

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

+ **F.A.O.(OS) No. 50 of 2007**

% Reserved on: July 15, 2009
Pronounced on: July 20, 2009
INDIAN OIL CORPORATION LTD. Appellant
Through: Mr. Abhinav Vashishth and
Mr. Raman Kumar, Advocates.
versus

G.S.JAIN & ASSOCIATES & ANR Respondents
Through: Mr. Pinaki Misra, Senior
Advocate with Mr. Sandeep
Sharma, Advocate.

WITH

+ **FAO(OS) 51/2007 & CM No. 2382/2007**

INDIAN OIL CORPORATION LTD. Appellant
Through: Mr. Abhinav Vashishth and
Mr. Raman Kumar, Advocates.

versus

G.S.JAIN & ASSOCIATES & ANR Respondents
Through: Mr. Pinaki Misra, Senior
Advocate with Mr. Sandeep Sharma,
Advocate.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE NEERAJ KISHAN KAUL

1. Whether Reporters of the local newspapers may be allowed to see the judgment? [YES]
2. Whether to be referred to the Reporter or not? [YES]
3. Whether the judgment should be reported in the Digest? [YES]

J U D G M E N T

NEERAJ KISHAN KAUL, J.

1. By this common order, we are disposing of both the
aforementioned appeals filed against the decision of the learned

Single Judge dated 15th December, 2006. The impugned judgment dated 15th December, 2006 had affirmed the awards dated 14th October, 1987 published by Shri N. Guha Roy and made the same rule of the Court rejecting the objections of the appellant.

2. The two awards are dated 14th October, 1987 and are non-speaking awards.

3. The Indian Oil Corporation Limited (for short 'IOCL') invited offers for construction of skirted granular pile foundation for 1 MCO tank and 3 FO tanks at its on-going works at Haldia Refinery. Vide another notice inviting tender, IOCL invited offers for the construction of skirted granular pile foundation for one fire water tank within the precincts of the same refinery. The respondents had submitted offers as per tender documents in respect of both notices inviting tenders. The offer was accepted and contractor proceeded to execute the work in question.

4. For some period of time, IOCL paid money to the contractors as per bills raised but towards the end of the works, it not only refused to pay the bills but even proceeded to make recoveries.

5. Attempts were made between the parties to sort out the disputes. However, since they could not sort out the dispute, the same were referred to the sole arbitration of Shri N. Guha Roy, a retired Engineer and an ex-employee of IOCL. The IOCL has alleged

mala fide and prejudice of the Arbitrator against the IOCL. The learned counsel appearing for the appellants limited his arguments and challenge to the award as also the judgment of the learned Single Judge to the issue of bias on the part of the learned Arbitrator.

6. The learned Single Judge has in great detail dealt with the submissions of both the parties as regards the allegations of bias against the Arbitrator and has rejected the same. We are in complete agreement with the said findings of the learned Single Judge. Before the learned Single Judge, the IOCL had sought to establish bias by its pleadings and affidavits of officers of the IOCL to that effect were filed. Affidavit of Shri K.V. Guruswamy filed before the learned Single Judge reads as under:-

“(iii) M/s. Patron Engineering Construction Pvt. Ltd., (hereinafter called “Patron”) was awarded a contract for fabrication and erection of air pre-heater system including civil, structural and electrical work at Haldia Refinery on August 18, 1986 for a total estimated contract value of Rs.1,07,51,187/16. A copy of the applicant/respondent No.1 corporation's letter of indent dated August 18, 1986 in this behalf is annexed to the application of respondent No.1 under Section 30 and 33 of Indian Arbitration Act 1940 and marked Annexure “H” therein.

(iv) On October 17, 1986, Patron appointed Granger as its sub-contractor to undertake the work for a total contract value of Rs.22,83,088/- (Rupees Twenty Two lakhs eighty three thousand and eighty eight only). A copy of Patron's letter dated October 17, 1986 in this behalf is annexed to the Application of Respondent No.1 under Sections 30 and 33 of

Indian Arbitration Act and marked as Annexure "I" therein.

(v) On May 20, 1987, Granger was directly awarded by the Haldia Refinery of the Respondent No.1 corporation the work of fabrication and erection for one Toluene Tank (capacity 350 m.cu.) at Haldia Refinery for a total contract value of Rs.66,880/- (Rupees sixty six thousand eight hundred and eighty only). A copy of the respondent No.1 corporation's letter of Indent dated 20.5.1987 in this behalf is annexed to the application of respondent No.1 under Sections 30 and 33 of Indian Arbitration Act and marked as Annexure "J" therein.

