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

Reserved on: 16th May, 2019

Date of decision: 26th August, 2019

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O.M.P. 172/2014

STEEL AUTHORITY OF INDIA LTD.

..... Petitioner

Through: Mr. A. S. Chandiok, Senior Advocate
with Mr. Sharat Kapoor, Mr. Ritesh
Kumar, Mr. Shrey Kumar, Mr.
Ramya Kutty and Mr. Taran Singh,
Advocates. (M:9818493330)

versus

PSYSTEME & ANR.

..... Respondents

Through: Mr. Kush Sharma and Ms. Shrutika
Garg, Advocates. (M:9311399002)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The short question that arises in the present case is as to whether there existed an obligation on Respondent No.1- Psysteme GmbH and Respondent No.2 – M/s Mantri Enterprises (*hereinafter the ‘Suppliers’*) for obtaining comprehensive marine cum erection insurance (*hereinafter ‘CME insurance’*) and if so, the scope of the said insurance policy. The Petitioner – Steel Authority of India Limited (*hereinafter ‘SAIL’*) floated a global tender on 20th October, 2000 for “*design, engineering, supply of plant equipment and installation, commissioning and testing of width measurement system*” (*hereinafter, ‘system’*) in its Hot Strip Mill, Rourkela Steel Plant. Respondent No. 1, a German company and its Indian agent, Respondent No.2 – M/s Mantri Enterprises submitted their bids. The

Suppliers were asked to accept the ocean freight and insurance policy in Indian rupees, and were asked to quote prices as per revised format. Finally, the bid of the Supplier was found to be the lowest bid and the letter of intent was issued on 2nd July, 2002, for the award of work of a total value of Rs.83,78,377/-, which was accepted by the Supplier on 14th August, 2002. The acceptance of tender was issued on 28th August, 2002. Various amendments/clarifications had been issued after the initial bid. The bid, clarification letters, the terms of tender and the general conditions of the contract together constitute the contract.

2. It was the Suppliers' case that the acceptance of tender was issued without application of mind and thus, various amendments had to be resorted to. The system was partly imported and partly supplied indigenously. Design and engineering of the system was done in Germany and the same was shipped to India in October, 2003. The system reached Kolkata Port in a container on 27th November, 2003. After inspection at the port, delivery of the same was taken. The system was cleared at Calcutta port by SAIL and its officials without intimation to the Suppliers. The transportation of the goods from the port to Rourkela plant was also effected. According to the Suppliers, clearing from the port and subsequent transportation was done without their knowledge. The shipping documents were, however, not handed over to the Supplier. Thereafter, the installation work was commenced. During the time when erection was going on at the plant, a fire broke out on 25th May, 2004 in the Hot Strip Mill at Rourkela Steel Plant. The fire then spread to the area where the commissioning of the system was taking place and substantial part of the equipment got damaged. The Indian agent called upon SAIL in respect of replacement of the cables

and the equipment, which was destroyed in the fire. Disputes then arose between the parties as to who was in breach. The area of dispute was in respect of port clearance having been made by SAIL and the installation being commenced, without prior intimation to the Supplier. SAIL, on the other hand insisted that a CME insurance policy ought to have been taken to cover up such eventualities until the stage of commissioning.

3. In view of these disputes, the matter was referred to the Indian Council of Arbitration, and a *Id.* Sole Arbitrator was appointed to adjudicate the disputes. The *Id.* Arbitrator arrived at the following findings:

- That the tender was silent in respect of providing CME insurance policy.
- That the letter of acceptance of tender dated 28th August, 2002 contained a modified and revised clause relating to insurance i.e. Clause 17, which imposed an obligation upon the Suppliers to provide insurance policy for transit storage, watch and ward, workmen compensation etc., including third party coverage for the entire job valid up to commissioning and handing over of the facilities to SAIL.
- Respondent No. 1 had conveyed its acceptance on 7th October, 2002, and a further letter dated 7th October, 2002 was relied upon by the Suppliers, wherein only marine insurance policy had been agreed to and not CME. This letter was denied by SAIL, and it was alleged that the same was a forged and fabricated document.
- That the irrevocable letter of credit opened by SAIL, which contained an insurance clause, did not provide for CME insurance.
- The performance bank guarantee, which was submitted by the Suppliers was also only for marine insurance and not CME insurance.

