

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL**

**NEW DELHI**

**Dated : June 3, 2011**

**Petitions No.392(C) of 2010 & 393(C) of 2010**

Wire & Wireless India Pvt. Ltd.

...Petitioner

Vs.

M/s Information TV Pvt. Ltd.

...Respondent

**BEFORE:**

**HON'BLE MR. JUSTICE S.B. SINHA, CHAIRPERSON**

**HON'BLE MR. G. D. GAIHA, MEMBER**

**HON'BLE MR.P.K. RASTOGI, MEMBER**

For Petitioner : Mr.Tejveer Singh Bhatia & Mr. Vikas  
Gupta, Advocates

For Respondent : Mr.Bhagabati Prasad Padhy, Advocate

**J U D G M E N T**

**S.B. Sinha**

These two petitions involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgement.

The basic fact of the matter being not in dispute, we may notice the same in brief from Petition No.392(C) of 2010.

Suffice, however, it to say that the parties hereto entered into two agreements for carriage of the channels of respondent which is a broadcaster for the towns of Delhi and Kanpur.

We may notice the relevant clauses of one of the agreements being dated 20.5.2008

"2.Term

This Agreement shall be valid for a period of One (1) Year starting from 20.05.2008 and ending on 19.05.2009 save as otherwise provided in this Agreement, it is agreed between the parties hereto that this Agreement would be predetermined if ITPL turns its channel/s into a pay TV channel."

"5.CHARGES/CARRIAGE FEE:

For the carriage of ITPL India News Channel across the cable television networks of WWIL situated at Delhi including Noida, ITPL shall pay TO WWIL Rs.1,40,00,000 (Rupees One Crores Forty Lakhs Only) inclusive of all taxes except service tax as applicable from time to time, collectively for the whole duration of this Agreement commencing from 20.05.2008 in the following manner:

- a)Rs.35,00,000/- (Rupees Thirty Five Lakhs) at the time of execution of this agreement
- b) Rs.35,00,000/- (Rupees Thirty Five Lakhs) on or before 31.8.2008.
- c) Rs.35,00,000/- (Rupees Thirty Five Lakhs) on or before 30.11.2008.

d) Rs.35,00,000/-(Rupees Thirty Five Lakhs) on or before 28.02.2009.

b)ITPL shall be solely liable for the payment of all taxes, levies, cess etc., applicable from time to time on the cable services provided by WWIL to ITPL under this Agreement.

c) All payments will be made by way of a Bank Draft drawn in favour of Wire and Wireless (India) Ltd payable at New Delhi.

d) Save as otherwise provided in this Agreement, if WWIL fails to carry the Services of ITPL in qualitative consistent and wholesome way, ITPL reserves the right to reasonably revise, reduce or withhold payments and the commercial terms of this Agreement.

.....

" 9. WAIVER:

No failure or delay on the part of the party hereto in exercising any power or right hereunder shall operate a waiver thereof nor shall any single or partial exercise of such right or power preclude any other or further exercise of any other right or power hereunder."

.....

"14. MODIFICATIONS:

This Agreement shall not be altered, modified or supplemented, except with the prior written consent of the authorized signatories of parties to this Agreement."

In this case, indisputably, the carriage fee was to be paid in advance wherefor petitioner was to raise invoices. It contends that

despite carrying its channels, respondent failed and/or neglected to pay the carriage fee for the last quarter and thus, an amount of Rs.32,00,095/- is due to it in respect of the town of Delhi and a sum of Rs.9,00,022/- in respect of the town of Kanpur.

The respondent contends that the amounts claimed by petitioner are not payable as it has consensually and voluntarily waived its right to receive the carriage fee for the last quarter.

The petitioner has claimed its right on the basis of the said agreements alone. It is not in dispute that the agreements in question have not been amended, varied or modified by any instrument in writing.

The respondent, however, would contend that the invoices were not served upon it. It expressed its inability to pay the carriage fee owing to economic recession in the country which was prevailing at that point of time.

For the said purpose petitioner is said to have entered into exchanges of e-mails with respondent.

We may notice some of them.

By an e-mail dated 9.3.2009 Shri Sanjay Grover of respondent was intimated by Shri Raghavendra Hooda, the Senior Business Manager (Operations) of petitioner as under:

"Mr. Grover,  
1. p.ref. our telecon recently.

