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

Date of Reserve: August 31, 2009
Date of Order: October 15, 2009

+Arb. P. 151/2001
% 15.10.2009

Indian Oil Corporation Ltd. ...Petitioners
Through: Mr. V.N. Koura with Ms. Pooja Aneja, Advocates

Versus

Lloyds Steel Industries ...Respondent
Through: Mr. Amit S. Chadha, Sr. Advocate with Mr. Nikilesh Kr., Advocates

JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

JUDGMENT

1. This petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 ("the Act", for short) has been made by the applicant/petitioner with a prayer of appointing a sole arbitrator from amongst the penal of arbitrators nominated by the applicant and mentioned in the petition to adjudicate the disputes between the parties.

2. Facts in nutshell for deciding this petition are that the applicant awarded a contract for the design, supply, fabrication, erection, stress relieving, testing etc and associated civil, structural and electrical works of five (5) Nos. Horton Spheres of size 12M Diameter for the applicant's Mathura Refinery by issuing letter of acceptance of tender dated 21st November 1994 to the respondent. The formal contract was signed between the parties on

24th November 1994 for a total nominal value of Rs.10,29,73,770/-. The Resident Construction Manager (RCM) of Engineers India Ltd (EIL) was appointed as the Engineer-in-charge for the project. The contractual time period for completion of work was 16 months from the date of issuance of telegram on acceptance i.e. 7th October 1994.

3. The contention of petitioner/applicant is that the respondent showed complete lack of interest for timely completion of work and even the mobilization of resources at the job site was started after expiry of five months from the awarding of work. The inadequate and tardy progress of work continued right till scheduled completion date. Upon the expiry of the contractual completion period, the respondent had failed to fabricate, erect or install even a single Horton Sphere and had achieved a progress of hardly 5% of the total scope of work. The respondent's failure to perform the contractual work resulted into delay in other dependent works at the refinery and the petitioner had to urgently procure two readymade bullets (spheres) to be utilized for the storage of Propylene to fulfill its immediate need. Consequently, the petitioner reduced the scope of work of respondent from 5 Horton to 3 Horton spheres and the respondent was to complete this altered scope of work within eleven months from 28th November 1997 i.e. the date of letter amending the work issued to respondent. The respondent failed to accept the amendment issued by the petitioner and did not proceeded to complete even the reduced scope of work with the result that the applicant had no option but to exercise its powers under clause 7.0.1.0 of the general conditions of contract which formed part of the contract; to terminate the contract. Thus by letter dated 16th September 1998, the petitioner/applicant terminated the contract of respondent. Thereafter, applicant awarded

unfinished work left by respondent to GR Engineers Works Limited for a total lumpsum value of Rs.11,70,00,000/- at the risk and costs of respondent in view of clause 7.0.9.0 of GCC. It is stated that as a result of respondent's breach, the petitioner suffered huge losses to the tune of Rs.8,31,86,544/- partly towards the amount payable for the said work carried at the risk and costs of respondent and partly towards liquated damages for delay, supervisory and other charges. The applicant accordingly asked respondent to make payment of Rs.5,31,86,544/- which respondent refused to /defaulted and hence the disputes arose between the parties.

4. The arbitration clause as contained in the contract between the applicant and respondent reads as under:

> *"9.0.0.0 ARBITRATION*
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> *9.0.1.0 Subject to the provisions of Clause 6.7.1.0 and 6.7.2.0 hereof, any dispute or difference between the parties hereto arising out of any notified claim of the Contractor included in his final bill in accordance with the provisions of Clause 6.6.3.0 hereof and/or arising out of any amount claimed by the owner (whether or not the amount claimed by the owner or any part thereof shall have been deducted from the final bill of the contractor or any amount paid by the owner to the contractor in respect of the work) shall be referred to arbitration by a Sole Arbitrator selected by the contractor from a panel of three persons nominated by the General Manager."*

5. It is submitted by petitioner/applicant that Deputy General Manager vide its letter dated 1st January 2001 requested general manager of applicant to nominate a panel of three persons so that respondent may chose one person from among them as the arbitrator. The General Manager vide its

letter dated 8th January 2001 nominated following three persons and asked respondent/ contractor to select one of them as the sole arbitrator:-

1. Mr. Justice Jaspal Singh (retd.), Retd. Judge Delhi High Court
2. Mr. Justice S.B. Wad (retd.), Retd. Judge, Delhi High Court.
3. Mr. Justice S.S. Chadha (retd.), Retd. Judge, Delhi High Court.

6. The applicant thereafter requested respondent to appoint one from among the above panel as sole arbitrator. The respondent however vide its letter dated 15th January 2001 refused to appoint a sole arbitrator from among the panel and disputed the liability towards the applicant. Thus, the applicant has approached this Court by way of present application/ petition.