(vi) The Id. Arbitrator entered upon the reference on May 25, 1987 by his letter dated 25.5.1987. A copy of Id. Arbitrator's letter dated May 25, 1987 is annexed to the Application of respondent No.1 under Sections 30 and 33 of Indian Arbitration Act and marked Annexure "K" therein.

(vii) Meanwhile, the respondent No.1 corporation through its Engineer-in-Charge, Engineers Indian Ltd. had made serious and repeated complaints to Patron with regard to the poor performance and unsatisfactory progress of the work awarded to it and had issued various and serious warnings and admonitions to Patron in this behalf. Patron had in turn passed on these complaints to Granger and had expressed its own serious dissatisfaction to Granger, who was to undertake the performance of the work, and a situation had even been reached in which Patron would have to either terminate the contract of Granger or face termination of its own contract by the respondent No.1 corporation. These communications were also addressed to and dealt by Shri N.Guha Roy as Granger's Managing Director.

(viii) The situation was the same with regard to the contract for the construction of the Toluene Tank directly awarded to Granger by the Respondent No.1 Corporation's Haldia Refinery.

This work has to be completed by August 26, 1987 but had barely commenced by them, resulting in the respondent corporation having had to address several admonitions and warnings to Granger in this behalf, which were also addressed to and dealt by Shri N.Guha Roy, its Managing Director.

(ix) Consequently, Granger and particularly, the Id. Arbitrator as its promoter and Managing Director had been the recipient of serious admonitions at the hands of the respondent No.1 corporation during the pendency of the arbitration proceedings and was on the threshold of economic loss by virtue of imminent termination of the contracts awarded to Granger at Haldia Refinery.

(x) This obviously had resulted in the Id. Arbitrator developing a strong and unconcealed bias against the Respondent No.1 corporation in the arbitration proceedings involving the respondent No.1 corporation pending before him.

15. I say that this bias was accentuated by the fact that Patron had threatened to terminate at Granger's risks and costs a large part of the contract of Granger on October 12, 1987 and that the termination of the contract directly awarded by the respondent No.1 corporation to Granger at the risks and costs of Granger was increasingly imminent."

7. Further in paragraphs 16 and 17 of his affidavit, Shri K.V.Guruswamy has deposed as under:-

"16. I say that in the circumstances, the Senior Management of the respondent No.1 corporation was compelled to consider the steps which could be taken to protect the interest of the respondent No.1 in the matter, resultant upon which it was decided to move in three phases, as necessary, with a view to maintaining, so far as possible, the dignity of the Respondent No.2 as an erstwhile senior officer of the respondent

No.1 corporation and at the same time ensuring that he does not proceed further in the matter. To this end, it was decided that:

(i) Shri K.V.Guruswamy (the deponent) as the senior most officer of the respondent No.1 corporation dealing with the case and an erstwhile colleague of the respondent No.2 could in the first instance tactfully speak to the respondent No.2 and request him to consider withdrawing from the reference on the ground that the respondent corporation had taken a decision that ex-officers of the respondent No.1 corporation shall not act as arbitrators in matters involving the respondent No.1 corporation.

(ii) If the respondent No.2 refused to be deterred from proceeding further in the matter by virtue of gentle persuasion, then the respondent No.1 should politely but firmly address the respondent No.2 in writing informing him of the apprehensions of the respondent No.1 corporation in the matter and requesting him to withdraw from the reference in view thereof.

(iii) If the Id. Arbitrator was nonetheless adamant to proceed with the matter, then to apply to the Court to withdraw the authority of the Id. Arbitrator pursuant to the provisions of Section 5 of the Arbitration Act.

17. I say that according to the course of action decided upon as specified above, Shri K.V.Guruswamy (the deponent), spoke twice over the telephone to the Id. Arbitrator at Calcutta during the 2nd and 3rd weeks of September, 1987 and requested him to consider withdrawing from the reference in view of the decision taken by the respondent No.1 corporation that it was improper for the ex-officers of the respondent No.1 corporation to act as arbitrators in matters involving the respondent No.1 corporation. The respondent No.2, however, stated that since he had been appointed before this decision, the impropriety did not attach to his appointment.

