.1.1994. The Claimant had to remain content with a note of the financial advisor and chief Accounts Officer on the letter stating that "if L.C. can not be open then payment for supplies may be made within a week of submission of bill to accounts." By a letter dt. 14.9.1994 the Claimant again wrote to the Respondent that without the letter of credit, the Claimant as a small scale industries was facing serious problems on account of non payment of the lots already supplied. The Asstt. General Manager (Tech. Development) of the Respondent noted on the letter accepting that no L.C. have been opened and so direct payment may be made on a priority basis. Even after this no L.C. was opened.

14. By a another letter dt. 19.9.1994 the Claimant requested the Respondent for release of payment as no L.C. has been open by Respondent. On this letter the financial advisor and Chief Accounts Officer of Respondent noted that "if the terms of payment is against L.C. being 400 KV project payment may be made on priority after receipt of planned funds for second quarter.".....By a letter dt. 20.8.1994 the Claimant wrote to the Respondent that as small scale industry, without the Respondent having opened an L.C., it was causing financial strain effecting supplies and that the Respondent was also not lifting the material already inspected by it. Similar letters were written by the Claimant addressed to the Respondent on 19.12.94, 9.1.1995 and ent. As late as 19.9.94 the Respondent had been assuring that the letter of credit will be established. Even on 19.12.94, 9.1.95 and 10.4.95 the Claimant repeated for establishing the letter of credit for supplies...." (*Emphasis Supplied*)

3. In the reply filed by the respondent it was pleaded that the term of the contract obliging the respondent to open a Letter of Credit was waived and that the delay in supplying cables was that of the appellant primarily due to finalization of the drawings pertaining to the cables, default whereof was that of the

appellant. It was pleaded that appellant supplied 25% of the contracted quantity and that to beyond the period prescribed, thereby compelling the respondent to terminate the contract. Being relevant for our decision, averments in para 5 and 11 of the reply filed needs to be noted. They read as under:-

“5. That the contents of para 5 of the Claim Petition, as stated, are wrong and denied. It is denied that opening of the Letter of Credit against Lorry Receipt was a fundamental condition of payment under the contract. On the contrary the contract and the subsequent transactions that took place between the parties would clearly show that the parties had agreed to give a go-bye to the so called fundamental terms.....

.....

11. That the contents of para 11 of the Claim petition, as stated, are wrong and denied. The said date for completion of contract was 19.11.1993. Yet no delivery was effected till the said date. In fact as already submitted above, commercial production could only commence due to repeated default by claimant on January, 1994. There was clearly uncertainty as to whether the claimant would be in a position to supply cables in accordance with the approved standards. In addition, claimant had already received 5% advance and another 5% advance was released subsequently upon clearance of commercial production. Hence, a total amount of ₹52,895/- had been paid to the claimant with no cables in sight. In these circumstances, the parties mutually agreed to waive the requirement of issue of irrevocable Letter of Credit....” (Emphasis Supplied)

4. In addition to its reply, the respondent raised a counter claim claiming a sum of ₹86,12,922.70 together with interest @19.75% per annum from the appellant, inter-alia contending that since the appellant had committed breach of the contract

as it had failed to supply the total contracted quantity of the cables within the period prescribed, it was constrained to purchase cables for the remaining quantity and for which loss caused to it was ₹86,12,922.70.

5. In para 11 of the rejoinder filed by the appellant, it pleaded as under:-

“11. Contents of para “11” are re-affirmed. It is denied that the Claimant had not affected delivery before 19.11.1993. In fact the Claimant were ready and willing to commence the complete supplies but on account of delays on the part of the Respondent in establishing the L/C as referred in the claim statement as well as in para herein above. Even as soon as the clearance for commercial production was given, the claimant had made substantial supplies to the Respondent even though the L/C as required under the contract was not established by the Respondent which is a fundamental term of the contract.

There can be no question of uncertainty in regard to supplies by the Claimant because despite the delays in establishing the L/C, part supplies that were ready were made on 27.1.1994. Even thereafter, further, supplies were made on the assurance and on the faith that the Respondent will fulfill their part of obligation by establishing L/C for supplies under the contract.