2. Pl. find the said file reflecting outstanding as per our records, as attached. The same had also been dispatched to you via speed post.
3. As per our discussion, pl endorse your remarks/observations, if any. Apart from that, pl let me know the disbursal of this amount at the earliest as the same has been pending for some time."

In response thereto Shri Sanjay Grover stated: -

"I ve revd the same but again I am writing yu the note reg my payments issue I had asked fr discounts from mr manish also as per our meetings held till date I had nt received any response on its pls see."

By another e-mail dated 27.5.2009 it was communicated that the details of outstanding payments on account of carriage for the towns of Delhi and Kanpur had been sent.

The respondent, however, by an e-mail dated 27.5.2009 stated as under:

"I request yu again to start the channel in vijay nagar & ashok vihar my md is annoyed with yur understanding pla see I have requested yu no of times reg this as we had paid our 90% payouts to yu fr 3 & month quarter fr delhi & kanpur units. Pls arrange to start my channel first."

A reminder was issued by petitioner by an e-mail dated 27.5.2009 asking respondent to let the sender know its payment plans for the month in view of the commitment made in that behalf.

A demand notice was sent on 27.5.2009.

Yet again on 6.8.2009 petitioner sent an e-mail to the following effect:

"I would like to draw your attention on the Balance outstanding payment for Delhi & UP as per the detail mentioned below:

Invoice No.DEL01-000076 dt 01/02/09 Balance Outstanding Amount Rs.29,32,600/-

Invoice No.UTT01-000067 dt 01/02/09 Balance Outstanding Amount Rs.8,42,700/-

As you are aware of the fact these are already overdue and even after our discussion on numerous occasion the payment against these invoices has not been made by you.

We, once again request you to release the payment of above mentioned Invoices immediately without any further delay.

We request you to pl. confirm us the payment schedule with returned mail."

The respondent, however, in its reply accepted that an offer was made by petitioner for grant of extension only for a month subject to the condition:

- (i) immediate payment of the outstanding
- (ii) renewal of the agreement.

It, having said so, contended as under:

"The claim of the petitioner for the payment of carriage fees for the last quarter of the Agreement period is not sustainable in law as both the parties negotiating the payment of the carriage fee and

there was promises and reciprocal promises before the accrual of the liability. The Petitioner for the best reasons known to him choose not to exercise its right to terminate and stop the distribution of the signals of the Respondent under the agreement, despite the consistent stand of Respondent seeking discount of carriage fee much before the accrual of the liability. The petition has been filed with ulterior intention as the Respondent has stopped the renewal of the Channel Carriage Agreement dated 20.5.2008."

In support of the said contention respondent has relied upon an e-mail dated 13.3.2009 issued to Sanjay Grover by Mr. Manish Sehgal, which is to the following effect:

"This refers to the meeting we had in Essel house today.

We appreciate your concern on the existing market scenario and consequent financial implications.

However, we too are facing similar problems.

We are pleased to inform you that your existing carriage deal is being extended for a period of one month subject to your clearing of entire old outstanding and closing the new deal for this financial year."

(Emphasis Added)

A request was also made to Shri Harish Gupta who had formal meeting with the CEO by an e mail dated 18.5.2009.

Yet again on 14.2.2009 Shri Sanjay Grover sent an e-mail to Shri Mainsh of petitioner which reads as under:

"This is with reference to our agreement done dt 20<sup>th</sup> May 08 fr my channel fr delhi ncr & Kanpur units on s-band & subsequent to our meetings & discussions held regarding discounts required fr my channel as we had already cleared our payments till feb09 fr delhi & ncr & fr kanpur but I need discounts & extension fr 4 months & revive the agreement on discounted rates as in this present scenario of global recession we need yur co support thus i request yourself to kindly look into this on priority."

The core question which arises for consideration is as to whether respondent has made out any case of waiver of carriage fee for the last quarter of the specified period.

Mr. Bhagwati Prasad, the learned counsel appearing for respondent would contend:

1. Although the agreement in question has not been modified, amended or varied by an instrument in writing, petitioner by its conduct must be held to have waived its right to receive the carriage fee for the last quarter of the year.

2. The offer of respondent must be held to have been accepted sub silentio by petitioner.

3. Keeping in view the provisions of the agreement, in the event, the offer made by respondent was not acceptable to petitioner, the only option it had was to terminate the agreement.

