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

+ OMP (COMM) 341/2016

Date of Decision : 29th July, 2019

THDC INDIA LTD. Petitioner

Through Mr.Puneet Taneja and
Ms.Laxmi Kumari, Adv.

versus

JAIPRAKASH ASSOCIATES LTD. Respondent

Through Mr.Lovkesh Sawhney, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 14.04.2016 passed by the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Agreement for "Construction of Tehri Dam and Associated works" dated 24.01.1997 executed between the parties.

2. The dispute between the parties was confined to a narrow compass. In terms of Clause 36 of the General Conditions of Contract (GCC), the respondent was entitled to a Price Adjustment for increase or decrease in rates of raw material, labour etc. The Price Adjustment

was to be calculated quarterly but was to be paid once a year to the respondent. Clause 36(i)(f) of the GCC further stated that the Base Date for indices for price adjustment shall be 01.04.1996. Admittedly the petitioner made entire payment including the Final Bill to the respondent on the basis that, as the indices as on 01.04.1996, that is, a specific date, were not available, for indices of labour, All India Consumer Price Index for Industrial Workers, General Index published in the Indian Labour Journal of Labour Bureau, Ministry of Labour, Government of India, for the months of March, 1996 and April, 1996 would be relevant and an average was take to determine the same. Equally, for the construction material, the Average Index Number of Wholesale Price in India for all commodities published by Economic Advisor, Ministry of Industries, Government of India, New Delhi, for the last week of March, 1996 and first week of April, 1996, was taken with certain modification. The Final Bill was paid to the respondent on 06.03.2009 and the Bank Guarantees as well as the Retention Money were also released to the respondent. By a letter dated 15.11.2010, that is, after a period of more than 1 ½ years, the petitioner called upon the respondent to pay an amount of approximately Rs.9.06 crores, claiming that the basis on which the payment of Price Adjustment had been made was incorrect. This claim was based on the interpretation put by the petitioner on Clause 36(i)(f) to the effect that the Price Index for labour and material being published on monthly basis, index published for the month of April, 1996 should have been considered while making payment for the Price

Adjustment under Clause 36 of the GCC. As this was objected by the respondent, the disputes were referred to the Arbitral Tribunal.

3. The Arbitral Tribunal consisted of three members and almost on all the issues, the majority opinion was rendered by a ratio of 2:1. As far as the interpretation of Clause 36 is concerned, the majority of the Arbitral Tribunal agreed with the interpretation of the clause sought to be placed by the petitioner that the monthly Index published for April, 1996 was to be taken for determining the claim of Price Adjustment on labour under Clause 36 of the Agreement. The Arbitral Tribunal further held that the interpretation to Clause 36 adopted in 1998 was ad-hoc in nature or made under a mutual mistake. The majority disagreed with the submission of the respondent that upon payment of the running bills on a different basis and the subsequent conduct of the parties, a new contract by *sub-silentio* came into existence. It further did not agree with the respondent that the payment so made created any rights in favour of the respondent or disallowed the petitioner for making recovery of such amount. The claim of the petitioner was also held not to be barred by law of limitation. However, the majority agreed with the submission of the respondent that by raising a demand of such amount in March/April, 2008 and thereafter not pursuing it any further, but in fact making the payment of the Final Bill, releasing the Performance Bank Guarantee and the Retention Money, the petitioner waived its rights that it had for seeking a recovery of such amount.

4. While the respondent has not challenged the Impugned Award, same has been challenged only by the petitioner on this finding of the majority of the Arbitral Tribunal.

5. Learned counsel for the petitioner submits that once the Arbitral Tribunal held that the interpretation put by the petitioner, though belatedly, on Clause 36 of the GCC is correct, there is no question of waiver applicable to the facts of the case. He submits that Article 4 of the Agreement specifically provides that mere payment of any money to the respondent would not act as a waiver against the petitioner. Further, such recovery is permissible even after the payment of Final Bill in terms of Clause 38.5 of the GCC. He submits that the Arbitral Tribunal has therefore committed a grave error in accepting the claim of the respondent on this account.