(Emphasis Supplied)

6. In support of its case, the appellant examined Mr.Sanjeev Kumar Chadha, the Marketing Manager of the appellant company and V.Balakrishnan, Manager – Commercial of the appellant company as CW-1 and CW-2 respectively. In their respective testimonies the witnesses reiterated the contents of the claim petition and rejoinder filed by the appellant. It would

be useful to reproduce the following portion of the cross-examination of Mr.Sanjeev Kumar Chadha CW-1 by DESU:-

“Q44 As per the contract what was the total quantity of cables to be supplied by the claimant?

Ans It was 760.2 Kms.

Q45 Between January, 1994 to July, 1994 the claimant supplied 195 Kms. of cables. What happened to the balance?

Ans 194 Kms. of cables was supplied on continued assurance of DESU to open Letter of Credit as per the terms of the contract. Since the same was not honoured at any time, requests were made on more than 20 occasions to open letter of credit and grant variation in price since the delays were attributable to DESU. Since no firm commitment or arrangement was made there was no other option except to stop the supplies.

Q46 Who in DESU gave you an assurance as mentioned by you that the Letter of Credit would be opened?

Ans There is a letter on record signed by the Executive Engineer where it has been clearly spelled.”
(Emphasis Supplied)

7. On behalf of the respondent, Mr.L.P.Gupta, Executive Engineer of the respondent and responsible for the execution of the contract in question, was examined as RW-1. In his testimony, the witness reiterated the contents of the reply and counter claim filed by the respondent. It would be useful to note the following portion of the cross-examination of the witness by the appellant:-

“QUE.101: Does the contract provide for establishing Letter of Credit by DESU against supplies?

Ans: Yes, but in accordance with the approved dispatch schedule.

....

QUE.108: Do you agree that KEI wrote number of letters to DESU for establishing Letter of Credits to enable it to make supplies?

Ans: Yes, the case of opening L/C was placed before the Hon'ble High Court even in writing statement filed by the Respondent and offer was made to the Claimant if supplies of balance cables in accordance with agreed terms and conditions within four months from the date then DESU would agree to accept balance cables despite this claimant failed to take any step to supply the cables.

QUE.109: I put it to you that in the letter dated 13.11.1994 and 19.2.1994 which are on record DESU admitted that they are not in a position to open L/C which includes note of financial advisor and chief accounts officer. Are you in a position to deny this?

Ans: No comments. I am not admitting nor I am denying.

QUE.110: Do you have any document to show on record that there was any mutual agreement to waive clause relating to opening of Letter of Credit?

Ans: Bills for the supplies as and when submitted by M/s KEI were processed and accepted by them for payment other than through L/C that they means they agreed to accept payment in this new mode of payment."

8. It needs to be highlighted that no questions were put to Mr.L.P.Gupta RW-1, in his cross-examination by the appellant that the appellant had supplied seven lots of cables to the respondent on 27.01.1994, 24.06.1994, 08.07.1994, 19.07.1994 and 08.08.1994 despite the fact that the respondent had not

opened a Letter of Credit in its favour on the basis of the assurances given by the officials of the respondent to the appellant that the Letter of Credit would soon be opened or that he i.e. Mr.L.P.Gupta or any other Executive Engineer had written a letter to the appellant assuring that the Letter of Credit would soon be opened by the respondent.

9. As regards documentary evidence, amongst other documents, the appellant produced the letters dated 22.08.1994, 19.09.1994, 19.12.1994 and 09.01.1995 stated to have been written by the appellant to the respondent in connection with the opening of a Letter of Credit.

10. The first letter dated August 22, 1994, relevant portion, reads as under:-

“

As per the terms of the contract we were to get letter of credit from DESU for claiming 85% payment before the commencement of the supply. In spite of persistent follow up L/C could not be opened. Based on the verbal assurance of your officials we have supplied approximately ₹72 lacs worth of cables against which our bills for a total amount of ₹61,01,728.23 are pending involving 85% of the ex-works price + 100% tax and duties. We are giving below the details of the bills pending at the office of the 400 KV Project, Jhandewalan Extension, New Delhi for processing:

....

We are putting the above facts before you for the reasons that no company can afford to execute the contract unless and until the progressive payments are released and contractual commitments are met by both the parties. The non processing and non receipt of payments of our bills has seriously affected our cash flow which have also brought to the notice of Additional Chief Engineer 400 KV through our various letters and also in our personal meetings.

We, therefore, request you to please intervene in the matter and take necessary action for immediate clearance of our bills and payment thereof.