Strong reliance in this behalf has been placed on:

- (i) A well known treatise by Chitty on Contracts, the relevant paragraph whereof is as under:

**“23-039 Waiver or forbearance.** Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to its **original** tenor. Waiver (in the sense of “waiver by estoppel” rather than “waiver by election” ) 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.”

**23-043 Consideration for waiver.** A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given. It may therefore be more satisfactory to regard this form of waiver, that is “waiver by estoppel”, as analogous to, or even identical with, equitable forbearance or “promissory” estoppel. Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective: first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it.”

- (ii) Waman Shrinivas Kini v. Ratilal Bhagwandas and Co.  
AIR 1959 SC 689;
- (iii) Dewan Singh v. Champat Singh & Ors. 1969 (3) SCC  
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We would proceed on the assumption that even in a case of this nature the right under a contract can be waived. However, in view of Clauses 9 and 14 of the agreement, the validity whereof is not in question, both `waiver' as also `modification' in the contract could have been carried out only by an instrument in writing.

Even otherwise in terms of Section 92 of the Indian Evidence Act, no other evidence would be admissible.

The petitioner in support of its case has examined three witnesses namely Shri Sanjay Arya, Vice President Technical, Shri Anil Jain, Assistant General Manager (Finance & Accounts) and Shri V. Suresh Kumar who had signed the channel carriage agreement on its behalf.

The respondent in support of its case has examined Shri Rajiv Misra, Chief Operating Officer.

Indisputably both the parties have not examined their officers who had exchanged e-mails, making offer(s) or counter offer(s).

In that view of the matter no part of evidence, in absence of any contract in writing varying the terms of the original contract, would be admissible except to show that even no such agreement had been entered into orally.

Although Mr. Bhagwati Prasad has placed before us the 28<sup>th</sup> Edition of Chitty on Contract, we may notice the relevant paragraphs from the 30<sup>th</sup> Edition of the said Treatise:

**"22-044 Consideration for waiver.** A waiver is also distinguishable from a variation of a contract in that there is no consideration for the forbearance moving from the party to whom it is given. It may therefore be more satisfactory to regard this form of waiver, that is " waiver by estoppel". as analogous to, or even identical with, equitable forbearance or " promissory" estoppel. Although consideration need not be proved, certain other requirements must be satisfied for such an estoppel to be effective; first, it must be clear and unequivocal; secondly, the other party must have altered his position in reliance on it, or at least acted on it.

**22-050 Burden of proof.** It is for the party seeking to terminate the contract to prove the existence of the facts which justify the exercise of his contractual right to terminate."

Paragraph 2-069 which was in the 28<sup>th</sup> Edition of the said authority does not appear to be contained in its 30<sup>th</sup> Edition. However, we may notice the same:

**"2-069 Silence and Conduct.** The general rule that there can be no acceptance by silence does not mean that an acceptance always has to be given in so many words. An offer can be accepted by conduct; and this is never thought to give rise to any difficulty where the conduct takes the form of a positive act. In principle, conduct can also take the form of forbearance: for example, a debtor's offer to give additional security for a debt can be accepted by the creditor's forbearing to sue for the debt. Similarly, a tenant can accept an offer of a new tenancy by simply not vacating the premises. In one

such case it was said that the offer had been accepted by "silence; but it seems better to say that it was accepted by conduct and that the landlord had waived notice of acceptance. Similarly an offer made to a landowner to occupy land under a licence containing specified terms may be accepted by the landowner's permitting the offer or to occupy the land. The possibility of acceptance by conduct is, yet again, illustrated by the arbitration cases already mentioned, in which an agreement to abandon the proceedings was alleged to have arisen from delay in prosecuting them. As already noted, legislation has now dealt with the practical problems which used to arise from delay in the pursuit of arbitration claims, but the reasoning of the arbitration cases could still apply where the legislative provisions have been excluded by agreement or where it was alleged that some other type of claim or remedy had been abandoned by tacit agreement. According to those cases, an offer of abandonment can be accepted by reacting to it, not merely by inactivity, but also by some further conduct: e.g. by closing, or disposing of, the relevant files."

We may, however, notice paragraph 34-474 from the 30<sup>th</sup> Edition of the said book.