Consequently, the respondent No.1 corporation was constrained to formally address the respondent No.2 in terms of a Regd.A.D. letter dated September 30, 1987 informing the respondent No.2 in clear and unequivocal terms, that the Id.Arbitrator had adopted a totally biased approach in the matter and that in the circumstances no serious doubt has arisen on the quality of justice which the Corporation can expect in these proceedings, and whether any meaningful purpose will be served in the continuation of these proceedings.”

8. The learned counsel for the IOCL urged before the learned Single Judge that bias could be inferred from the following:-

“(a) The arbitrator was the Managing Director of a company Granger Engineering and Construction Pvt. Ltd. Indian Oil Corporation had awarded a contract to a company named Patron Engineering Construction Pvt. Ltd. Said contract was awarded on 18.8.1986. On 17.10.1986, Patron had sub-contracted, a part of the works awarded today by Indian Oil Corporation to Granger. Said works executed by Granger on behalf of Patron were found to be sub-standard and a dispute was pending between Indian Oil Corporation and Patron Engineering when learned arbitrator accepted assignment to act as an arbitrator. On 20.5.1987, Granger Engineering and Construction Pvt. Ltd. was directly awarded a contract by Indian Oil Corporation. Learned arbitrator was pressurizing Indian Oil Corporation not to take penal action under the contract between Indian Oil Corporation and Patron Engineering Construction Pvt. Ltd.

(b) In the same Haldia complex, wherein works were awarded to M/s.G.S.Jain and Associates (contractor), identical work for 3 MCO tanks were awarded to SEMINDIA Pvt. Ltd. at a contract value of Rs.92.46 lacs per MCO tank. In the instant case, M/s.G.S.Jain and Associates had bagged the works for 1 MCO tank and 3 FO

tanks for a sum of Rs.1,71,48,717.05 value of the work pertaining to the MCO tank was Rs.96,59,840.60. Whereas SEMINDIA Pvt. Ltd. did not seek any additional amount, M/s.G.S.Jain and Associates sought additional amounts. If award was upheld, M/s.G.S.Jain and Associates would get a sum much above what was paid to SEMINDIA Pvt. Ltd., meaning thereby, it would cease to be the lowest bidder.

(c) Adequate hearing was not given to Indian Oil Corporation. Nature of dispute was such that it was impossible for the parties to conclude submissions within 3 days. Learned arbitrator gave an extensive hearing to counsel for M/s.G.S.Jain and Associates. As far as Indian Oil Corporation was concerned, learned arbitrator made a pretence of giving a hearing.

(d) The award was published post haste. On 30.9.1987, Indian Oil Corporation notified the learned arbitrator that he should not proceed ahead with the hearing. A telegram was dispatched on 11.10.1987, requesting learned arbitrator not to proceed ahead with the matter. It was followed by a letter dated 12.10.1987. In spite thereof, learned arbitrator concluded the hearing on 12.10.1987 and published the award on 14.10.1987.”

9. The two contracts in question forming the subject matter of the arbitration proceedings were formalized between the appellants and the respondents in the year 1982. When the dispute arose, the contractor sought appointment of an Arbitrator. On 28th February, 1986, the appellant IOCL proposed three names, one of them being Shri N.Guha Roy, (the Arbitrator) for the contractor to exercise an option. On 9th May, 1986, the contractor refused to accept any one of the three named persons for being appointed as an Arbitrator. On 10th June, 1986, IOCL stated that no other name could be sent as

persons notified in the letter dated 28th February, 1986 were of standing and probity. On 8th August, 2006, respondent/contractor selected Shri N.Guha Roy to function as the Arbitrator.

10. The learned Single Judge has rightly held that it was not in dispute between the parties that Shri N. Guha Roy was a retired General Manager in IOCL and was well known to the employees of the IOCL. The learned Single Judge referred to extracts of the affidavit filed by the employees of the IOCL to conclude that the employees of IOCL had fairly intimate personal relationship with the learned Arbitrator. The learned Single Judge also took note of the fact that on 23rd March, 1987, a formal letter was issued by IOCL appointing Shri N. Guha Roy as the Arbitrator. Soon thereafter on 20th May, 1987, IOCL awarded a contract to Granger Engineering and Construction Pvt. Ltd. of which Shri N. Guha Roy was the Managing Director. The learned counsel for the respondents had urged before the learned Single Judge that it was actually IOCL which was acting *mala fide*. It was also urged by him that it is IOCL which would be guilty of attempting to either bribe or influence the learned Arbitrator by offering his company a contract and recognizing his company as a sub-contractor. It was further urged by the counsel for the respondents before the learned Single Judge that it was within the knowledge of IOCL that a company headed by Shri N. Guha Roy had been awarded a contract by IOCL. The counsel for the respondents