6. I have considered the submissions of the learned counsel for the petitioner, however, find no merit in the same. At the outset, it must be noted that waiver is not a simplicitor question of law, but a mixed question of law and fact. The Arbitral Tribunal is the final judge of the facts and even on question of law, unless its finding is contrary to the law which involves the public policy of India, the Award cannot be set aside even if the Arbitral Tribunal makes a mistake in law. The jurisdiction of the Court under Section 34 of the Act is limited and it cannot act as a Court of Appeal to judge the evidence led by the parties before the Arbitral Tribunal in order to arrive at a different conclusion. If the conclusion arrived at by the Arbitral Tribunal is

plausible, the Court must refrain itself from interfering with such Award.

7. Even otherwise, the facts of the present case do not show the finding of the Arbitral Tribunal to be in any manner incorrect. As noted hereinabove, the contract between the parties was entered into on 24.01.1997. The first bill for Price Adjustment for the period of January, 1997 to December, 1997 was cleared by the Engineer-in-Charge by applying the formula of averaging out the Indices. The respondent had certain grievances against the same. Considering such grievances, the bill was paid by a method of averaging with certain modification. The petitioner thereafter adopted the same formula while making payments upto 47th Running Bill of the respondent. This is over a period of 1998 to 2006.

8. The work was completed by the respondent on 31.05.2006 and the Defect Liability Period also expired on 31.05.2007. At that stage the Final Bill of the respondent was pending clearance from the petitioner.

9. It seems that in the year 2006 an internal audit report raised an objection on the method adopted for calculation of Price Adjustment for the period upto December, 2005. Based on certain legal opinion received by the petitioner, the petitioner by a letter dated 29.03.2008, called upon the respondent to deposit the amount of excess payment made to it in the provisional bills. The respondent, by its letter dated 02.04.2008, objected to the claim of the petitioner and even threatened to take legal action for settlement of the disputes. The petitioner in

response, by the letter dated 07.08.2008 called upon the respondent to deposit a sum of Rs.8.7 crores on the above account.

10. As the respondent again protested, a meeting of higher ranking Officer of the petitioner with the respondent was held on 15.04.2008, wherein the respondent was asked to submit its justification for denial of the claim of the petitioner.

11. It seems that thereafter, legal opinions were taken by the petitioner and the respondent and both opinions advised that the claim of the petitioner would not be maintainable.

12. Based on such opinion, the petitioner addressed a letter dated 26.06.2008 to the respondent, which reads as under:

“In a recent legal opinion obtained from Senior Advocate, Hon’ble Supreme Court of India, conveyed to the Project by the Legal & Arbitration Wing, Corporate Office, Rishikesh the following has been communicated:

On the subject cited above the learned Advocate has opined that the question of interpretation of the clause and to effect the recoveries at this stage may not be justified. Further, it has also been communicated that the recoveries from the payment on account of change of method of calculation of values of LO & MO to revised method of calculation at this stage does not arise and any recovery at this stage denied.

The above legal opinion has been obtained by Corporate Legal Cell in response to minutes of meeting held on dated 15.4.08 at Rishikesh.”

13. Clearly the above letter shows that the issue stood closed at the petitioner's end. The petitioner dropped the demand of Rs.8.70 crores as thereafter on 06.03.2009, the petitioner released the final payment of the respondent adopting the earlier interpretation put to Clause 36 of the GCC and also released the Performance Bank Guarantee and the Retention Money of the respondent. Hence, the contract stood discharged on that date.

14. As noted hereinabove, it is almost 1 ½ years thereafter that the petitioner again woke up to its rights and sought to recover the amount on the basis of the changed interpretation put forth to Clause 36 of the GCC.

15. Learned counsel for the respondent vehemently argues that this change of interpretation was only because the respondent had succeeded in certain other arbitration proceedings and the petitioner did not want to make the payment under those Awards.