- That the equipment was despatched from Germany to Calcutta on 27th October, 2003. The shipping documents contained the insurance policy, which was only for marine insurance covering the journey between the warehouse in Germany and the port in Calcutta.
 - Ld. Arbitrator concluded that SAIL did not take any objection to the fact that only marine insurance was provided. SAIL and its officials had acquiesced and accepted the consignment without objection or demur. If the consignment was not in terms of the contract, delivery of the same ought not to have been taken by SAIL. Thus, SAIL had agreed to only accept marine insurance.
 - Even after the equipment reached Rourkela Steel Plant, no defects were pointed out in the insurance policy. SAIL also did not take any insurance for transportation from the port to its works at Calcutta. The Equipment continued to remain at the Rourkela plant without any insurance cover.
 - SAIL was in breach of the contract between the parties and was liable to pay the balance outstanding payment.
4. Ld. Arbitrator thereafter concluded, on the basis of the evidence, that the alleged letter dated 7th October, 2002 was never sent, as no proof of delivery was ever produced by the Suppliers. No amendment was, thus, made to the acceptance letter. Finally, the Ld. Arbitrator held as under:

“O. Therefore, I accept the contentions of the Respondent that no alleged letter dated 7.10.2002 was sent by the Claimant No.2 to the Respondent. Therefore, no amendment to the AT was ever suggested by the Claimants and that no amendments or modifications were ever agreed to by the Respondent.

Therefore, in terms of clause 17 of AT only, the Claimants were bound to provide the CME insurance and that the Claimants' contention that they were to provide; only the marine insurance cover is not correct.”

5. After having observed that the Suppliers were bound to provide CME insurance, the Ld. Arbitrator surprisingly holds that the officials of SAIL, through their conduct and through subsequent documentation, namely letter of credit, performance bank guarantee etc. had impliedly waived the condition of insurance in Clause 17 of the Acceptance of Tender. Since the letter of credit opened by SAIL itself did not contain a CME insurance clause and the payment of 80% of the cost of the imported equipment was released to the Suppliers, Ld. Arbitrator concludes that the Suppliers thought that they were to only provide marine insurance policy and not CME insurance. Ld. Arbitrator relies upon the cross-examination of the witness on behalf of SAIL to submit that the letter of credit only stated that the insurance was from “warehouse to warehouse”. Since SAIL had itself opened the letter of credit without CME insurance, the Suppliers were right to have understood that no comprehensive insurance was to be taken. Ld. Arbitrator further held that the documents, including the insurance policy were received by SAIL one month prior to the actual supply and SAIL did not show any vigilance, and no defects were pointed out in the insurance policy. Therefore, Ld. Arbitrator concluded as under:

“93. It is further pertinent to mention that the shipping documents including the insurance policy was received by the Respondents from the Claimant No.1 in Germany, one month prior to the receipt of the imported equipment at the Kolkata Port. Had the officials of the Respondent being vigilant, the defect in

the insurance policy not in conformity with the clause 17 of the AT could have been noticed and pointed out. The Respondents failed to do the same. Getting the imported consignment cleared at Kolkata Port from port and custom authorities and taking the imported equipment to their factory at Rourkela after due inspection, through their own staff and associate company, and not raising any objections even after few months of transportation of the equipment to their works by the Respondents, would show that the Respondents had waived the condition of the clause 17 of the AT of the Claimant to provide CME insurance. The Respondents cannot take advantage of their own wrong, their own conduct, acts, omissions and commissions. The Respondents are barred by principle of estoppels to raise a claim after unilaterally waiving the condition of providing CME insurance and accepting the Marine insurance policy without demur and protest. This view further supported by Clause 44 of the General conditions of the contract which talks of waiver, which clause has been reproduced hereinabove in para no.53.

94. Therefore, I am constraint to observe and hold that the officials of the Respondent in different departments whether in sales, marketing, finance or other department, may be due to lack of coordination, inadvertently, even after acquiring knowledge and becoming aware that the Claimants had only provided for Marine Insurance and not for CME insurance in terms of AT, remained indifferent and silent. It was well within the knowledge of the Respondent that only Marine Insurance was asked for in the Global Tender and that only this fact was discussed during discussions for finalizing the commercial terms and based on this the respondent on its own instructed their bankers i.e. State Bank of India, Rourkela Branch to open an LC in favour of the Claimant No.1, calling for opening of an LC in favour of the Claimants calling for

Marine Insurance. Therefore, by conduct and by principles of acquiescence and implied waiver, the Respondent cannot at a later stage, after a fire took place in the hot strip mill area on 25.05.2004, during erection process and damage equipment, state that it was only at that stage that they acquired knowledge of the claimants not providing for CME Insurance in terms of clause 17 of AT, that is not providing a back to back insurance policy, covering the entire equipment lying at the erection site in the premises of the Respondents and during erection process. I am of the opinion that this is an afterthought on the part of the officials of the Respondents to cover up the lapses on their own part. Therefore, the action of the Respondents calling upon the Claimants to replace the damaged equipment fully knowing that the same was not duly insured was incorrect. I am of the opinion that the Respondent had subsequently woken up after the enquiry was conducted by the officials of the Respondent themselves enquiring into the causes and incident of fire. During the enquiry, it must have come to the notice of the Senior officials of the Respondent that the damaged equipment supplied by the Claimants was not duly insured in terms of Clause 17 of AT of providing a Comprehensive Marine-cum-Erection Insurance Policy.