had further submitted that notwithstanding the non-acceptance by the contractor of any named person on the panel when IOCL wrote to the contractor to select one, it was the IOCL which compelled the contractor to choose one out of the three persons, name whereof was proposed by the IOCL. He had also referred to the affidavit of Shri K.V. Guruswamy to contend that when the arbitration proceeded, employees of IOCL knew about the contract awarded by IOCL to Granger Engineering and Construction Pvt. Ltd. and Patron Engineering Construction Pvt. Ltd. sub awarding a contract to Granger Engineering and Construction Pvt. Ltd. The learned Single Judge also referred a further deposition in the affidavit by way of evidence filed by Shri K.V.Guruswamy, which reads as under:-

“9. I say that since the respondent No.1 corporation's claims were very substantial and had been made and finalized as a result of careful and detailed technical discussions and field exercises and were regarded by the management of the respondent No.1 corporation as substantial and unworthy of such summary and derogatory dismissal, I, Shri K.V.Guruswamy, Deputy General Manager of the Projects Department of the Refineries and Pipelines Division of the Respondent Corporation and the officer in overall charge of the case on behalf of the Corporation, called on the respondent No.2 with a view to explain to the ld. Arbitrator the gravity of the respondent No.1's claims, and to request the respondent No.2 not to summarily reject the respondent No.1's claims and contentions without hearing the matter at length and giving the respondent No.1 a full opportunity to explain its claim. The ld. Arbitrator, however, gave me the distinct impression that he had already made up his mind in the matter and that nothing further

could in any manner alter his opinion.

10. I say that this led to a series of discussions between the officers of the respondent No.1 corporation and its counsel on whether, in view of the apparently biased and pre-judged attitude displayed by the Id. Arbitrator, the respondent No.1 corporation could expect substantial justice in the matter. Since the Id. Arbitrator had been a Senior Officer of the respondent No.1 and since proceedings were yet at a preliminary stage, inasmuch as further pleadings were yet to be filed at the next date of hearing in the proceedings, it was felt that there was no urgency for the respondent No.1 to take a decision in the matter, and that it was proper that a decision be withheld until the conclusion of the next sitting at Calcutta which was fixed for August 28, 29, and 30, 1987, during which the respondent No.1 would hopefully have an opportunity of opening its case before the Id. Arbitrator. A copy of the minutes of the proceedings held at New Delhi on July 10 and 11, 1987 as recorded by the Id. Arbitrator and sent to the parties are annexed to the application of the respondent No.1 under Sections 30 and 33 of Indian Arbitration Act, 1940 and marked Annexure "E" therein."

11. It was admitted by the counsel for the appellants that no proper application alleging bias was ever made before the Arbitrator. However, the counsel for the appellant relied on a letter dated 30th September, 1987 to contend that IOCL had written to the Arbitrator alleging bias and asking him to recuse himself from the matter. Further the learned counsel for the appellant also referred to a telegram dated 11th October, 1987 as also a letter dated 12th October, 1987 sent by the IOCL to the Arbitrator which were to the same effect.

12. On 12th October, 1987, the Arbitrator concluded the proceedings and noted that though vide communication dated 28th September, 1987, a last opportunity was given to the IOCL to submit arguments as per proceedings dated 30th August, 1987, however, inspite of repeated opportunities, IOCL had failed to submit the same and none was present on behalf of the IOCL. The representative of the respondents was directed to deposit Rs.320 only towards costs of stamp papers for making and publishing the awards. The awards were made on 14th October, 1987.