**"34-474 Waiver or variation.** A similar attitude was taken by the Court of Appeal in *Plasticmoda Societa Per Azioni Vs Davidsons (Manchester) Ltd* but a difference of opinion occurred in *WJ Alan & Co Ltd V EL Nasr Export and Import Co*. The buyers undertook to furnish a confirmed credit covering the sale on f.o.b. terms of two shipments of coffee at a price at Kenyan shs. 262 per ton. The sellers did not raise any objection when the buyers furnished a confirmed credit expressed in sterling and, in point of fact, began to operate the credit and asked for an extension of the shipping time. After the second shipment but before the presentment of the documents, the pound sterling was devalued; the value of the Kenyan currency

remained unaltered. The sellers obtained payment under the confirmed credit and then sued the buyers for the difference between the amount paid and the amount in Kenyan currency for which the credit ought to have been opened. The Court of Appeal held that the sellers were not entitled to recover. Lord Denning M. R. said:

"... the sellers, by their conduct, waived the right to have payment by means of a letter of credit in Kenyan currency and accepted instead a letter of credit in sterling".

He emphasized that a person is entitled to rely on the waiver although no consideration has moved from his and although he has not sustained any detriment by acting on it. Megaw L. J. based his concurring judgment on a different ground. In his view the consequence of the acceptance of the sterling credit by the sellers was "that the original terms of the contract of sale as to the money of account was varied from Kenyan currency to sterling'. He conceded that if there were no variation of the contract, the buyers would still be entitled to succeed on the ground of waiver. But he thought that this principle would have a more suitable scope of application in cases involving a number of shipments. A similar view was expressed by Stephenson L.J., who doubted whether the waiver doctrine would apply in cases where the buyer had not altered his position to his detriment."

In Anson's Law Contract it is stated as under:

"(e) WAIVER

A party who voluntarily agrees to forbear from insisting on the mode of performance or time of performance fixed by the contract, or forbears from so insisting, will be held to have waived the right to require that the contract be performed by the other party in accordance with its terms. But 'waiver' is a term which bears many meanings, has been

criticized as a 'slippery word worn smooth with overuse, and as we shall see, is also used to refer to an election between inconsistent rights. Waiver is relevant where difficulties of form or absence of consideration mean that there is no variation of the contract. Waiver was developed by the common law mainly as a device for evading the formal requirements of the Statute of Frauds, but because, as we have noted, formal requirements are much less important in the modern law, this aspect is now of less importance, although still relevant for certain type of contract, such a contracts for the sale of land and guarantees."

In Cheshire and Fifoot on Contract, it is stated:

**"Waiver of a contractual term by one party at the request of the order:**

Such, then, is the law where the variation is made for the mutual advantage of both parties. A different and a slightly more complex situation may arise where the alteration of the contractual terms is designed to suit the convenience of one only of the parties. One party may accede, perhaps reluctantly, to the request of the other, and promise that he will not insist upon performance according to the strict letter of the contract. This is an indulgence that is a common feature of commercial life. In the case of a contract for the sale of goods, for instance, approval may be given to the request either of the seller or the buyer that the date of delivery be postponed for a short time. An arrangement of this kind for a substituted mode of performance is generally described as either a waiver or a forbearance by the party who grants the indulgence."

The high authority of Chitty on which reliance has been placed by Mr. Bhagwati Prasad, itself would, therefore, show that no variation of a

contract required to be made or evidenced by writing must be made or evidenced only by writing. **[See also paragraph 23-033, page 1466]**

In the aforementioned situation the question of applying the principle of waiver in this case would not arise.

Moreover, respondent itself in its reply stated that it had not accepted the offer of petitioner in terms of its e-mail dated 18.5.2009. In that view of the matter, the subsequent negotiations as alleged by respondent resulting in novation of contract should have been pleaded and proved; the burden in this behalf being entirely on it.

The respondent having not examined the officers who entered into negotiations with the officers of petitioner and in any event having not examined any responsible officer including its Chief Executive cum Managing Director to establish its contentions, cannot be said to have proved any meeting with the authorized representative of petitioner for arriving at the alleged understanding.

It is of some significance to notice that although respondent invoked the doctrine of sub silentio, it itself had never sent any letter to petitioner containing the terms of the modified contract.

The offer made by petitioner was a conditional one.

It was to be accepted in its entirety or not at all. If the conditional offer of petitioner had not been accepted, it is too late in

the day for respondent to contend that at least it was entitled to one month's extension, free of charges.