95. These issues are therefore accordingly decided. I accept the contentions of the Respondent that in terms Clause 17 of the AT dated 28.08.2008, the Claimants had to provide Comprehensive Marine-cum-Erection Insurance Policy for the total job valid till commissioning. That the amendment proposed by the Claimant No.2 vide letter dated 07.10.2002 was also an afterthought on his part. The Claimants have failed to prove the same. The Claimants were under legal obligation to take CME insurance in terms of AT. As observed herein above, the Respondent by their own conduct, action and inaction and by execution of the

documents prior to and after confirmation of At, did not enforce the CME Insurance and had themselves issued LC in favour of the Claimant No.1 asking for a Marine Insurance Policy only. Further the Respondent accepted the equipment dispatched by the Claimant no.1 from Germany based on the shipping documents sent including the Bill of Lading and Marine Insurance, at Kolkata port and took custom and port clearance. The equipments were duly inspected by the officials of the respondent at Kolkata port before being dispatched and transported to the Rourkela Steel Plant without being challenged or objected to.”

6. On the basis of all the evidence, the Ld. Arbitrator came to the conclusion that though the second letter dated 7th October, 2002 had not been proved, SAIL had waived the CME insurance clause as provided for under Clause 17.

7. According to the Arbitrator, SAIL had breached the agreement as it took control of the consignment, contrary to clause 9.4.3 to 9.4.5. There were several lapses on behalf of SAIL. Clearance at the port was to be effected by the Indian agent of the German company, and SAIL was not justified in effecting the port clearance. In conclusion, the Ld. Arbitrator held as under:

“114. The Respondent had paid 80% of the invoice value to the Claimant at the time of delivery in terms of Clause 9 & 13 of the AT dated 28.8.2002,. The balance was payable only on commissioning and final acceptance. Undisputedly the equipment was never commissioned. After the incidental of fire, the Respondent called upon the Claimants to replace the damaged equipment, but the Claimants declined to replace and claimed additional payment for the same. The Respondent declined to pay which led to dispute

between the parties. As per the terms of payment, 10% payment was due against successful erection and commissioning of the system and issuance of commissioning certificate. The last 10% payment was due after six months of regular and reliable working of the system.

115. Admittedly, the Respondents had paid only 80% of the invoice value of the equipment supplied. I, therefore, direct the Respondents to pay the balance 20% of the outstanding amount to the Claimants. The Claimants as per the Statement of Claim has claimed Euros 1,24,629 i.e. Rs. 69,79,224 as on 25th October, 2007 i.e. the date of filing of the Statement of Claim. The Claimant No.2 has claimed a sum of Rs.20,52,747/- + legal costs amounting to Rs.8,25,000/-. The Claimants during arguments and in evidence did not substantiate their claims on various heads as stated in the Statement of Claim. Therefore, all such claims are rejected.

Therefore, I am of the opinion that the Claimant No.1 is entitled to recover a sum of Euros 30,690 being the balance amount due and payable as per the invoices. Similarly, the Claimant No.2 is entitled to recover the balance amount of Rs. 11,09,619/- from the Respondent. No other amount under any head or claim are payable to the Claimants. The Claimants are not entitled to pre arbitration interest as claimed in the Statement of Claim. All other claims of the Claimants are rejected.

I further direct the Respondent to pay a sum of Euros 30,690 to the Claimant No.1 along with interest @ 12% @ per annum with effect from 25.10.2007 to the date of the award. Similarly, the Respondent are directed to pay a sum of Rs.11,09,619/- to the Claimant No.2 alongwith interest @ 12% per annum with effect from 25.10.2007 to the date of the award. The Respondent is directed to make the payment to the Claimants within 90 days of the receipt of the award.

The parties to bear their own costs.”

Submissions of the parties

8. It is submitted by Mr. Chandiok, Id. Sr. Counsel that the contract stood concluded with the acceptance on 7th October, 2002. The conclusion that SAIL had waived the requirement of CME insurance is not tenable, as under Article 44 of the General Conditions of Contract, there cannot be any waiver unless the contract itself has been amended. He further submits that the letter of credit cannot overrule the express terms of the contract, and the Suppliers were under a duty to take a CME insurance policy. The obligation to issue a letter of credit is one of the obligations under the contract itself. However, the said document cannot amend the contract. It is further submitted that the clauses of the contract are clear that the property passes to SAIL only once installation is complete. According to Id. Senior Counsel, the contract had five different components - namely design, supervision, commissioning, supply and installation. While the former three were the obligation of Psysteme - the German company, supply and installation were to be done by M/s Mantri Enterprises - the Indian company. Apart from Clause 17, the General Conditions of Contract also required the Suppliers to cover all the risks. The award completely misinterprets the contract, and the various clauses, including the clause relating to waiver. It is further submitted that the payment was also to be made in three tranches - namely 80% by letter of credit, 10% upon successful erection and commissioning and thereafter issuance of the commissioning certificate, and the remaining 10% after six months of regular and reliable working of the system. Thus, the finding that SAIL and its officers had impliedly waived the requirement of CME insurance was contrary to the terms of the contract itself, which

would thus be violative of public policy. The term “successful commissioning” is defined in the contract. The scope of works is also clear in the contract, that till the actual commissioning takes place, the property in the goods remains at the risk of the Suppliers. Ld. Arbitrator’s finding that SAIL is barred by estoppel from seeking CME insurance as it had accepted marine insurance policy without any protest is contrary to the said Article 44 of the General Conditions of Contract. Reliance is placed on the following judgments.