7. In reply to this application, the respondent submitted that the petition was not maintainable as respondent filed a suit being no. 76 of 1997 arising from an alleged breach pertaining to the same contract in respect of which the applicant was seeking appointment of an arbitrator. The aforesaid suit was filed by the respondent to seek injunction and other reliefs against the applicant so as to restrain applicant from invoking two bank guarantees for an amount of Rs.1.26 crore. The said suit was pending adjudication and in the said application the applicant did not reserve its right to invoke arbitration hence the present application was not maintainable.

8. It is further submitted by the respondent that applicant's invoking arbitration clause was barred by limitation and therefore this Court has no territorial jurisdiction to appoint an arbitrator. The execution of contract is not disputed but it is submitted that before expiry of 16 months period for

construction of five Horton Spheres, a joint meeting was held amongst the representative of petitioner; its consultant Engineers India Limited and the respondent on 30th November 1995 and the applicant unilaterally reduced the scope of work from five Horton Spheres to three Horton Spheres and lot of correspondence was exchanged between applicant and respondent on this unauthorized reduction of scope of work. The applicant vide letter dated 26th April 1996 had threatened termination of the contract. It is submitted that the cause of action, if any, therefore accrued in 1996 and the application was filed in May, 2000, thus it was beyond the period of limitation. The other ground taken is that the respondent was a sick industrial company within the meaning of Section 3(i)(o) of Sick Industrial Companies Act, 1985. The respondent has filed a reference under Section 15 of SICA on 28th June 2001 and the reference has been registered and became of registration of reference no proceedings against respondent can lie except the proceedings for appointment of an arbitrator.

9. It is also submitted by respondent that there was no arbitration agreement inter se parties since by reduction of scope of work the earlier contract between the parties came to an end and a new contract regarding reduction of scope of work was executed in November-December, 1997 which contained no arbitration agreement inter se parties. Thus, the present application under the old contract containing arbitration clause was not maintainable in respect of novated contract. It is further submitted that this Court has no territorial jurisdiction to entertain the application since the respondent resides outside the territory of this Court i.e. at Mumbai. The other ground taken by respondent is that the application was not filed within the stipulated period of 30 days of refusal on the part of respondent as

provided under Section 11 of the Act. It is also one of the contentions in the reply that the arbitrators nominated by the applicant did not have necessary mechanical/ civil engineering qualification so as to do justice to the issue and disputes arising between the parties. The disputes between the parties were of complex nature involving detailed knowledge of mechanical and civil engineering. Any adjudicator would require qualification of mechanical and civil engineering in order to adjudicate the disputes between the parties. The other contentions raised by respondent are on merits of the disputes which this Court need not go into.

10. A perusal of pleadings of the previous suit filed by respondent against plaintiff would show that the suit was in respect of bank guarantees issued by respondent's bank in favour of plaintiff and the suit had nothing to do with the disputes arising out of the contract. It is now settled law that a bank guarantee constitutes an altogether different and independent contract between the bank and the beneficiary and merely because plaintiff had filed a suit with a prayer that the respondent should be restrained from invoking the bank guarantee would not mean that the plaintiff is not entitled to invoke the arbitration clause for adjudication of disputes between the parties arising out of the main contract.

11. The plea taken by respondent that the contract stood revoked in November-December, 1997 and there was no arbitration clause in the novated contract is also a baseless plea. The original contract vide clause 2.5.1.0.1 provided that the scope of work could be altered or reduced by respondent. Clause 2.5.1.0 reads as under:-

> *"2.5.0.0 ALTERATION IN THE SCOPE OF WORK:*
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> *2.5.1.0 The owner may at any time(s) before or after the commencement of the work, by notice in writing issued to the Contractor, alter the scope of work by increasing or reducing the jobs required to be done by the Contractor or by adding thereto or omitting therefrom any specific job or operations or by substituting any existing jobs or operations with other jobs and or operations, or by requiring the Contractor to perform any extra works in or about the jobs site, and upon receipt of such notice the contractor shall execute the job(s) as required within the altered scope of work."*

It is thus clear that merely because the applicant had reduced the scope of work, the contract would not stand novated and it would be a continuation of the old contract.

12. During arguments, learned counsel for respondent drew the attention of the Court to the letter dated 28th November 1997 whereby the scope of work was reduced. It is submitted that this offer was a conditional offer and since respondent had not acceded to the condition imposed in the letter, no concluded contract came into force in respect of reduced scope of work and the original contract only can be considered by the Court to decide the issue of limitation. He submitted that the originally disputes arose between the parties in 1996, therefore, cause of action arose in 1996 and the present application made in 2000 was beyond the period of limitation. The clause to which attention of the Court was drawn by respondent, contained in the letter dated 28th November 1997, reads as under:-

> *"6. Liquidated Damages:*
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> *If this letter is unconditionally and irrevocably accepted*

by you by signing and returning two copies hereof in token of your acceptance and by extending the validity of the Bank Guarantee as specified in Para 5(a) hereof, we shall not levy Liquidated Damages under the contract except after the expiry of the time of completion as specified in Para 3 thereof."

