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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 435/2015

FIBERFILL ENGINEERS Petitioner
Through: Mr. Amit Gupta with Mr. Anant A.
Pavgi and Ms. Mansi Kukreja, Advocates.

versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr. M.M. Kalra with Ms. Sonali Kumar,
Advocates.

With

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ARB.P. 436/2015

FIBERFILL ENGINEERS Petitioner
Through: Mr. Amit Gupta with Mr. Anant A.
Pavgi and Ms. Mansi Kukreja, Advocates.

versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr. M.M. Kalra with Ms. Sonali Kumar,
Advocates.

And

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ARB.P. 437/2015

FIBERFILL ENGINEERS Petitioner
Through: Mr. Amit Gupta with Mr. Anant A.
Pavgi and Ms. Mansi Kukreja, Advocates.

versus

INDIAN OIL CORPORATION LIMITED Respondent
Through: Mr. M.M. Kalra with Ms. Sonali Kumar,
Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER
30.11.2016

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1. These three petitions by, Fiberfill Engineers, under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') seek the appointment of an Arbitrator to adjudicate the disputes arising out of separate Contracts dated 30th January 2009 entered into between the Petitioner and the Respondent, Indian Oil Corporation Limited ('IOCL') for supply, installation and commissioning of Retail Visual Identity Elements viz., Monoliths, Facility Signs, Direction Signs, Spreaders at various retail visual outlets of IOCL in State Offices all over the country.

2. Arbitration Petition No. 435 of 2015 concerns Contract No. 10008959 (IOCL Monolith Work), Arbitration Petition No. 436 of 2015 pertains to Contract No. 10009013 relating to retail visual identity (RVI) work in Madhya Pradesh, Uttar Pradesh and Arbitration Petition No. 437 of 2015 pertains to Contract No. 10009011 concerning RVI work in Andhra Pradesh and Karnataka.

3. The work orders were placed on region-wise lots giving state-wise quantities for monoliths as per the requirement of each State offices. Copies of the letter of acceptance in respect of each contract had been placed on record. It appears that there was a delay in completing the works. The

Petitioner sought to explain the delays citing the difficulty in importing the primary raw material from Japan and the USA for reasons beyond the control of the Petitioner and “on account of various defaults on part of the Respondent.” The Petitioner's case is that the Respondent unfairly deducted amounts from the bills raised by it on the ground of liquidated damages/price adjustment for the delay.

4. In the above circumstances, separate legal notices dated 5th December 2014 were issued by the Petitioner to the Respondent calling upon it to release the amounts due under the contracts together with interest. This was followed by a further letters dated 5th June 2015 (in the case of Arb Pet. No. 435 & 436 of 2015) and 28th February 2015 (in the case of Arb Pet. No. 437 of 2015) by the Petitioner invoking the arbitration clause 9 of the works contract requesting the Respondent IOCL, to nominate a panel of three persons in accordance with the arbitration clause so that the Petitioner could select one Arbitrator. When IOCL did not respond to the said notice, the present petitions were filed.

5. Separate replies have been filed by the Respondent in each of the petition. By way of a preliminary objection, it is stated that there was a full and final settlement of all the claims and that the Petitioner had already accepted the final payment under the work contracts including commission and deductions. The copies of ‘no claim certificates’ were enclosed with each of the replies.

6. In the rejoinders to the above replies, which were more or less identical, the Petitioner for the first time sought to explain the 'no claims certificates'

issued by it. In para 4 of the rejoinder in Arb.P. No. 435 of 2015 it was stated thus:

“4. That it is submitted that in regard to the allegations pertaining to the acceptance of the final bills and giving no claim certificate, it is submitted that the Respondent has tried to play mischief inasmuch as for the Three arbitration petitions, i.e., Arb. P. No. 437 of 2015, Arb.P. 436 of 2015 and Arb.P. No. 435 of 2015, the Respondent has placed on record identical no dues certificate even though the three petitions related to different contracts. The certificates do not even mention as to which contract do they pertain. It is submitted that no sanctity can be given to the letters filed along with the reply by the Respondent.

Furthermore, it is relevant to note that the no claim certificate filed by the Respondent is dated 9th June 2012 and 28th January 2014, whereas the last payment for the contract was received on 23rd June 2014.

It is submitted that the signing no dues certificate by the Petitioner was a pre-requisite by the Respondent for the clearing of the payment to the Petitioner. That in case of the absence of such certificate, the payment would not have been made to the Petitioner. It is submitted that such no dues certificate obtained by the Petitioner cannot be held binding upon the Petitioner. That the no dues certificate obtained by the Petitioner is prior in time than the release of the payment by the Respondent.”

7. It was further submitted in the parawise reply to the preliminary objection as under:

“It is submitted that the signing no dues certificate by the Petitioner was a pre-requisite by the Respondent for the clearing of the payment to the Petitioner. That in case of the absence of such certificate, the payment would not have been made to the Petitioner. It is submitted that such no dues certificate obtained by the Petitioner cannot be held binding upon the Petitioner. That the no dues certificate obtained by the Petitioner is prior in time than the release of the payment by the Respondent.