- i. MMTC v Belcom 226 (2016) DLT 247*
- ii. Tamil Nadu Electricity Board v N. Raju Reddiar (1996) 4 SCC 551*
- iii. State of Rajasthan v Nav Bharat Construction Co. (2006) 1 SCC 86*
- iv. Bharat Coking Coal Ltd. v Annapurna Construction (2003) 8 SCC 154*
- v. FCI v M/s Arosean Enterprises Ltd. & Anr 1995 II AD (Delhi) 505*
- vi. United Commercial Bank v Bank of India AIR 1981 SC 1426*
- vii. Associate Builders v DDA (2015) 3 SCC 49*

9. Finally, it is submitted that the dismissal of the counter claim is also untenable and is liable to be set aside.

10. On behalf of the Suppliers, Mr. Jayant Mehta, Id. Counsel submits that the obligation to take CME insurance was introduced subsequent to the letter of intent. The contract had two components - namely, manufacture on one hand, and installation and erection on the other. SAIL never insisted upon Clause 17 to be adhered to. In fact, the letter of credit opened by SAIL itself shows that the only insurance that was to be taken was marine insurance, and nothing more. The obligation was only to obtain the

insurance from warehouse to warehouse, which obligation was duly discharged by the Suppliers. It is further argued that the question as to whether CME was to be given is a question of fact, which cannot be gone into in a Section 34 petition. SAIL, by accepting the goods when they arrived at the Kolkata port, and getting the same cleared, without informing the supplier or its agent, had agreed to absolve the Suppliers from responsibility. Under Section 63 of the Indian Contract Act, 1872, the promisee may dispense or remit part of the contract, thus, SAIL itself, which is the promisee in this case, had agreed to waive the requirement of CME insurance, and no fault can be found in the same. The contract had three components, namely foreign manufacture and shipping, domestic acceptance and transportation to the warehouse as also installation and successful completion. The third was in respect of services for installation and commissioning of the system. CME also would not have covered the fire, as only erection and commissioning had covered even if the CME insurance had been taken. He relies on the following judgments.

- i. Jagad Bandhu Chatterjee v Smt. Nilima Rani and Others 1969 (3) SCC 445*
- ii. Gordhandas Lalji v B. Banerjee and Others AIR 1958 SC 1006*
- iii. Sulej Construction Ltd. v Union Territory of Chandigarh (2018) 1 SCC 718*
- iv. Associate Builders v DDA (2015) 3 SCC 49*

Analysis and Findings

11. The only issue on which the parties have addressed submissions and on which SAIL has raised its objections is in respect of the kind of insurance

policy that was to be taken by the Suppliers, and whether there was a breach by either of the parties.

12. As per the invitation to the tender, various instructions were given to the bidders. The clear requirement was that the “total work should be executed on an integrated basis”. The bid, which was submitted, provided for various components, which are as under:

Sl. No.	ITEM	FOREIGN PRICE		INDIAN PRICE	GRAND TOTAL PRICE
		<i>In Foreign Currency</i>	<i>In equivalent Indian Currency Rs. Million</i>	<i>Indian Currency in Rs. Million</i>	<i>Rs. Million</i>
		Euros	Rs.	Rs.	Rs.
1	Total of Plant & Equipment (From H above)	130,500	5,611,500	535,000	6,146,500
2	a) Ocean Freight b) Marine Insurance c) Landing Charges			350,000	350,000
3	C.I.F. Cost {1 + 2}	130,500	5,611,500	885,000	6,496,500
4	a) Customs Duty (@25% of 3)	29,250	1,257,750		1,257,750
	b) Countervailing duty @ 16% Special Addl. Duty @ 4%)	18,720	804,960		804,960
	c) Taxes & Duties on imported items required for	5,850	251,550		251,550
		2,700	116,100		116,100

	<i>Assembly further Processing in Indian Manufacturer's work shop</i>				
5	<i>All port charges including Port rent. Port & Customs clearance and Inland transport of imported equipment including transit insurance.</i>			93,525	93,525
6	<i>Inland transport for Indian equipment including transit insurance</i>			6,000	6,000
7	<i>Landed at site cost of equipment i) Imported a) b) ii) Indigenous a) b)</i>				
8	<i><u>Erection, testing, Commissioning including all civil engineering work and related supplies and establishment of P.G Parameters (both imported & indigenous items) and all Insurance except transit insurance.</u></i>			662,000	662,000
9	<i>Foreign supervision charges in India</i>	22,950	986,850		986,850

