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

Decided on: 26th February, 2024

\+ O.M.P. (COMM) 241/2021 & CRL.M.A. 5759/2024, I.A. 10440/2021.

M/S. FIBERFILL ENGINEERS THROUGH ITS PARTNER MR. RISHABH KISHORE ..... Petitioner

Through: Mr. Amit Gupta, Mr. Shiv Verma, Ms. Muskan Nagpal, Advocates.

versus

M/S. INDIAN OIL CORPORATION LIMITED THROUGH DY. GENERAL MANAGER (ENGG.) ..... Respondent

Through: Mr. Jayant Mehta, Sr. Advocate with Ms. Mala Narayan, Mr. Shashwat Goel, Ms. Isha Ray, Mr. Udit Dedhiya, Advocates.

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CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 ["the Act"], is directed against an arbitral award dated 13.08.2020 by which a learned sole Arbitrator has adjudicated disputes arising between the parties under three contracts dated 30.01.2009.

2. The contracts were executed pursuant to tenders floated by the respondent for supply, installation and commissioning of Retail Visual Identity Elements at its retail outlets all over the country. The contracts were similar in all respects, except that they related to different State offices of the respondent. Disputes under the three contracts were heard together with the consent of learned counsel for the parties, and disposed

of by a common award dated 13.08.2020.

3. The petitioner raised claims of approximately Rs. 8.1 crores against the respondent, on account of delay in implementation of the contracts and also sought refund of liquidated damages deducted by the respondent, loss of business opportunity, and price escalation. In the impugned award, these claims have not been decided on merits, but a conclusion has been recorded, that the claims were discharged by accord and satisfaction on account of full and final settlement between the parties.

4. I have heard Mr. Amit Gupta, learned counsel for the petitioner, and Mr. Jayant Mehta, learned Senior Counsel, and Mr. Shashwat Goel, learned counsel, who made submissions on behalf of the respondents.

5. At the outset, in the impugned award, several contentions of the parties are recorded based on the "SAP system", "SAP Contract", and other documents stated to have been generated by the SAP system. Before this Court, however, it is the accepted position that SAP is an internal management software of the respondent and the petitioner has neither any control over the inputs in the SAP system, nor any ability to edit any documents uploaded on the SAP system. The hearing before this Court, therefore, proceeded on the basis of the contracts and documents signed by both the parties.

6. Before entering into the controversy with regard to full and final settlement of the disputes, the process adopted by the parties in working of the contracts in question requires some elaboration. The contracts are umbrella contracts which provide for execution of the work in question at various retail sites of the respondent, within the jurisdiction of the concerned State office. Under the contracts, the respondent issues "call up

orders" for work to be executed at a particular site/sites. Each call up order contains several "line items" of different elements to be executed. On the basis of these line items, the respondent then generates "service entry sheets" ["SES"] upon submission of bills by the petitioner. After completion of the work, the SES are approved by both the parties. It is further clarified by learned counsel for the parties that several call up orders are placed under the same contract, and several SES are generated under the same call up order. Until this point, there is no difference between the parties.

7. As mentioned in greater detail hereinafter, however, there is one further element on which the parties are not *ad-idem*. According to the respondent, after the SES is signed by both the parties, it may be subjected to deductions, for example, on account of defective work done or on account of delay by levy of liquidated damages, and payment is made after those deductions are effected. As will be discussed in greater detail later in this judgment, it is the contention of the respondent that payments made in terms of the SES, after these deductions, have also been accepted by the petitioner. This contention is disputed by the petitioner.

8. Turning now to the question of whether the claims in the present case were discharged by accord and satisfaction, it may first be noted that the impugned award records the clear position of the respondent that no formal "No Dues Certificate" had been signed by the claimant[1]. The learned Arbitrator also noted the submission on behalf of the claimant that no final bill was prepared under Clause 6.2.1.0 of the General

[1] Paragraphs 5.2 and 7.19 of the impugned award dated 13.08.2020.

Conditions of Contract and that this fact had been admitted by the respondent's witness[2]. On this basis, the learned Arbitrator has considered the respondent's position that the petitioner was issuing tax invoices after competition of the work, based upon the SES created in the respondent's SAP program, and jointly signed by representatives of both parties. The SES was thereafter sent to the Finance Department of the respondent for release of payment.

