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

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O.M.P. 404/2011

M/S KIRAN CONSTRUCTION COMPANY Petitioner
Through: Mr. V.K. Sharma, Advocate.

Versus

BHARTIYA YANTRA NIGAM LIMITED
AND ANOTHER Respondents
Through: Mr. M.M. Kalra and Mr. Kunal
Kalra, Advocates for R-2.

~~O.M.P. 407/2011~~

M/S KIRAN CONSTRUCTION COMPANY Petitioner
Through: Mr. V.K. Sharma, Advocate.

Versus

BHARTIYA YANTRA NIGAM LTD
AND ANOTHER Respondents
Through: Mr. M.M. Kalra and Mr. Kunal
Kalra, Advsocates for R-2.

CORAM: JUSTICE S. MURALIDHAR

ORDER

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08.02.2012

1. The Petitioner was awarded the work for construction of civil and structural works by Respondent No.2/Indian Oil Corporation Ltd. (IOC) for its plant, building and pump foundation at Bhatinda Oil Terminal. There were two contracts awarded -- one known as Part B and other known as Part

C. Respondent No.1 was the supervisor acting on behalf of IOC.

2. Disputes arose between the parties and the Petitioner sought reference of the disputes to arbitration. The Petitioner filed Arbitration Applications Nos. 30 and 31 of 2000 in this Court under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act'). By an order dated 28th September 2001, the said applications were disposed of by the learned Single Judge, appointing Mr. Justice Jaspal Singh (Retired) as the Sole Arbitrator to adjudicate the disputes between the parties. Although the IOC raised a plea that the appointment had to be in terms of the contract between the parties, whereby the Arbitrator had to be appointed by the Managing Director, (Marketing Division), IOC, it was held by this Court that since the appointment had not been made within the stipulated time, IOC had forfeited its right in that regard. Reference was made to the judgment in *Datar Switchgears Ltd. v. Tata Finance Ltd., 2000 (3) Arb. LR 447*. The above order was challenged by IOC by filing Civil Writ Petition Nos. 1710 of 2002 and 1719 of 2002. Both writ petitions were dismissed by the Division Bench of this Court by an order dated 27th September 2002. Accordingly, the appointment of Justice Jaspal Singh as Sole Arbitrator became final.

3. While the arbitral proceedings were in progress, the Petitioner on 9th August 2008 sent a communication to the learned Arbitrator as follows:

“Sub: In the Matter of Arbitration between:

Indian Oil Corporation Ltd.

And

Kiran Construction Co.

Sir,

Kindly refer to the proceedings date as 12.08.08 fixed by your goodself.

In this context, we humbly pray that Indian Oil Corporation Ltd. has agreed to settle the issues by adopting alternate dispute redressal machinery at their level.

As such you are requested to kindly drop the proceedings as fixed for 12.08.08.

Thanking you,

Yours faithfully,

For, Kiran Construction Co.

Sd/-
Prop.”

4. On 12th August 2008 the learned Arbitrator referred to the above letter received from the Petitioner and ordered that the arbitral proceedings stood terminated.

5. However, IOC did not take any decision in that regard. It is stated by the Petitioner that on the basis of an email dated 24th October 2008 from the Law Officer of IOC the Petitioner expected that IOC would appoint another Arbitrator as per IOC's prescribed mode of arbitration. When no such decision was forthcoming from the IOC, the Petitioner sent it a legal notice on 11th September 2009 calling upon the Chairman of IOC "to intervene and appoint the arbitrator" failing which the Petitioner would have to move this Court. IOC in its reply dated 30th November 2009 pointed out that there was no "written consent/agreement by the Corporation for appointment of a substitute arbitrator" and stated that the Petitioner had to approach this Court under Sections 14 and 15 of the Act for appropriate directions since the learned Arbitrator had been appointed by this Court.

6. For some reason, without filing the present petitions under Sections 14 and 15 of the Act, immediately thereafter the Petitioner wrote to the learned Arbitrator requesting the revival of the arbitral proceedings. By letter dated 14th January 2011 the learned Arbitrator informed the Petitioner that in view of the fact that arbitral proceedings already stood terminated, nothing could be done at his end. The present petitions under Sections 14 and 15 of the Act were thereafter filed by the Petitioner in May 2011. The prayer is that

the vacancy caused by termination of the proceedings by the learned Arbitrator may be filled by appointing another Arbitrator.

7. It is submitted by Mr. M.M. Kalra, learned counsel for IOC that the Petitioner itself asked IOC to appoint an Arbitrator as per the procedure outlined in the arbitration clause of the contract and therefore the present petition asking the Court to appoint an Arbitrator was misconceived. Moreover, at the time the Petitioner wrote to the learned Arbitrator on 9th August 2008 stating that IOC had “agreed to settle the issues by adopting alternate dispute redressal machinery at their level” there was in fact no such agreement.

8. It is pointed out by Mr. V.K. Sharma, learned counsel for the Petitioner that when the Petitioner sent a legal notice to IOC on 11th September 2009, referring to an email dated 24th August 2008 from its Law Officer, asking it to appoint an Arbitrator IOC on 30th November 2009 declined stating that orders had to be passed by this Court under Sections 14 and 15 of the Act. The net result is that the arbitration proceedings have come to an end and the process of having the matters adjudicated through an alternate

mechanism has also not commenced.

9. It appears to this Court in the above circumstances that it is expedient to direct that the arbitral proceedings should recommence before Mr. Justice Jaspal Singh (retired). The plea of Mr. Kalra that this Court should direct the Managing Director of IOC to either himself act as Arbitrator or nominate an Arbitrator in terms of the arbitration clause contained in the contract is rejected in view of the fact that such a plea was already rejected by this Court by its order dated 28th September 2001 which became final. The arbitral proceedings had commenced before Justice Jaspal Singh. It is not considered expedient to have the proceedings commence afresh before another Arbitrator. Further, although the Petitioner had asked IOC to appoint an arbitrator way back in the year 2008 followed by the legal notice dated 11th September 2009, admittedly in the period of over two years thereafter no steps were taken by the IOC in that regard.

10. Consequently, it is directed that the arbitral proceedings which stood terminated by order dated 12th August 2008 of the learned Arbitrator Mr. Justice Jaspal Singh would now stand revived before him. The order dated 12th August 2008 passed by him terminating the arbitral proceedings is set

aside.

11. The parties will now appear before Justice Jaspal Singh, on 5th March 2012. The parties will ensure that all the necessary papers, which already form part of the arbitral record up to 12th August 2008, are provided to the learned Arbitrator. The proceedings will commence from the stage at which they were on 12th August 2008.

12. The petitions are disposed of in the above terms.



S. MURALIDHAR, J.

FEBRUARY 08, 2012

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