13. A perusal of letter of respondent dated 14th February 1997 would show that after respondent had failed to achieve the progress in respect of construction of 5 Horton Spheres at Mathura Refinery and the petitioner had to procure two bullets urgently, talks were going on between the parties for reduction of scope of work and vide this letter dated 12th February 1997 respondent categorically gave its confirmation to execute the contract for the balance three Horton Spheres within the timeframe of 11 months from the date of communication including one month towards re-mobilization. In the same letter, the respondent had sought confirmation of the applicant that it should not impose liquidated damages provided under the contract and the liquidated damages should now be applicable from the time of completion of 11 months from the date of letter. It is in this context that the respondent had put this clause of liquidated damages. In fact vide letter dated 28th November 1997, the offer made by respondent for carrying out reduced scope of work was accepted by the petitioner and the contract stood amended accordingly. However, the petitioner also made its stand clear in respect of liquidated damages in terms of above clause. Since the original contract itself provided that the scope of work could be reduced by the applicant/petitioner, I consider that vide letter dated 28th November 1997, no new contract was sought to be brought into force but only the old contract was continued and the petitioner /applicant made its stand clear regarding liquidated damages. The plea taken by the petitioner that the earlier contract had come to an end

and the cause of action arose only under the earlier contract in 1996 therefore is fallacious. The cause of action in this case in fact arose beyond 28th November 1997 when the respondent failed to carry out the work even as per the amended scope of the work and the petitioner had to invoke the risk purchase clause. The risk purchase clause under the contract reads as under:-

> *"7.0.9.0. Upon termination of the Contract, the owner shall be entitled at the risk and expenses of the contractor by itself or through any independent contractor(s) or partly by itself and/or partly through independent contractor(s) to complete to its entirety the work as contemplated in the scope of work and to recover from the contractor in addition to any other amounts. Compensations of damages that the owner may in terms hereof otherwise be entitled to (including compensation within the provisions of Clause 4.4.0.0 and clause 7.0.7.0 hereof) the difference between the amounts as would have been payable to the contractor in respect of the work (calculated as provided for in Clause 6.2.1.0 hereof read with the associated provisions thereunder and Clause 6.3.1.0 hereof) and the amount actually expended by the owner for completion of the entire work as aforesaid together with 15% (fifteen per cent) thereof to cover owner's supervision charges, and in the event of the latter being in the excess former, the owner shall be entitled (without prejudice to any other mode of recovery available to the Owner) to recover the excess from the security deposit or any monies due to the contractor."*

14. A perusal of this risk purchase clause coupled with the other provisions of the contract would show that the applicant could have made the claim

regarding damages suffered by it because of risk purchase, only after the work under the risk purchase contract was completed and the applicant knew as to how much it had to shell out more than the original contract. Thus, under no circumstances, this application made by the applicant was barred by limitation. The applicant invoked the arbitration clause soon after the execution of the risk purchase order, as and when it learnt about the exact quantum of damages due to risk purchase and other heads.

15. The other plea taken by the respondent that the respondent was a sick company is also not tenable. Even the respondent has not placed on record any order under SICA declaring the respondent company as sick or considering the application of respondent for this purpose.

16. The plea of respondent that the present application could not have been moved beyond 30 days of refusal of respondent to appoint an arbitrator is a baseless plea. Section 11 does not specify a period of 30 days for making an application before the Court. Thirty days period under Section 11(4) is a period given to a party to appoint an arbitrator on receiving notice/ request from the other party. After expiry of 30 days of the request, a right vests in the other party to move the Court for appointment of an arbitrator. The application for appointment of an arbitrator can be made within the period of limitation as prescribed under Limitation Act and not within 30 days only.

17. It is not disputed by respondent that a dispute arose between the parties which needs adjudication. The plea of respondent is that the arbitrator nominated by the applicant/ petitioner were not having civil or mechanical engineering qualifications and therefore they are not competent arbitrators.

In this case no assessment of engineering or civil work is involved. In fact, the claim of petitioner is in respect of risk purchase and supervisory charges etc. because of a failure of respondent to perform its part of contract. Thus the nature of claim does not call for any civil or mechanical engineering knowledge.

18. I, therefore, consider that it is not necessary that the arbitrator suggested by the petitioner/applicant should have knowledge of civil and mechanical engineering. The application of the petitioner for appointment of a sole arbitrator is allowed. I hereby appoint Shri V.S. Aggarwal, a retired Judge of this Court, as the arbitrator in this matter. The petitioner shall place its claim before the learned arbitrator within 30 days from today and the learned arbitrator on receipt of claim from the petitioner/applicant shall act upon the reference and shall endeavour to pass an award as early as possible. The arbitrator shall fix his own fees considering the nature of work involved.

19. The petition stands disposed of with above order.

October 15, 2009 **SHIV NARAYAN DHINGRA J.**
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