9. It may be noted that the case run by the respondent before the learned Arbitrator, to some extent, is directly contrary to the position taken by it in proceedings before this Court under Section 11 of the Act[3]. In the said proceedings, the respondent had taken a clear stand that No Due Certificates had been signed by the petitioner. However, the respondent was unable to produce those certificates despite the directions of this Court. In any event, this Court ultimately dismissed the petitioner's application for appointment of an arbitrator, but the decision was reversed by the Supreme Court[4], leaving the question open for adjudication by the learned Arbitrator.

10. Be that as it may, the learned Arbitrator has also noted the submission of the petitioner that the documents placed on record by the respondent in the arbitration proceedings were inconsistent with the stand of full and final settlement, inasmuch as the respondent was unable to correlate the certificates placed before the Arbitral Tribunal with a particular work order/call up order or to match the same with the payments made from time to time. In the context of this submission, the

[2] Paragraph 7.4 of the impugned award dated 13.08.2020.
[3] ARB.P. Nos. 435-37/2015.
[4] Order dated 04.04.2018 in SLP (C) Nos. 11328-11330/2017.

learned Arbitrator has also noted the evidence of the respondent's witness in cross-examination, that the dates of payment are not contained in the No Due Certificate as the certificates are prepared by the Engineer and sent to the Finance Department of the respondent which makes the payments. It is clear therefrom that, even according to the respondent, the No Due Certificates were made prior to any payment having been actually made by the respondent.

11. In the impugned award, the issue has been summarised as follows:

> *"7.23 Though I have stated the law related to No Due Certificate, it may be mentioned at the outset that in the instant case, the Claimant has not taken the plea of fraud or coercion or undue influence in signing the SAPs.* ***On the contrary, the Claimant has raised a basic objection that these SAPs relied upon by the Respondent cannot be treated as No Due Certificates****. As noted above, the contention of the Claimant is that the manner of processing the payments stated by the Respondent is its internal working software used for the contract and internal allocation of work between the various State Offices which has no relevance to the dispute. According to the Claimant, there cannot be multiple No Due Certificates. Such an assertion of the Respondent is untenable. It is argued that it has to be a single document for each contract. Further, no Final Bill was prepared in the instant case after the completion of the contract. It is also stated that the Respondent has made contradictory statements while taking a position that No Due Certificates were given by the Claimant.*
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> *7.24 In this scenario, the moot question that needs determination is as to whether the SAPs relied upon by the Respondent can be treated as No Due Certificates as per the provisions of the Contract entered into between the parties?"*[5]

12. After extracting the clauses of the contract, the learned Arbitrator has held as follows:

> *"7.33 The aforesaid scheme of the provisions contained in the GCC undoubtedly mentions about preparation of Final Bill. Such a Final Bill is to be prepared on the completion of the entire Contract and the responsibility to make these bills rests on the Contractor, i.e., the Claimant in the instant case. If such a Final Bill is not prepared, it is*

[5] Emphasis supplied.

the Claimant did not discharge his obligation in this behalf. ***In the instant case, we are examining the impact of 'No Due Certificates' which were given by the Claimant while receiving the payments in respect of each call up order.*** *It is an admitted case that in respect of each call up order, after its execution, Service Entry Sheets (SES) were prepared.* ***All these SESs are placed on record by the Respondent which are tendered in evidence through witness on affidavit and duly proved.*** *In fact, there is no dispute about that the Claimant signed these certificates. On examination of these sheets, following features are discernible:*

(i) Against the column as to whether it is RA/Final Bill, SES mentions it to be "Final Bill";

(ii) It mentions the Work Order number with date as well as period during which the work was performed.

7.34 ***Pursuant to the aforesaid bills prepared, payment was made to the Claimant. On receipt of such payment, the Claimant signed 'No Claim/No Due Certificate' in respect of each such payment.*** *By way of illustration, language of one such certificate is reproduced below:*

No claim/No due certificate

Friday, 24. January 2014

Name of Department :

Name of the work : Supply, Installation and Commissioning of Retail Visual Identity Elements viz. Spreaders, Building / Canopy fascia and Building / Canopy

Name of the contractor : FIBERFILL ENGINEERS

SAP LOA No. : 17963801 dt-09.07.2009

No Claim certificate

Certified that I/We have discharged our entire obligation under abolition of Contract Labour Act,1970 and I/We would indemnify the owner if there is any demand against the corporation on our account.