It is submitted that if the Petitioner had raised any claim/dispute with regard to deduction in the bill; the Respondent would have withheld the amounts to be released to the Petitioner by the Respondent. It is therefore, submitted that there are arbitral disputes between the parties which require fair adjudication. All other allegations to the contrary are absolutely wrong and hence denied.”

8. In light of the above replies of the Respondent, the Court by its order dated 27th July 2016 directed the Respondent to produce the original of the ‘No Claim Certificates’. On 27th September 2016 the original files were brought to the Court. Copies of each relevant file were made and supplied to learned counsel for the Petitioner and also filed in the Court by the Respondent.

9. Today the Court has also perused the original files containing ‘No Claim Certificate’. Two broad questions arise for consideration in the present petitions. First is whether the Petitioner has stated all the facts within the knowledge of the Petitioner and second is whether the Petitioner’s explanation for issuing ‘No Claim Certificate’ by way of rejoinders can be accepted by the Court and the arbitrable dispute, if any, be referred to the arbitration?

10. As far as the first question is concerned, a careful perusal of the each of the entire arbitration petitions reveal that there is no statement made thereunder by the Petitioner that it had issued ‘No Claim Certificate’ to the Respondent on various occasions and that it was compelled to issue such ‘No Claim Certificate’ in order to receive the payment. Strangely even in notices sent by the Petitioner to the Respondent prior to the filing of the

arbitration petitions including the notice invoking the arbitration clause there is no whisper of any claim certificate having been obtained by the IOCL from the Petitioner under coercion. It is only by way of rejoinder that the Petitioner has sought to explain that no claim certificate had been obtained under coercion and therefore did not constitute the full and final settlement of all claims.

11. The Court finds no justification whatsoever by the Petitioner withholding relevant facts concerning the no-claim certificates which was material to the reliefs sought in these petitions. It is one thing to make a full disclosure of the facts and then offering an explanation why the reliefs would be maintainable notwithstanding such no-claim certificates. It is another to withhold those material facts and offer an explanation after the Respondent points them out in its reply. The Petitioner has, by adopting the latter course, demonstrated that despite knowing that it had issued 'No Claim Certificates', whatever the circumstances, concealed that relevant fact in the petitions thereby disentitling it for any relief. There can be no excuse whatsoever for the Petitioner coming to the Court with unclean hands.

12. Turning to the second question, the Petitioner does not dispute the issuance of such 'no claim certificates'. However, learned counsel for the Petitioner relied on the decisions in *Union of India v. Master Construction Company* (2011) 12 SCC 349, *Bharat Coking Coal Limited v. Annapurna Construction* (2003) 8 SCC 154, *NTPC Limited v. Reshmi Constructions, Builders and Contractors* (2004) 2 SCC 663, as well as *Ravindra Anant*

Deshmukh v. City and Industrial Development Corporation of Maharashtra Limited AIR 1997 Bom 284 and submitted that the kind of no claims certificate that has been obtained by the IOCL from the Petitioner in the present case does not qualify to be certified as full and final settlement of claims of the Petitioner. He submitted that they did not mention the contract number, or the cheque details by which the payment was so made and many of them contained incomplete or incorrect particulars and, therefore, could not be relied upon.

13. The Court finds that in each of the decisions cited by the learned counsel for the Petitioner, the affected party, i.e., the Contractor had lodged the protest either on the every date of receiving payment or soon thereafter. Invariably in those cases the contractor stated that he was coerced into issuing such certificates in order to receive payment . Further, such letter of protest was written proximate to the receipt of payment. In that context, in each of the abovementioned decisions, one of the questions that arose before the Courts was whether such protest was genuine.

14. As far as the present cases are concerned, there was no protest whatsoever raised by the Petitioner while accepting the payment or soon thereafter or even in the demand notice issued by the Petitioner to the Respondent subsequently. The protest was voiced only in the rejoinders filed by the Petitioner to the replies of the IOCL in these petitions. Consequently, the question of considering whether protest is genuine or whether the no claim certificates signed by the Petitioner can be considered to be full and final settlement of all claims of the Petitioner even does not arise. It is

inconceivable that if the Petitioner had a genuine grievance about the manner in which the no claim certificates were obtained, it would not even lodge a protest.

15. For all the aforementioned reasons, the Court is not inclined to grant any reliefs prayed for in these petitions. They are dismissed with costs of Rs. 5,000 each which will be paid by the Petitioner to the Respondent within a period of four weeks.

IA No. 16077/2015 (delay of 50 days in re-filing the petition) in Arb.P. 437/2015

16. For the reasons stated therein, this application is allowed. The delay of 50 days in re-filing the petition is condoned.

NOVEMBER 30, 2016
Rm

S.MURALIDHAR, J