	<i>during design, manufacture, erection, testing commission and establishment of PG Parameters & on site training.</i>				
10	<i>Sales Tax on Works Contract Tax including Surcharge on Works contract Tax a) dismantling & Civil works whenever applicable b) Erection of Plant & Equipment erection of fabricated building structures including sheeting.</i>				
11	<i>Service Tax if any, on Services rendered</i>				
12	<i>Total Price of the Package</i>	209,970	9,028,710	1,646,525	10,675,235

13. The tender conditions provided that the terms contained in the invitation to tender, and the general conditions of contract would be applicable to the supply of the system. The scope of the work, as per the acceptance letter dated 28th February 2002, reads as under:

*“8.0: Scope of work:
Installation of Width Gauge after Finishing Stand-6 in
HSM, as per Annexure. 1 (Technical Specification)”*

14. As per the said letter, the insurance requirement was specified as under:

“17.0 Insurance : M/s PSystem shall undertake comprehensive Marine-cum-Erection Insurance policy for transit, storage watch-and-ward, workmen compensation etc. including third party for the total job valid upto commissioning and handing over the facilities to RSP.”

15. The payments were to be made in two separate components, which read as under:

“13.1 For Design Engg., Supply of imported supplies and Foreign Supervisions:

- a) 80% on prorated basis by irrevocable Letter of Credit.*
- b) 10% against successful erection and commissioning of the system and against issuance of Commissioning Certificate.*
- c) 10% after 6(six) months of regular and reliable working of the system and against issuance of Final Acceptance Certificate (FAC).*

13.2 For Indigenous Design Engineering & Supply, To be paid to, M/s Mantri Enterprise, Visakhapatnam-530003 on certification of M/s PSysteme, Germany.

- a) 80% on pro-rata against supply as per billing schedule.*
- b) 10% against successful erection and commissioning of the systems and against issuance of Commissioning Certificate.*
- c) 10% after 5(six) months of regular and reliable working of the system and against issuance of Final Acceptance Certificate (FAC).”*

16. It is, thus, clear that the German company was to be made separate payments and the Indian agent was also to be made payments for successful erection and commissioning of the system.

17. The letter dated 7th October, 2002 conveyed the Suppliers' acceptance to the acceptance letter dated 28th August, 2002 as amended vide letter dated 5th October, 2002. The letter is significant and is set out herein below:

*“PSYSTEME
PROCESS-AUTOMATON
STEINWENDER GMBH*

*PSYSTEME – Georg – Haliasier – 81369 Munchen,
Germany*

*SYSTEMTECHNIK
BILDVERARESHUNG
SENSORTECHNIK
MESS UND
REGELTECHNIK*

*SAIL-ROURKELA STEEL PLANT
Chief Materials Manager (CP)
ROURKELA-769011*

India

<i>The Nachachi</i>	<i>Unser Zeichen</i>	<i>Datum</i>
	<i>St/Sho02154</i>	<i>Oct. 7, 2002</i>

Kind Attn: Mr. D. P. Padhee

*Ref: Your A.T. No.P4/654/09201 Dt. 28.8.02 &
Amendment letter P4/654/09201/76 Dt.29.9.02
Sub: Our ORDER CONFIRMATION*

Dear Sir,

*With reference to the above we enclose herewith the
A.T. after corrections as per your Amendment letter
and fax No.ME/RS/02 109 Dt.5.10.02 signed by us on
all pages as Terms of Acceptance. Further please note
that we accept for the test for 30 days continuously as
discussed by you with by Mr. Mantri and the
Commissioning Certificate to be issued by your*

Supervising agency immediately after 30 days of Test as agreed with our Mr. Mantri.

The delivery & Commissioning shall be completed by us within 9 months from the date of order confirmation 17.10.02. The Performance Bank Guarantee shall be sent shortly at the request you to arrange to obtain the Irrevocable L/C immediately.

Thanking You,

Yours faithfully,
For PSYSTEME

Sd/-
M. Steinwe”

18. In the schedule, Clause 17 was clearly agreed to by the Suppliers.
The General Terms and Conditions of the contract provide as under:

“1. SCOPE OF WORK: In consideration of the contract price to be paid by the purchaser, the contractor's scope of supplied and services shall be as per Technical specification (TS) and subsequent confirmation on a fully coordinated and integrated basis till successful commissioning and handing over of the plant to the satisfaction of purchase. The contractor shall supply commissioning spares, initial fill and consumables and special tools and tackles required for erection and commissioning of the package till issue of commissioning certificate. Any supplies and services which might not have been specifically mentioned in the TS but are necessary for completeness of the package shall be supplied by the contractor free of cost. The approval of purchaser at any stage shall not relieve the contractor of his obligations under this contract.

The contractor shall maintain properly all temporary lines in site. The contractor shall provide all construction tools and facilities including consumables for erection at site. The contractor shall maintain his own site office and stores as required for the work. All safety, health and pollution control measures as required to be adopted as per the statutory relations and safety code and practices shall be the responsibility of the contractor during execution of contract. The contractor shall take all precautions to avoid damage to any property of purchaser including underground facilities. In case of damage the contractor shall make good of the same at free of cost.