I/we certify that I/We have no further claim than those given in the final bill and I/We accept the payment as full and final settlement of all My/Our claim .

For FIBERFILL ENGINEERS

Sign of Contractor

No Due Certifcate

Certified that there is nothing due from this agency on account of T&P articles materials,electricity etc.,and that the work has been completed as per specification of contract and/or except where reduced rates proposed (Strike which is not applicable).

Site Enginner

Engineer Incharge

IndianOil Corporation Limited

IndianOil Bhavan, Abbakka Nagar, Kolla

This certificate also mentions name of the work, SAP LOA No. It

corresponds to Service Entry Sheet. ***The Claimant categorically mentioned that on receipt of the payment in respect of that particular SES, which is also described as the 'Final Bill' in the certificate, it had no further claim. Thus, the Claimant accepted the details given in SES/Final Bill.****"*[6]

13. There is, in my view, a fundamental difficulty with the case made out by the respondent, which is that none of the certificates placed before the learned Arbitrator were shown to have been issued after the payment was made. This is of significance in the present case because the petitioner's case, even during the arbitral proceedings, was that amounts had been deducted by the respondent unilaterally on account of liquidated damages, *after* the submission of the bills by the petitioner[7].

14. Referring first to the No Due Certificate dated 24.01.2014 which has been reproduced in paragraph 7.34 of the award, it is the contention of Mr. Gupta that this certificate was signed at the time of submission of the bill and not after the payment was made. It is submitted that the respondent led no evidence at all which could support the observation in the impugned award, that these certificates were signed "*after receipt of payment*". Mr. Mehta, on the other hand, submits that the certificates were signed *after* payment was made, but is unable to point out any evidence laid before the learned Arbitrator in this regard. In the impugned award, the averments in the Statement of Defence have been reproduced in paragraph 5.2 of the award, which do not indicate even a contention of the respondent, that the No Due Certificates was signed after the payment was made.

15. The certificate, entitled "No Claim/No Due Certificate", is in two

[6] Emphasis supplied.
[7] Paragraphs 7.8, 7.41 of the impugned award dated 13.08.2023.

parts – the part signed by the petitioner is a "No Claim Certificate", and the part signed by the respondent is a "No Due Certificate". Upon a reading of the certificate itself, the petitioner appears to have certified that there would have been "*no further claim than those given in the final bill*" and that it would "*accept the payment as full and final settlement on its claim*". Immediately below this certificate, is a certificate to be signed by the respondent's representative, to the effect that there is nothing due from the agency on account of various articles etc. Upon a reading of the entire document, there does not appear to be any indication that these certificates were made after the payments had been received, and that these signified a full and final settlement. Instead, the certificate appears to indicate that the bills submitted by the petitioner incorporate all its claims, that payment of the amount mentioned in the bill would be treated as full and final settlement of all its claims, and that the petitioner has no dues to the respondent, to be adjusted against payment.

16. In the impugned award, reliance has additionally been placed upon the SES sheets which were also generated, admittedly, *prior to payment* having been made. By an additional affidavit dated 13.02.2024, the respondent has contended that the petitioner in fact signed an additional sheet in the SES documents, after consenting to deduction of liquidated damages. However, as noted below, only one of these additional sheets – out of several hundreds SES in issue – was placed before the learned Arbitrator, rendering it impossible to adjudicate this contention.

17. In the impugned award, the contention regarding deductions subsequent to these documents having been executed, has been noticed but not adjudicated. I am of the view that this is a fundamental issue

which goes to the root of the matter. Even in the award, the finding is that the parties had agreed to settle the claims at a particular amount, but the respondent has not been able to make a case that the said amount was, in fact, paid. This is the very basis of a claim of accord and satisfaction, which may defeat the petitioner's plea for refund of the amount of liquidated damages deducted by the respondent, but has escaped adjudication altogether.