We will be highly obliged to you for your immediate action in the matter.”

11. The relevant portion of the letter dated September 19, 1994 produced by the appellant reads as under:-

“We have been awarded contract for supply of 1.1. Kv control Cables to 400 KV sub-stations. Vide LOA NO. XEN (400 KV)SS-III/918 dt. 20.11.1992. The ordered cables are under supply to various sub-stations. We had already supplied 25.00 lacs worth of materials to you against which the following bills are being forwarded to DYFO (F-3) Rajghat by the Executive Engineer 400 Kv:

....

As per the terms of LOA we have to receive 85% of Ex-works Value under Letter of Credit, since the Letter of credit has not been established we had supplied to materials and lodged the bills directly to XEN (400 KV) for obtaining direct payments. We are small scale industry and our cash flow is affected because of non receipts of progressive payments in time. Further we are not in a position to manufacture cables for want of funds for making payments to our raw material suppliers etc.

In view of the above we request you to consider our case sympathetically and we request you to advise your DYFO (F-3) to make the payments of the above referred bills on priority basis.

Thanking you and hoping of your favourable action.”

(Emphasis Supplied)

12. The letter dated December 19, 1994 produced by the appellant records that the respondent had not opened a Letter of Credit despite several requests of the appellant in said regards and that the respondent should open a Letter of Credit in favour of the appellant for a sum of ₹100 lakhs in respect of

payment of the future supplies to be made by the appellant. The letter dated January 09, 1995 produced by the appellant reiterates that the respondent should open a Letter of Credit in favour of the appellant for a sum of ₹100 lakhs in respect of payment of the future supplies to be made by the appellant.

13. We need not note the documents produced by the respondent as the same have no bearing on the controversy involved in the present case.

14. After considering the case in its entirety, vide award dated April 23, 1997 the learned Arbitral Tribunal held:- (i) both the parties are responsible for the delay in supply of the cables; (ii) a letter written by the Engineering Department of DESU produced by the appellant indicates that DESU had failed to open a Letter of Credit because of some internal problems, which was an essential term of the contract; (iii) the contention advanced by DESU that it was mutually agreed between the parties to waive the condition relating to opening of Letter of Credit by DESU contained in the contract fails for the reason there is no evidence on record to show that such an agreement was reached between the parties; (iv) in view of the failure of DESU to open the Letter of Credit the appellant was justified in not supplying total contracted quantity of cables to DESU; and (vi) in view of the fact that it was DESU which had committed breach of the contract by not opening a Letter of Credit it was not justified in encashing the 3 bank guarantees furnished by the appellant. Based on the above reasoning, save and except claims Nos.8 and 9 the Arbitral Tribunal allowed all the other claims raised by the appellant though it awarded lesser amounts

than what was claimed by the appellant under each claim. The Arbitral Tribunal rejected the counter claim filed by DESU for the reasons:- (i) there was delay on the part of DESU in floating the tender for the procurement of the cables which remained to be supplied by the appellant; (ii) there was variation in the specification of the procured and original cables and the terms and conditions of the new and original contract; and (iii) it was DESU which had committed the breach of the contract by not opening a Letter of Credit in favour of the appellant.

15. Aggrieved by the award dated April 23, 1997 Delhi Vidyut Board, the successor-in-interest of DESU, filed objections under Sections 30 and 33 of the Arbitration Act, 1940 limiting its challenge to the decision of the Arbitral Tribunal allowing claims Nos.2, 3 and 4 raised by the appellant, which is evident from a reading of the impugned judgment.

16. Vide impugned judgment dated August 28, 2000, the learned Single Judge allowed the objections filed by Delhi Vidyut Board and set aside the award dated April 23, 1997 passed by the Arbitral Tribunal, in its entirety, oblivious of the fact that the respondent had limited its challenge to the decision of the Arbitral Tribunal allowing claims Nos.2, 3 and 4 raised by the appellant. It has been held by the learned Single Judge that:- (i) while concluding that DESU had committed the breach of contract by not opening a Letter of Credit the Arbitral Tribunal had proceeded on the assumption that the terms relating to opening of the Letter of Credit by DESU contained in the contract between the parties were of the essence of the contract, which assumption was incorrect in view of the

provisions of Section 11 of the Sale of Goods Act, 1930 which provision stipulates that unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale; (ii) the fact that the term relating to opening of the Letter of Credit by DESU was not of the essence of the contract between the parties is fortified from the conduct of the appellant of having supplied 1/7th of the contracted quantity of cables without a letter of credit being opened; (iii) The finding arrived at by the Arbitral Tribunal that the parties had not waived the term of the contract requiring letter of credit to be opened had ignored the vital fact of the appellant commencing supply after expiry of the stipulated period within which the contract had to be completed.