16. The above sequence of events would show that on the first protest by the respondent in 1998, the petitioner adopted an interpretation to Clause 36 of the GCC and started making payment in accordance thereof and thereafter, in 2006, on an audit objection, the petitioner sought to change the interpretation to Clause 36 of the GCC and make recovery of excess payment made to the respondent. However, on legal opinion received, the petitioner took a conscious decision not to pursue this claim any further and by its letter dated 26.06.2008, it clearly expressed this decision to the respondent. This decision was also expressed by its conduct of releasing the final

payment of the respondent as also the Bank Guarantee and the Retention Money on 06.03.2009. The Arbitral Tribunal has therefore, rightly concluded that the above conduct of the petitioner showed the waiver by the petitioner of its rights to claim recovery of any excess amount paid earlier.

17. In ***Ramdev Food Products (P) Ltd. v. Arvinbhai Rambhai Patel*** (2006) 8 SCC 726, the Supreme Court explained ‘Waiver’ in the following words:-

“73. The matter may be considered from another angle. If the first respondent has expressly waived his right on the trade mark registered in the name of the appellant Company, could he claim the said right indirectly? The answer to the said question must be rendered in the negative. It is well settled that what cannot be done directly cannot be done indirectly.

74. The term ‘waiver’ has been described in the following words:

‘1471. Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. ... A person who is entitled to rely on a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration. ...

It seems that, in general, where one party has, by his words or conduct, made to the other a promise or

assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.’ (See Halsbury's Laws of England, 4th Edn., Vol. 16, para 1471.).

75. Waiver may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel. [See Halsbury's Laws of England, 4th Edn., Vol. 45, para 1269]

76. In Indu Shekhar Singh v. State of U.P. this Court held: (SCC p. 142, para 26)

“26. They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal.”

18. The Supreme Court in **Jagad Bandhu Chatterjee v. Smt. Nilima Rani and Ors.**, (1969) 3 SCC 445, has held as under:

“5. In India the general principle with regard to waiver of contractual obligations is to be found in s. 63 of the Indian Contract Act. Under that section it is open to a promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or he can accept instead of it any satisfaction which he thinks fit. Under the Indian law neither consideration nor an agreement would be necessary to constitute waiver. This Court has already laid down in Waman Shrinivas Kini v. Ratilal Bhagwandas & Co.(1) that waiver is the abandonment of a right which normally everybody is at liberty to waive. "A

waiver is nothing unless it amounts to a release. It signifies nothing more than an intention not to insist upon the right....."

19. In ***P.Dasa Muni Reddy v. P.Appa Rao***, (1974) 2 SCC 725, Supreme Court has considered the concept of waiver in the following words:

"13 ...Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver sometimes partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question..."

20. On the concept of waiver, ***Pollock & Mulla on The Indian Contract & Specific Relief Acts*** (15th Edition, Vol-I pp. 954-955), states as under:-

“In the law of contract, the term waiver is used to describe the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance for in the contract or accept instead of it any satisfaction which such party thinks fit. Waiver and abandonment are in their primary context unilateral acts. Waiver is the intentional relinquishment of a right or privilege. Unilateral act or conduct of person which is not relied upon by another person to his detriment is nothing more than mere waiver, acquiescence or laches while act or conduct of a person amounting to an abandonment of his right and inducing another person to change his position to his detriment certainly raises the bar of estoppel. Waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known, existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, the party would have enjoyed. Unless there is a clear intention to relinquish a right that is fully known to a party, a party cannot be said to have waive it. Even if an agreement refers to waivers that can be expressly made under various clauses of the agreement, the section enables waiver of even other performances under the agreement. A waiver is distinguishable from the variation or alteration of a contract in that while the former is a unilateral act of a party, the latter is a bilateral act of the parties. Neither a consideration nor an agreement is necessary for waiver. Where one party voluntarily accedes to the request of the other party that he should not insist on the precise mode of performance fixed by the contract, the court will hold that he has waived his right to insist that the contract be performed in this respect according to its original tenor...