18. It may be noted that, during the course of hearing in this Court, an offer was made by Mr. Gupta with regard to resolution of the disputes finally. The respondent did not accept the offer and instead filed an affidavit dated 13.02.2024 contending, *inter alia*, as follows:

> *"5. That after performing the job,* ***the Respondent used to raise separate bills for each of the RO under each call-up order. Such bills were submitted along with the tax invoice and requisite documents for processing to the concerned officer of the Respondent. This processing was done by creating Service Entry Sheets (i.e. SESs).*** *These SESs were created for each RO. These SESs mention whether the bill submitted by the Respondent was a first bill or the final bill for works at the RO.* ***The net final amount payable to the Petitioner after applying price adjustment (if any) for delay in completion of work used to be mentioned on the SESs. The representatives of both, the Petitioner and the Respondent, jointly signed & stamped the SESs after which the payments were released to the Petitioner.***
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> *6.* ***That the final amount which is mentioned in the SESs have been released/ transferred to the Petitioner against all the SESs for all the ROs****. Undisputedly, the Petitioner has never raised any protest or objected to the calculations made in the SESs* ***after applying price adjustment (which was done for most of the ROs). In fact, Petitioner had put his sign and stamp on each page of the SESs, including the pages where the financial calculations were made after applying price adjustment.*** *The Petitioner has also never protested/ objected to the payments which were released to it. as per the SESs. All the payments were duly received by it at the relevant time.*
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> *xxxx xxxx xxxx*
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> *9. That the above-mentioned mechanism, i.e. deduction of delay related compensation was done in the manner described in Para 8*

above. ***In other words, the SES sheets that were subjected to such deductions on account of delayed work by the Petitioner contained an additional sheet showing the amount deducted. That sheet was also signed by both the parties hereto. Further, the said signed sheets were placed before the Ld. Arbitrator.*** *It is submitted that the net amount, i.e. invoice minus (-) delay compensation, signed off by both the parties was paid over by the Respondent to the Petitioner.*

xxxx xxxx xxxx

12. ***That the Petitioner has received full and final payment towards each call-up order. For some of the call-up orders, the Petitioner has signed No claims certificates after receiving the payments,*** *all of which were placed before the Ld. Arbitrator.* ***For the remaining/ other call-up orders, the Petitioner was paid in full as per the calculations made/ amount mentioned in the respective SES sheets for each RO****. It is reiterated that the calculations in the SESs were made after applying price adjustment (if any) for delay in completion of work by the Petitioner, which were also signed and stamped by the Petitioner."*[8]

19. In this affidavit, therefore, the respondent has accepted the position that the joint signing and signature on the SESs was prior to release of payments to the petitioner. However, in paragraph 6 of the affidavit dated 13.02.2024, it is stated that a final calculation was contained on the SES after applying price adjustment i.e., after deduction of liquidation damages. It is stated that the petitioner has put its sign and stamp on each of the SES including where the final calculations were made after applying price adjustment. One such example was also annexed to the affidavit[9].

20. Upon filing of this affidavit, Mr. Gupta raised a specific objection that other than the one page annexed to the affidavit, no other calculations after price adjustment had been placed on record before the learned Arbitrator. It was contended that the specific contentions in this affidavit were in excess of the record before the learned Arbitrator, and

[8] Emphasis supplied.
[9] Paragraph 7 of the affidavit dated 13.02.2024.

particularly, that the averment in paragraph 9 that the said signed sheets were placed before the learned Arbitrator was contrary to the record. The petitioner has also filed an application under Section 340 of the Code of Criminal Procedure, 1973 ["Cr.PC"][10] in this connection.

21. Two further affidavits dated 15.02.2024 have thereafter been filed by the respondent. The deponent has clarified that his averments in the earlier affidavit referred only to the signed sheets which were annexed as Annexure-A to the affidavit. Mr. Mehta now confirms that, other than for the one SES referred to in that sheet [which pertains to an adjustment of liquidated damages of Rs.2,821.75/-], no other sheet, even purporting to show the petitioner's concurrence to any deductions, was placed before the learned Arbitrator. The contents of the affidavit dated 13.02.2024 thus appear to be substantially in excess of the record.

22. The upshot of this discussion is that the respondent had not placed any evidence before the learned Arbitrator to demonstrate that any amount of full and final settlement had been accepted by the petitioner after calculation of liquidated damages, that payment had been made of the amount so settled, or any certificate of full and final settlement was signed by the petitioner after accepting payment.

23. While questions of evidence and contractual interpretation are generally within the province of the Arbitral Tribunal, an important exception is where no evidence in support of the finding was placed before the learned Arbitrator. This is clear from the judgments of the Supreme Court, *inter-alia*, in *Associate Builders v. DDA*[11], *Ssangyong*

[10] CRL.M.A. 5759/2024.
[11] (2015) 3 SCC 49, paragraphs 31 and 32.