17. It was urged by learned counsel for the appellant that the learned Single Judge has erred in setting aside the award on the reasons:-

A. That the Arbitral Tribunal interpreted the contract between the parties and concluded that the terms relating to opening of the Letter of Credit by DESU in favour of the appellant contained in the contract were of the essence of the contract. It is settled legal position that an arbitrator is the final authority to interpret a contract between the parties and save and except the view being perverse, it is impermissible for the Court to re-read the contract for purposes of its interpretation. As long as an arbitrator has considered all relevant terms of the contract and the view taken by the arbitrator is a plausible view, the Court cannot interdict the award under Section 30 of the Arbitration

Act, 1940. In view of said legal position, it was not open for the learned Single Judge to have upset the conclusion arrived by the Arbitral Tribunal that the terms relating to opening of the Letter of Credit by DESU contained in the contract were of the essence of the contract.

B. That the Arbitral Tribunal had returned a finding of fact that the parties had not waived the terms relating to opening of Letter of Credit by DESU in favour of the appellant contained in the contract, after duly considering the evidence led by the parties and other facts and circumstances of the case. It is settled law that the arbitrator being sole judge of the quality and quantity of evidence, it is not open to the Court to sit in appeal over the decision of the arbitrator by re-appreciating the evidence led before the arbitrator while dealing with objections under Section 30 of the Arbitration Act, 1940.

C. That the learned Single Judge fell into an error in entertaining the plea predicated upon Section 11 of the Sale of Goods Act, 1930 advanced by the respondent when such plea was not raised by DESU before the Arbitral Tribunal. It is settled legal position that pleas not taken before the Arbitrator cannot be raised in a challenge to the award.

D. That the view taken by the learned Single Judge that the terms relating to opening of a Letter of Credit by the DESU in favour of the appellant contained in the contract were not of the essence of the contract in view of the provisions of Section 11 of the Sale of Goods Act, 1930 is erroneous in view of the following observations made by an English Court in the decision reported as Trans Trust S.P.R.L. v Danubian Trading Co Ltd 1951 T. 507:-

“This is another case concerned with the modern practice whereby a buyer agrees to provide a banker’s confirmed credit in favour of the seller. This credit is an irrevocable promise by a banker to pay money to the seller in return for the shipping documents. One reason for this practice is because the seller wishes to be assured in advance not only that the buyer is in earnest but also that he, the seller, will in fact obtain his money when he delivers the goods. Another reason is because the seller often has expenses to pay in connexion with the goods and he wishes to use the credit so as to pay those expenses. He may, for instance, be himself a merchant, who is buying the goods from the growers or the manufactures, and has to pay for them before he can obtain delivery, and his own bank will only grant him facilities for the purpose if he has the backing of a letter credit. The ability of the seller to carry out the transaction is, therefore, dependent on the buyer providing the letter of credit, and for this reason the seller stipulates that the credit should be provided at a specified time well in advance of the time for delivery of the goods.

What is the legal position of such a stipulation? Sometimes it is condition precedent to the formation of a contract, that is, it is a condition which must be fulfilled before any contract is concluded at all. In those cases the stipulation “subject to the opening of a credit” is rather like a stipulation “subject to contract.” If no credit is provided, there is no contract between the parties. In other cases a contract is concluded and the stipulation for a credit is a condition which is an essential term of the contract. In those cases the provision of the credit is a condition precedent, not to the formation of a contract, but to the obligation of the seller to deliver the goods. If the buyer fails to provide the credit, the seller can treat himself as discharged from any further performance of the contract and can sue the buyer for damages for not providing the credit.”

(Emphasis Supplied)

18. As is evident from the aforesaid conspectus of facts, the controversy involved in the present case centers around the terms relating to opening of a Letter of Credit by DESU in favour of the appellant contained in the contract, which reads as under:-

“7.0 TERMS OF PAYMENT

7.1 The ex-works price component of the control cables will be paid as follows:-

....