13. On a perusal of the documents, we are distressed to note that a public corporation like the IOCL chose to write letter dated 30th September, 1987 and such other similar letters to the Arbitrator. This correspondence, in fact, admits that the employees of the IOCL met the learned Arbitrator to discuss the issues which he was seized of as an Arbitrator and it was during the course of those meetings and discussions that the employees of the IOCL got a distinct impression that the Arbitrator had a closed mind on the issue. It causes us great anguish to note that employees of IOCL attempted to discuss the matter with the learned Arbitrator in private behind the back of the respondents and now seek to contend that since their discussions revealed that the Arbitrator had a closed mind on the issue, they requested him to recuse himself on grounds of bias. The learned Single Judge has rightly expressed displeasure at the

conduct of the employees of the IOCL for having admitted meeting the Arbitrator in private and discussing the matter with him as also requesting him to recuse himself. It is highly objectionable for any party to approach an Arbitrator who is seized of the matter. The learned Single Judge has correctly held that if any party feels that an Arbitrator should recuse from a matter referred to him, the correct and appropriate course is to file an application before the Arbitrator stating the facts on which the claim is made. A copy of such an application has to be made available to the opposite party who would have a right to make necessary submissions. The Arbitration Act of 1940 has adequate safeguards to seek removal of an Arbitrator who after entering upon reference commits a misconduct or suffers a disability to continue with the reference. Nothing of this sort was done. It was urged before us by the learned Counsel for the appellant that the application under Section 5 of the 1940 Act for removal of the Arbitrator was made on the date the award was delivered, that is, on 14th October, 1987. In order to verify this statement, we had called for the record of OMP No. 128/1987. A perusal of the said record shows that the said OMP was filed on 16th October, 1987 in this court. Thus, interestingly, even though the application dated 16th October, 1987 for removal of the Arbitrator was filed two days after the award was delivered, that is on 14th October, 1987, no application for removal of the Arbitrator alleging bias was ever moved before the Arbitrator.

14. Further we are in agreement with the conclusions of the learned Single Judge that IOCL is precluded from urging bias for the simple reason that it was fully aware of the contracts awarded by it to Granger Engineering and Construction Pvt. Ltd. of which Shri N. Guha Roy was the Managing Director and that M/s. Patron Engineering Construction Pvt. Ltd. to which IOCL had awarded a contract had sub-assigned a part thereof to Granger Engineering and Construction Pvt. Ltd. Deposition of Shri K.V. Guruswamy and Shri Yogendra Singh shows that IOCL was aware of the dispute regarding works executed by Granger Engineering and Construction Pvt. Ltd. Yet IOCL, after compelling the contractor to choose an Arbitrator from one of the three named persons after reiterating their names as persons of probity and standing, did not take recourse to legal proceedings to remove Shri N. Guha Roy. The learned Single Judge was absolutely right in observing that it would be a sad day in the administration of justice through Forum of Arbitration, if a party who has a dominant role in the appointment of an Arbitrator seeks to question his integrity. Facts pleaded by IOCL shows that it was aware of the reasons for the alleged bias when arbitration proceedings were being held. Yet it allowed the proceedings to continue. It took no steps to file an application before the Arbitrator calling upon him to recuse from the proceedings. The IOCL is clearly estopped from raising a plea of bias. But what has distressed us the most in this matter is the fact that employees of the IOCL went and

met the learned Arbitrator to discuss in private a matter that he was seized of. The story doesn't end here. The foundation of the alleged bias as contained in the letter dated 30th September, 1987 sent by the IOCL is that during the course of this meeting, the employees of the IOCL discovered that the Arbitrator had a closed mind on the matter and thus IOCL was constrained to request the Arbitrator to recuse himself on ground of bias. The conduct of the IOCL and its employees, to say the least, is highly improper. It is equally sad to note the impunity and brazenness with which the employees of the IOCL have deposed and contended in their correspondence with the Arbitrator that the basis of the allegation of bias was their impression formed during a private meeting with the Arbitrator on the matter that he was seized of behind the back of the respondents. We condemn this practice in the strongest terms. It is a sad day in the administration of justice that the employees of a public corporation have chosen to act in the manner that the employees of the IOCL did.

15. We see no infirmity in the findings of the learned Single Judge. In any case, appellants and its employees are guilty of gross misconduct and were liable to be non-suited on this ground alone. The learned Single Judge has rightly made the awards dated 14th October, 1987 the rule of the Court. The order of the learned Single Judge warrants no interference. We express our sincere hope that in future no party, more so, a public corporation or body ever attempts

to take recourse to the route which the employees of the IOCL did in this matter.

16. With the above observations, both the appeals are dismissed with costs of Rs.50,000/- payable not later than four weeks from today. The pending application stands disposed of as well.

**NEERAJ KISHAN KAUL
(JUDGE)**

**MUKUL MUDGAL
(JUDGE)**

**July 20, 2009
sb**