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Though waiver is akin to the principle of estoppels, estoppels is a rule of evidence and is not a cause of action

whereas waiver is contractual and may constitute a cause of action.”

21. Applying the above principles it has to be held that the petitioner intentionally and voluntarily waived its rights to make a recovery of excess amount paid by it to the respondent when it made payment of the final bill and released the Bank Guarantee and the retention money to the respondent and is now bound by the same.

22. Article 4 of the Agreement which has been relied upon by the counsel for the petitioner, is reproduced hereinbelow:

“ARTICLE 4.0 NO WAIVER OF RIGHTS

4.1 Neither the inspection by the OWNER or the Engineer-in-Charge or any of their officials, employees or agents nor any order by the OWNER or the Engineer-in-Charge for payment of money or any payment for or acceptance of, the whole or any part of the works by the OWNER or the Engineer-in-charge nor any extension of time nor any possession taken by the Engineer-in-charge shall operate as waiver of any provisions of the contract, or any power herein reserved, nor shall any waiver of any breach in the contract be held to be a waiver of any other or subsequent breach.”

23. In my opinion, the same would have no application to the facts of the present case. It is true that the payment of running bills made by the petitioner cannot amount to a waiver and therefore, for any such payment, Article 4 would come to the rescue of the petitioner. However, in the present case, the petitioner after having made the payment on the running bills, sought to recover the same in the year 2008. On the objection of the respondent, the petitioner took a

conscious decision to waive its claim and not pursue it any further, therefore, Article 4 of the GCC cannot come to its rescue.

24. Equally Clause 38.5 of the GCC cannot help the case of the petitioner. Clause 38.5 of the GCC is reproduced hereinbelow:

“38. 5 Over Payments And Under Payment

i) Whenever any claim whatsoever for the payment of a sum of money to the Corporation arises out of or under this contract against the Contractor, the same may be deducted by the Corporation from any sum then due or which at any time thereafter may become due to the Contractor under this contract and failing that under any other contract with the Corporation or from any other sum whatsoever due to the Contractor from the Corporation or from his security deposit, or he shall pay the claim on demand.

ii) The Corporation reserves the right to carry out post payment audit and technical examination of the final bill including all supporting voucher, abstracts, etc. The Corporation further reserves the right to enforce recovery of any overpayment whatsoever when detected.

iii) If as a result of such audit and/or technical examination any overpayment is discovered in respect of any work done by the Contractor or or alleged to have done by him under the contract, it shall be recovered by the Corporation from the Contractor by any or all of the methods prescribed in the contract, and if any under payment is discovered, the amount shall be duly paid to the Contractors by the Corporation .

iv) Provided that the aforesaid right of Corporation to adjust overpayments against amounts due to the Contractor under other contract with the Corporation shall not extend beyond the period of three years from the date of payment of the final bill or in case the final bill is

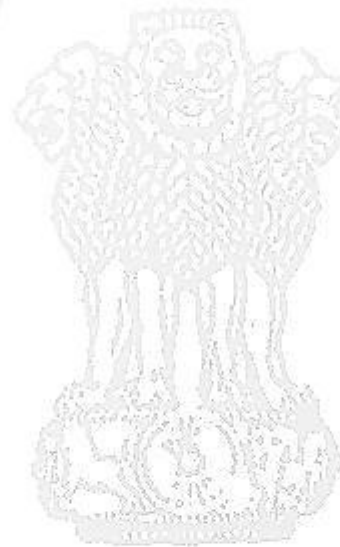
a MINUS bill, from the date the amount payable by the Contractor under the MINUS final bill is communicated to the Contractor.”

25. Having waived its claim, the petitioner cannot rely upon Clause 38.5 of the GCC to justify the recovery of its claim.

26. In view of the above, I find no reason to disagree with the decision of the majority Arbitrators. The petition is therefore dismissed, with no order as to costs.

JULY 29, 2019/vp

NAVIN CHAWLA, J



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