(iii) Eighty Five percent (85%) of the ex-works price shall be paid through irrevocable Letter of Credit against presentation of:

- a) Evidence of dispatch (R/R or Receipted L/R).
- b) Detailed invoice.
- c) Detailed packing list.
- d) Insurance policy/certificate.
- e) Material dispatch clearance certificate (MDCC) issued by the purchaser.

....

8.0 MODE OF PAYMENT

8.1 DESU will establish an irrevocable letter of credit in your favour valid for a period of ninety (90) days in accordance with the dispatch schedule for 85% of ex-works price.

.....”

19. The controversy involved in the present case can be pithily stated as under: The appellant had supplied 25% of the total contracted quantity of the cables to DESU. Whereas the appellant contended that it was justified in not supplying the

balance quantity for the reason DESU had violated an essential term of the contract by not opening a Letter of Credit in its favour for the purposes of making payment of 85% of the ex-works price of the cables to it, DESU contended that the appellant had committed breach of the contract by not supplying total contracted quantity of cables and that its omission to open a Letter of Credit in favour of the appellant does not excuse the appellant from supplying total contracted quantity of cables for the reason the parties had mutually agreed to waive the term relating to opening of a Letter of Credit by DESU in favour of the appellant.

20. As already noted hereinabove, it has been held by the learned Single Judge that the appellant had committed breach of contract by not supplying total contracted quantity of cables to DESU. In coming to the said conclusion, 2 reasons have been given by the learned Single Judge: viz. (i) the terms relating to opening of a Letter of Credit by DESU in favour of the appellant contained in the contract were not essential terms of the contract in view of the provisions of Section 11 of the Sale of Goods Act, 1930 and the conduct of the appellant of having supplied 1/7th of the total contracted quantity of cables to DESU despite the fact that DESU had not opened a Letter of Credit in its favour; and (ii) the parties had agreed to waive the terms relating to opening of Letter of Credit by DESU in favour of the appellant which is evident from the conduct of the appellant of having made first supply after the expiry of the period stipulated for completion of contract.

21. With regard to the reasoning of the learned Single Judge that the terms relating to opening of a Letter of Credit by DESU in favour of the appellant were not essential terms of the contract, a reasoning predicated upon Section 11 of the Sale of Goods Act, 1930, it is significant to note that a perusal of the pleadings of DESU before the Arbitral Tribunal evidences no such stand being taken.

22. There can be no quarrel with the proposition that a plea not taken before the arbitrator cannot be raised in a challenge to the award. (See the decision of the Supreme Court reported as J.G. Engineers Pvt. Ltd v Calcutta Improvement Trust AIR 2002 SC 766 and a decision of a Division Bench of this Court in FAO (OS) No.27/2007 titled as '*Union of India v TRG Industries Pvt. Ltd*' decided on 27.10.2009.)

23. An award can be set aside under Section 30 of the Arbitration Act, 1940 when there is an error apparent on the face of the record or when the arbitrator is found to have misconducted himself or the arbitration proceedings. In the absence of an objection/plea taken before the arbitrator, it can neither be said that there was an error apparent on the face of the record nor that the arbitrator has misconducted himself. In the absence of plea which may have been taken by a party, the arbitrator, who is to decide in an adversarial fashion, as the Court is also to decide, cannot be expected to render decision on such matter. If no decision has been rendered by the arbitrator on a plea which was not raised before him, no fault can be found with the award on such ground. As a necessary corollary to the aforesaid, a point not raised before the arbitrator

cannot be permitted to be raised for the first time before the Court.

24. In view of above legal position, the learned Single Judge was perhaps not justified in allowing DESU to raise a plea predicated upon Section 11 of the Sale of Goods Act. That apart, in view of the law declared in Trans Trust's case (supra), the view taken is even otherwise incorrect.

25. On the subject whether the award could be set aside with respect to the view taken by the Arbitral Tribunal that the appellant had never waived the condition of a letter of credit to be opened and that the finding was one of fact, the legal position with respect to waiver of a term of the contract by a party to the contract is succinctly stated in the following passages contained in Chitty's Contract, Volume 1, 25th Edition, pages 1495, 1497 and 1498:-

"Waiver may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation.

.....