After completion of all site activities the contractor shall vacate the site after cleaning the debris in the form prior to the allotment. The contractor shall not be allowed to remove any scrap nor shall be given any credit for scrap materials. However the supplier shall be allowed to take back their own material in original form against documentary evidence to claim right and entering to the plant.

The Purchaser shall have the right, during the performance of the contract, to change the scope and/or technical character of the project and/or of the supplies and services stipulated in the contract. If any changes are required for completeness of the works as per scope of work the contractor shall not be entitled to extra price or time.

The General Specification for painting and colour code etc. shall be followed by the contractor for painting of equipment, steel structures etc. as annexed to Technical Specification and rules issued along with the Invitation to Tender.

2. SECURITY DEPOSIT: *The contractor shall submit Bank Guarantee for six (5%) of the contract price in*

the purchaser's proforma within 30 days of contract. The Bank guarantee shall be valid till end of Guarantee period. The BG shall be from a Nationalized Bank operable at Rourkela.

3. INSURANCE: The Contractor shall take out a Insurance Policy covering all risks specifically inclusive of all supplies, erection, site materials and third party covering all risks. The policy shall be kept alive and valid at all times till completion of erection, successful commissioning and supply of spare parts. In all cases, the Contractor shall lodge the claims with the Underwriters and also settle the claims without any extra cost to the purchaser. However, the contractor shall proceed with the repairs and/or replacement of the equipment/component without waiting for the settlement of the claims.

4.....

5. PRELIMINARY ACCEPTANCE CERTIFICATE: On completion of erection of the unit including utilities and auxiliaries, preliminary acceptance tests shall be taken up by the contractor to prove that the unit has been supplied and erected as per the contract and after erection is fit for start up and commissioning. Purchaser shall issue an certificate to this regard.

6. SUCCESSFUL COMMISSIONING: After the issue of preliminary acceptance certificate, the contractor shall commission the unit in an integrated manner under his sole responsibility. A detailed programme of commissioning shall be drawn up by the contractor in advance and submitted to the Purchaser for his approval. Commissioning of the unit shall be deemed to be successfully completed when equipment is able to meet the Contractual specification and quality incorporated in this contract. Results of commissioning

shall be recorded jointly by the contractor and the Purchaser. On successful completion of commissioning of the unit commissioning certificate shall be issued and the unit taken over by the Purchaser.”

19. The division of services between the German and Indian company was as under:

*“3. 4 No. of contracts to be awarded as below:
a) Design Eng & Supply of Eqpt. -Psysteme, Germany
b) Instn. Suprn. & Commissioning by Foreign Expert –
Psysteme Germany
c) Supply of Indegeneous items - MANTRI INDIA
d) Installation & Commissioning Assistance -
MANTRI, INDIA”*

20. The General Conditions of Contract for supply and erection of the plant machinery equipment, which was applicable in the present case, contained Article 26 and Article 44, which read as under:

*“Article-26 INSURANCE:
26.1 The entire property and interest (including plant, machinery, equipment and materials both indigenous and imported) contemplated in the contract shall be covered by comprehensive insurance (with the Purchaser as the principal holder) from ex-manufacturer's work stage until the plant is commissioned and guarantee tests completed successfully for full value against loss, damage or destruction by fire, lightning, earthquake, theft, pilferage, non-delivery of package/packages and all other risks including strikes, riots and civil commotions during transit, storage, erection, testing and commissioning to protect the Purchaser and the Contractor/ Contractors (including sub contractors). The insurance cover shall remain in full force upto the time the plant is finally accepted and taken over by the*

Purchaser. The Contractor shall from time to time, when so required by the Purchaser, produce the insurance policy and receipts for the premium. All moneys received under any of such policy shall be applied in or towards the replacement and repair of the plant damaged or destroyed but this provision shall not affect the Contractor's liabilities under the contract. The Contractor shall quote separately for taking out such insurance policy. The Purchaser, however shall have the right to direct that the insurance policy should be taken out with an Indian insurance company of his choice and if so directed, the Contractor shall take out insurance policy with the insurance company indicated by the Purchaser.

26.1.1 The Contractor shall settle claims with the underwriters and shall be solely responsible for the for the timely replacement/repair of damaged, broken or lost materials.

26.1.2 The Contractor's services shall include the filling and of all insurance claims on behalf of the Purchaser and all Work incidental thereto.

26.1.3 The Contractor shall be responsible for effecting insurance under the Indian Workmen's Compensation Act. Third Party Liability Insurance and any other insurance in with the Indian laws and regulation of his own cost.

26.2 Custody, intimation of shortage and damages etc.

26.2.1 Upon arrival at the plant site, of all plant machinery, equipment and materials, the Contractor shall assume custody thereof and remain responsible therefore until the plant is preliminarily accepted and taken over by the Purchaser in terms of the contract.