In Digital Infotainment Pvt. Ltd., Mumbai & Ors. v. M/s Anush Satellite Network, Karnataka and Ors. in Petition No.150(C) of 2009 disposed of on 7.2.2011 this Tribunal has held as under :

"68. A settlement being a contract between the parties must be given its full effect. The terms of the contract, when the settlement is an overall one, must be given effect to in their entirety. If giving benefit to one part of the settlement is subject to the compliance of the other parts, unless the conditions precedent therefor are satisfied, no case can be said to have been made out for implementing a part thereof. The words "subject to", in our opinion, assume significance. It provides for a condition precedent. The intention of the parties would also become apparent from paragraph 10 of the said memorandum of settlement. The list of operators as also of the Respondent No.1, subscribers was to be given to the company, was undertaken by Mr.Suresh I., so as to enable the 'Company' to effect changes in billing consequent recovery of the outstanding amounts. Reconciliation was to take place in 30 days and collections made from the operators were to be paid in 90 days."

Coming to the decision of the Supreme Court of India in Waman Shrinivas Kini (supra) it may be noticed that therein the question of waiver was considered in the context of subletting of a tenanted premises. The Supreme Court clearly held that there cannot be any waiver of any illegality. It amounts to release. A party may not insist upon its right.

It is not a case where the contract was to the benefit of only one of the parties. In that case the plea of waiver, however, was found to be unsustainable.

In Jagad Bandhu Chatterjee v. Smt. Nilima Rani & Ors. *Jairborthan*, 1969(3) SCC 445, the Supreme Court invoked the provisions of Section 63 of the Indian Contract Act in terms whereof a promisee may dispense with the performance of the promise made to him or he can accept, instead of it any satisfaction of the contract which he thinks fit. Such is not the position here.

We may, however, notice that at the stage of formation of a contract it is possible to invoke the doctrine of 'Acceptance sub silentio'. It has been so held by this Tribunal in *Ushodaya Enterprises Ltd., Ranga Reddy District, A.P. Vs. M/s. Sri Gouthami Cable Network, East Godavari District, A.P. Petition No.59(C) of 2010*.

We may furthermore notice that in *Bharat Petroleum Corpn. Ltd. v. Great Eastern Shipping Co. Ltd.* (2008) 1 SCC 503 at page 512, the Supreme Court of India, in the peculiar facts obtaining therein, held:

"19. It is, no doubt, true that the general rule is that an offer is not accepted by mere silence on the part of the offeree, yet it does not mean that an acceptance always has to be given in so many words. Under certain circumstances, offeree's silence, coupled with his conduct, which takes the form of a positive act, may constitute an acceptance-an agreement sub silentio. Therefore, the terms of a contract between the parties can be proved not only by their words but also by their conduct.

20. The conduct of the parties, as evidenced in the said correspondence and, in particular the appellant's silence on the respondent's letters dated 5-11-1998 and 4-1-1999, coupled with the fact that they continued to use the vessel, manifestly goes to show that except for the charter rate, there was no other dispute between the parties. They accepted the stand of the respondent sub silentio and thus, continued to bind themselves by other terms and conditions contained in the charter party dated 6-5-1997, which obviously included the arbitration clause."

It is not a case where by any standard, petitioner can be said to have bound themselves by any other term and conditions contained in the agreement in question by reason whereof it had given effect to only one part of it and not the other part.

It, however, is admitted that the amount payable in Petition No.392(C) of 2010 is only Rs.29,64,561/- as petitioner company had received the TDS certificate of Rs.2,35,534/- against the general entry shown in ledger statement for Rs.2,67,495/-. Thus, a sum of Rs.31,961/- had been adjusted towards TDS in the books of accounts.

The claim of petitioner to the aforementioned extent in Petition No.392(C) of 2010 is sustainable. The petitioner furthermore would be entitled to the amount claimed in the other petition i.e. Rs.9,00,022/-. The petitions are allowed. The petitioner shall be entitled to interest at the rate of 12% per annum on the sums from the date they fell due till realization.

The petitioner would also be entitled to costs in both the petitions.

Advocate's fee Rs.25,000/- in each of the cases.

**(S.B. Sinha)**  
**Chairperson**

**(G.D. Gaiha)**  
**Member**

**(P.K. Rastogi)**  
**Member**

**June 3, 2011**  
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