The party who forbears will be bound by the waiver and cannot set up the original terms of the contract. If, by words or conduct, he has agreed to lead the other party to believe that he will accept the performance at a later date than or in a different manner from that provided in the contract, he will not be able to refuse that performance when tendered.

....

Where one party has induced the other party to accede to his request, the party seeking the forbearance will not be permitted to repudiate the waiver and to rely on the letter of the agreement."

(Emphasis Supplied)

26. The plea that the finding is one of fact, ignores that the Arbitral Tribunal has not even bothered that the so called 32 letters claimed to have been written by the appellant were never filed before the Arbitral Tribunal, which Tribunal gullibly went by the pleadings of the appellant that on the subject of a Letter of Credit to be opened, it wrote 32 letters. It is an admitted position that as per the terms of the contract, DESU was to open a Letter of Credit in the favour of appellant before the commencement of supply of cables by the appellant. It is not in dispute that the appellant had supplied nearly 25% of the total contracted quantity of the cables to DESU on 27.01.1994, 24.06.1994, 08.07.1994, 19.07.1994 and 08.08.1994 despite the fact that DESU had not opened a Letter of Credit in its favour. It is also an admitted fact that though the mode of payment prescribed under the contract was opening of a Letter of Credit by DESU in favour of the appellant for payment of 85% of the ex-works price of the cables the appellant submitted bills to DESU for the payment of the cables supplied by it to DESU i.e. the appellant sought payment of the cables supplied by it to DESU by a mode other than the one prescribed under the contract.

27. A waiver can be express or implied. The conduct of the appellant of having supplied 25% of the total contracted quantity of the cables to DESU despite non-opening of a Letter of Credit by DESU in its favour and seeking payment of the cables supplied by it to DESU by a mode other than the one prescribed under the contract is *prima facie* waiver of the terms

relating to opening of a Letter of Credit by DESU in favour of the appellant contained in the contract. In such circumstances, the onus was upon the appellant to establish that it had not waived the said terms.

28. Now, the appellant has not produced a single letter recording that it was commencing supply, reserving the right to have a letter of credit opened. We reiterate that a bald plea in the Claim Petition that on the subject it wrote 32 letters is of no avail to the appellant, which has not even pleaded that in all the said letters it had categorically written that it was effecting supply without waiving the right to have a letter of credit opened.

29. As noted above, the appellant has produced only 4 letters, relevant portions whereof have been noted by us herein above. In the letter dated August 22, 1994, informing that it had supplied cables worth approximately ₹72 lakhs on verbal assurance that bills would be cleared, request is made for payments to be released. The letter does not record that the cables were supplied on the express information that the appellant was reserving the right to insist that a letter of credit should be opened. In the next letter dated September 19, 1994, there is a reference to a letter of credit required to be opened, but the prayer made is that the bills submitted for payment should be cleared.

30. Nowhere in the testimony of the witness of the appellant has it been deposed that supplies were effected by reserving a right to have a letter of credit opened, nor was the witness of the respondent cross-examined, by even a suggestion, that the

appellant effected supply of 7 lots but after reserving the right to have a letter of credit opened.

31. On the subject of default by the appellant, in para 15.2 of the award, the arbitral tribunal has noted the dates on which data-sheets, drawings and test-reports were submitted, the dates when they were returned for re-submission, because what was submitted was found to be wanting, the date when the same were correctly submitted and approved. The reasoning of the Tribunal in para 15.5 that since DESU was not to use the material in the immediate future, this delay was of no importance, is based on no evidence and appears to be the ipse dixit of the Arbitral Tribunal.

32. Suffice would it be to state that in contracts pertaining to public utilities, the instant contract being a supply component of a public utility service, it is inherently difficult to prove loss on account of delay.

33. Thus, on reasons other than the reasons given by the learned Single Judge, we concur with the final destination arrived at that the appellant waived the term relating to Letter of Credit being opened to secure payment and that the contra finding by the Arbitral Tribunal was based upon a mere pleading, without proof of the contents of the 32 letters referred to in the pleadings. There is no evidence that the appellant commenced supply of cables by expressly reserving the right to have the Letter of Credit opened, and in the absence of said evidence, the evidence of the conduct of the appellant in supplying 25% cables and raising bills for the same, being ignored by the Arbitral Tribunal, requires corrective action to be taken, with the

finding arrived at that said conduct shows waiver by the appellant.

34. The appeal is dismissed.

35. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MARCH 14, 2012
dk