26.3 The Contractor shall whether acting as the Purchaser's agent or as custodian be responsible for

communicating to the Purchaser any shortages, breakages or damages, etc, as soon as they come to his notice without prejudice to his obligations under clause 26.1.1 to 26.1.3 above.

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Article-44 NON-WAIVER OF DEFAULTS:

44.1 Failure of the Purchaser to insist upon strict performances of any terms and conditions of the contract will not be deemed a waiver of any rights or remedies that the Purchaser may have and will not be deemed a waiver of any subsequent default under the terms and conditions of the contract. No right or remedy of the Purchaser will be exclusive of any other right or remedy and the Purchaser will have all rights and remedies given under the contract and now or hereafter existing in-law or by statute. The shipping or delivery by the Contractor or receiving of or payment by the Purchaser for the plant under this contract, will not be deemed a waiver of the right for any prior failure by the Contractor to comply with any of the provisions of the contract.”

21. A joint reading of the above documents and clauses clearly shows that there was no ambiguity whatsoever as to the scope of work to be undertaken by the Suppliers. Each of the documents mentioned above, clearly, make it incumbent upon the Suppliers to manufacture, transport and supply the equipment and to ensure installation and commissioning of the same. The insurance obligation was contained in the acceptance of tender, as also the general conditions. Between the suppliers, which were a German company and its Indian affiliate, there was division of work, which was agreed to. While design, engineering and supply of the system was to be done by the German company, indigenous items, and installation and commissioning assistance was to be executed by the Indian supplier. Commissioning was to

be supervised by the foreign expert. Thus, the obligations and division of work between the two Suppliers did not absolve either of the Suppliers from obtaining CME insurance. In fact, a perusal of the bid, which was submitted, also shows that there was to be comprehensive insurance, which included ocean freight, marine insurance, landing charges, comprehensive insurance, port charges, port rent, port clearance and Indian transport. The bid, in fact, gives a complete breakup of the manner in which after equipment was transported to the Rourkela Steel Plant, erection and commissioning had to be undertaken, and the charges for the same. Item No.8 in the bid specifically reads as under:

“Erection, testing, Commissioning including all civil engineering work and related supplies and establishment of P.G Parameters (both imported & indigenous items) and all Insurance except transit insurance”

22. This item in the bid document leaves no ambiguity or doubt whatsoever as to the fact that the insurance was to be obtained till erection, testing, commissioning including civil engineering work and related supplies, especially for both imported and indigenous items. CME insurance was to be obtained separately. Thus, the documents did not, in any manner, reflect any concession from obtaining CME insurance.

23. The Suppliers relied upon the letter of credit opened by SAIL and the performance guarantee issued by the Suppliers. These two documents did not contain a specific mention of CME insurance. What would be the effect of such absence of CME insurance clause in the letter of credit or performance guarantee? In order to appreciate the significance of such

absence, the nature of these documents needs to be considered. The purpose of each of these documents is completely distinct from each other. The original tender conditions, acceptance of tender, the general conditions of the contract and the bid lay down the respective obligations of the contracting parties. They clearly specify as to what kind of equipment is to be supplied, the manner in which it is to be supplied, the timelines for supply, the nature of the documents to be executed, requirements from the Suppliers' side - for example, for installation, commissioning etc. These obligations were finalised and were to take concrete shape once the acceptance of tender was communicated, and the same was confirmed by the Suppliers.

24. The letter of credit, by its very nature, is a document which merely secures the payments for the Supplier once the supply has been effected from German shores. The letter of credit is a financial instrument, which safeguards the payment to the Supplier and depending upon the nature of the letter of credit, the same is negotiated through the respective banks of the parties and upon presentation of necessary documents, the banks honour the payments to the Suppliers. The letter of credit is a consequence of the contract but does not stipulate the terms and conditions of the contract. It is a result of the contract for supply, and an assurance for payment, but does not replace the contract in any manner. The creation of any ambiguity in the letter of credit or the performance guarantee in respect of the kind of insurance to be obtained does not obviate the onus upon the Suppliers to conform to the terms and conditions of the contract. Clearly, the second letter dated 7th October, 2002 relied upon by the Suppliers has been termed by the Ld. Arbitrator as an alleged letter, which was never delivered to

SAIL. Therefore, the Id. Arbitrator disbelieved the second letter dated 7th October, 2002. Admittedly, the contract condition for obtaining CME insurance was never changed. Even going by the Suppliers' own argument that the officers in SAIL accepted the letter of credit and performance bank guarantee without a CME clause, the same cannot be said to free the Suppliers from complying with the said obligation. The general conditions of the contract, which contains the non-waiver clause being Article 44 of the general conditions has been extracted above. The said clause is completely clear in its intent and purport, that there cannot be any waiver even if there is a failure to insist upon strict performance of the terms and conditions of the contract. It specifically provides that the delivery of the equipment or receiving of the equipment would not be deemed as "*waiver of the right for any prior failure*" by the Supplier. Clearly, once the equipment was supplied and 80% of the payment was released, SAIL did not have any option but to go ahead and get the same installed at its plant. Id. Arbitrator's finding that the waiver clause supports the case of the Suppliers is clearly contrary to a bare reading of the clause itself. Id. Arbitrator's observation is that SAIL was seeking to take advantage of its own wrong and that it was barred by the principle of estoppel after having waived the condition for providing CME insurance. This, according to the Id. Arbitrator, was supported by Article 44 of the General Conditions of the contract whereas a reading of Article 44 establishes the contrary. Failure of SAIL or its officers in insisting upon strict performance of the CME clause, cannot be deemed to be a waiver of any rights of SAIL, as per Article 44. Id. Arbitrator's interpretation is glaringly incorrect and thus, is not sustainable. The observation of the Id. Arbitrator extracted below is, thus,

