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

\+ FAO(OS) (COMM) 109/2017

M/S. JAIPRAKASH ASSOCIATES LIMITED (JAL)

..... Appellant

Through: Mr.Lovkesh Sawhney and Mr.Durgesh Kumar Pandey, Advocates.

versus

M/S. THDC INDIA LIMITED

..... Respondent

Through: Mr.Puneet Juneja, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A. K. CHAWLA

O R D E R

% **29.05.2018**

The appellant's grievance in this appeal under Section 37 of the Arbitration and Conciliation Act (hereafter 'the Act') is that the learned Single Judge fell into error in upholding the correction to the award made under Section 33 of the Act.

The dispute arose on account of construction contract awarded by the respondent-Corporation (hereafter called M/s. THDC India Ltd.). The appellant preferred claims which were referred to arbitration. THDC India Ltd. resisted the claims generally and also in a general manner disputed the entitlement to any interest. The Tribunal when framed final award, also factored interest @ 10% from the date of cause of action and 10% for future interest, which triggered application under Section 33 of the Act by M/s. THDC India Ltd., which, *inter alia*, contended that one of the contractual conditions precluded such interest (Clauses 50-51 of the general conditions of the contract), which was not accepted. M/s. THDC India Ltd., therefore, approached the Court under Section 34 of the Act contending inter alia that award of such interest was contrary to the contract. The learned Single Judge by the impugned order has accepted that contention holding that when the award of interest was excluded, the Tribunal could not have granted it. It is argued on behalf of the appellant by Mr.Sawhney that the question as to whether the award of interest and its preclusion, is pending consideration before the three-Judge Bench in view of the conflict of authorities.

It was argued next that the recent judgment in *Union of India vs. Susaka Private Limited and others,* (2018) 2 SCC 182 determines the issue. It was pointed out that in that judgment the Supreme Court notices the question of waiver of plea before the arbitral Tribunal and held that if an identical issue was not urged in the main proceedings before the Tribunal, the party complaining was barred from raising it at the later stages of the proceedings, especially in litigation before the Court.

In the said judgment of *Susaka* (supra), the Court noticed the contention in the following manner:-

> *"13. Ms Kiran Suri, learned Senior Counsel, appearing for the appellant (Union of India) while challenging the legality and*

correctness of the impugned judgment [Susaka (P) Ltd. v. Union of India, 2005 SCC OnLine Bom 159 : (2005) 2 Mah LJ 327] has argued only one point. According to the learned counsel, the Arbitral Tribunal misconducted in awarding interest on various claims and, therefore, a ground to set aside the arbitral award under Section 34 of the Act is made out.

14. Placing reliance on Clause 13(3) of GCC, the learned counsel urged that since Clause 13(3) provides that no interest will be payable upon the earnest money or the security deposit or amounts payable to the contractor under the contract (except government securities), Respondent 1 (claimant) was not entitled to claim interest on any of the heads."

The court's conclusions are recorded as follows:

"21. In our opinion, the appellant could have registered their objection before the Single Judge at the time of making a reference to the Arbitral Tribunal by pointing out Clause 13(3) of GCC or could have reserved their right to raise such objection before the Arbitral Tribunal. It was, however, not done.

22. Not only that, we further find that the appellant, in their reply, filed before the Arbitral Tribunal also did not raise this plea and allowed the Arbitral Tribunal to adjudicate the said issue on merits.

23. If the appellant was so keen to place reliance on Clause 13(3) of GCC to defeat the claim of Respondent 1 relating to the award of interest on various claims, then it was necessary for the appellant to have raised such plea specifically, in their reply, before the Arbitral Tribunal. No such plea was raised even before the Arbitral Tribunal.

24. Though we find that the appellant raised this ground, for the first time, in Section 34 proceedings [see Ground (cc)] before the Single Judge but again this ground was not pressed at the time of arguments. It is clear from the perusal of the Single Judge's order. Not only that, the appellant again did not raise this plea before the Division Bench.

25. In the light of the aforementioned factual scenario emerging from the record of the case, we cannot grant any indulgence to the appellant (Union of India) to raise such plea for the first time here. In our view, it is a clear case of waiver or/and abandonment of a plea at the initial stage itself.

26. Everyone has a right to waive and to agree to waive the advantage of a law made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy. Cuilibet licet renuntiare juri pro se introducto. (See Maxwell on The Interpretation of Statutes, 12th Edn. at p. 328)

27. If a plea is available, whether on facts or law, it has to be raised by the party at an appropriate stage in accordance with law. If not raised or/and given up with consent, the party would be precluded from raising such plea at a later stage of the proceedings on the principle of waiver. If permitted to raise, it causes prejudice to other party. In our opinion, this principle applies to this case".

In this case, we notice that the existence of the bar to payment of interest is not in dispute. However, the Tribunal itself noticed that (para 5.2) that M/s. THDC India Ltd. specifically urged that "claimant in the claim petition not to be rejected by the AT and no interest is to be payable to the claimant". Undoubtedly, the plea – noticed by the Tribunal did not specifically say why the interest claimed had to be rejected. However, the so-called elasticity or perceived vagueness in the opinion of the Court cannot result in the Tribunal ignoring the contention which defined its jurisdiction, altogether. It is recognized that there is a difference in the nature of the pleas that are usually accepted which are urged by the litigants in regular Court proceedings - on the one hand and that in arbitration proceedings. Furthermore, a general claim with respect to entitlement only means that the onus is cast upon the party asserting that it is entitled or not entitled for something. In other words, the absence of specific mention of the clause in no manner barred the THDC from urging that the appellant was not entitled to interest. Such being the case, and since the existence of the condition precluding payment of interest was not disputed, this Court is of the opinion that the Single Judge did not act unreasonably in holding that the rejection of Section 33 application was unwarranted. The circumstances in *Susaka'* case (supra) - as is evident from the extracted portions of the judgement were entirely different. It appears that in that case the respondent did not even urge the issue of its entitlement of interest at the primary stage or even before the Single Judge in hearing or the Division Bench in the appeal before it. Naturally, in these circumstances, the Supreme Court deduced that there was a waiver of the right to urge that ground. The facts of this case – as noticed above, are different.

For these reasons, the Court is of the opinion that the impugned judgment does not call for any interference. The appeal is accordingly dismissed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

MAY 29, 2018/*'dc'*