Engg. & Construction Co. Ltd. v. NHAI[12], and *Delhi Airport Metro Express (P) Ltd. v. DMRC*[13]. The principle has been expressed in *Delhi Airport Metro Express (P) Ltd.*, thus:

> *"29. Patent illegality should be illegality which goes to the root of the matter. In other words, every error of law committed by the Arbitral Tribunal would not fall within the expression "patent illegality". Likewise, erroneous application of law cannot be categorised as patent illegality. In addition, contravention of law not linked to public policy or public interest is beyond the scope of the expression "patent illegality". What is prohibited is for Courts to reappreciate evidence to conclude that the award suffers from patent illegality appearing on the face of the award, as Courts do not sit in appeal against the arbitral award. The permissible grounds for interference with a domestic award under Section 34(2-A) on the ground of patent illegality is when the arbitrator takes a view which is not even a possible one, or interprets a clause in the contract in such a manner which no fair-minded or reasonable person would, or if the arbitrator commits an error of jurisdiction by wandering outside the contract and dealing with matters not allotted to them.* ***An arbitral award stating no reasons for its findings would make itself susceptible to challenge on this account. The conclusions of the arbitrator which are based on no evidence or have been arrived at by ignoring vital evidence are perverse and can be set aside on the ground of patent illegality.*** *Also, consideration of documents which are not supplied to the other party is a facet of perversity falling within the expression "patent illegality"."*[14]

The present case is, unfortunately, one such where the respondent had not led any evidence at all to support its contentions.

24. This case has also been characterised by unfortunate and repeated prevarication in the stand taken by the respondent from time to time. As noted above, before this Court at the stage of Section 11 proceedings, it was contended that No Due Certificates have been signed in respect of the contracts in question. This position was abandoned before the learned Arbitrator, and reliance was instead was placed upon No Claim

[12] (2019) 15 SCC 131, paragraph 41.
[13] (2022) 1 SCC 131, paragraph 29 ["*Delhi Airport Metro Express (P) Ltd.*"].
[14] Emphasis supplied.

Certificates and SES sheets, which were characterised as constituting full and final settlement. The petitioner's position that payment was not, in fact, made in terms of the amounts signified under these documents, was not adjudicated, but before this Court in the Section 34 proceedings, it was contended that there were additional sheets, which formed part of the SESs, wherein the petitioner had accepted the amount of deduction on account of liquidated damages. As mentioned hereinabove, the position was sought to be justified on the basis that those extra sheets were also placed before the learned Arbitrator which, it is now admitted, is incorrect.

25. These inconsistent positions taken by the respondent from time to time have made the task of the Court all the more difficult and fortify the conclusion that the impugned award, based only upon accord and satisfaction without consideration of the merits of the petitioner's contention, ought not to prevail. It is of paramount significance that the respondent has neither been able to show, upon evidence, the petitioner's concurrence to the alleged full and final settlement, nor to establish that, even if there was a full and final settlement, payment was made in those terms.

26. As noted, the petitioner's offer of settlement was rejected by the respondent in the course of hearing. Counsel were also requested to take instructions, as to whether further costs and expenses in a fresh round of arbitration may be avoided, by an agreed reference to a fresh arbitration at the stage of final hearing. This was also not acceptable to the respondent. The position, in these circumstances, is that the impugned award is liable to be set aside, with liberty to the parties to agitate their

claims and counter claims, if any, afresh. For the reasons aforesaid, the petition is allowed and the impugned award dated 13.08.2020 is set aside with liberty to the parties to take fresh proceedings in accordance with law.

27. I am of the view that the respondent, having failed in this petition, and also having taken unjustifiably contrary stands at various points in the proceedings, is liable to an order of substantial costs. The respondent will pay costs of Rs.1 lakh to the petitioner.

28. Although the petitioner has filed an application under Section 340 of the Cr.PC, I do not consider it appropriate to institute proceedings under Section 340, Cr.PC. Suffice it to say that it is expected of all litigants that they will file affidavits only after due verification of the facts. The respondent, a public sector undertaking, has certainly been in breach of this salutary principle, but I am unable to find that such conduct was deliberate so as to justify the invocation of Section 340 of the Cr.PC.

29. The petition and pending applications are disposed of in these terms.

PRATEEK JALAN, J

FEBRUARY 26, 2024
"Bhupi"/Adhiraj/