contrary to a reading of the clause itself.

“ The Respondents cannot take advantage of their own wrong, their own conduct, acts, omissions and commissions. The Respondents are barred by the principle of estoppel to raise a claim after unilaterally waiving the condition of providing CME insurance and accepting the Marine insurance policy without demur and protest. This view further supported by Clause 44 of the General conditions of the contract which talks of waiver, which clause has been reproduced hereinabove in para no. 53.”

25. The submission of Mr. Mehta that SAIL did not insist upon the issuance of CME insurance policy, implying that it had acquiesced to non-performance would be, therefore, incorrect in the light of the clauses applicable. While under Section 63 of the Indian Contract Act, the promisee may dispense with, or remit performance of contractual obligations, in the present case, the mere act of an individual officer cannot constitute, dispensing or remitting of performance. In case of organizations such as SAIL, the conduct of one officer cannot bind the organization until and unless the dispensing or remitting was done in writing, superseding the contractual conditions. The judgment in ***Sutlej Construction (supra)*** would not be applicable on facts. In the said case, the Court found that there had been waiver by one of the parties by conduct for a long period despite being notified by the other party. In the present case, the Suppliers' obligation was not limited to mere supply of equipment. The fact that 10% of the consideration was to be paid only after issuance of commissioning certificate and thereafter successful commissioning, remaining 10%, six months' after the commissioning, subject to regular and reliable working of

the system and issuance of the final acceptance certificate, shows that the Suppliers' obligation continued even after the equipment had reached the port at Kolkata. A large part of the local work was to be executed by Mantri Enterprises – Respondent No.2, and was to be supervised by the German company. Clearly, in the facts of this case, successful erection and commissioning did not take place. No commissioning certificate was issued. Part of the equipment was also destroyed due to fire, and no final acceptance certificate was issued. Thus, the Ld. Arbitrator's finding that the Suppliers' were entitled to the remaining 20% of the consideration is clearly not sustainable. The Suppliers did have an obligation to obtain CME for the entire equipment. There was no installation and commissioning, and hence the remaining 20% is clearly not payable.

26. Coming to the counter claim of SAIL, a mere perusal of the events, which transpired once the equipment had reached Kolkata port, clearly, shows that SAIL took up upon itself to transport the equipment, contrary to the stipulation in the contract, that required M/s Mantri Enterprises to undertake transportation. When the equipment reached the port, SAIL did not notify the Suppliers, and even storage of the equipment was done by SAIL under its own supervision. The manner in which storage of the equipment was undertaken was also not communicated to the Suppliers. There is no doubt that the fire took place in SAIL's factory and the same resulted in destruction of the equipment. The timelines, which were to be adhered to as per the contract, were not adhered to. The officers, who were cross-examined, did not have any explanation as to why the letter of credit and the performance bank guarantee were not as per contractual terms and conditions. The fire occurred on 25th May, 2004 and by then, sufficient time

had elapsed. The equipment remained without insurance cover right from the port at Kolkata, and all through the time when it remained in SAIL's premises. Under these circumstances, this Court finds that SAIL had, in fact, acted in a callous manner. Considering that the equipment was lying in SAIL's premises since October /November, 2003 till May, 2004, there was no reason why the equipment was not installed. Clearly, there was a breakdown of the relationship between the Suppliers and SAIL.

27. The counter claim of SAIL prays for a refund of the entire payment made to the Suppliers. SAIL did not adhere to the terms and conditions of the contract in respect of receiving of equipment, transportation, storage, erection, installation and commissioning. Under such circumstances, the Suppliers cannot be blamed for SAIL's own fault. SAIL, having not insisted at any point for CME insurance, after taking the delivery of the equipment and also having failed to take care of the equipment, cannot seek refund of the amounts paid to the Suppliers. Thus, the counter claim by SAIL has been rightly rejected. While the Suppliers are clearly in default for not obtaining CME insurance, and non-release of the remaining 20% payment is as per the contract as the Suppliers failed to carry out the successful installation and commissioning of the equipment, release of 80% in terms of the contract and thus the counter claim, is not liable to be allowed.

28. OMP is disposed of in the above terms.

**PRATHIBA M. SINGH, J.
JUDGE**

AUGUST 26, 2019/dk