# Indian Oil Corporation Ltd. Vs Air Liquide Global EandC Solutions (India) Pvt. Ltd.

**Court:** Delhi High Court

**Date of Decision:** April 22, 2015

**Acts Referred:** Arbitration and Conciliation Act, 1996 - Section 11, 11(6)
Companies Act, 1956 - Section 434, 434 (1) (a), 434 (e), 439

**Citation:** (2015) 219 DLT 729

**Hon'ble Judges:** S. Muralidhar, J

**Bench:** Single Bench

**Advocate:** V.N. Koura and Mona Aneja, for the Appellant; Ayushi Kiran, Advocates for the Respondent

**Final Decision:** Disposed off

## Judgement

Dr. S. Muralidhar, J.
This is a petition under section 11(6) of the Arbitration and Conciliation Act, 1996 filed by Indian Oil Corporation

Ltd. ("IOC") seeking the appointment of an Arbitrator to adjudicate the disputes between it and the Respondent Air Liquide Global E&C

Solutions (India) Pvt. Ltd. (formerly known as Lurgi India Company Ltd.) arising out of a contract entered into between the parties whereby the

work of the Consultancy Services for project management, residual process design, preparation of front end engineering design, tendering etc. for

IOC"s Hydrocracker Project was to the Respondent.

2. A formal contract was signed between the parties on 28th February, 2006. The contract value initially was Rs. 23,64,86,990/ and later revised

to Rs. 39,22,52,890/-.

3. According to IOC, the Respondent owed it a sum of Rs. 5,25,07,006 and after adjusting the amounts already recovered from the Respondent,

a sum of Rs. 3,37,32,861.43 was still recoverable.

4. The case of the Respondent on the other hand is that it had issued a legal demand notice to IOC on 11th December 2013 raising its claims. In

response to the said notice, IOC by letter dated 22nd January, 2014 stated that ""the claims made by M/s. Lurgi have been reviewed at our end

and we have processed some of the claims which have been found tenable as per the terms of the contract"". By a further letter dated 6th February,

2014 IOC informed the Respondent that being a public sector company it was unable to make any commercial commitment before the approval

and once an appropriate stage was reached it would share the details with the Respondent. In a subsequent letter dated 26th February, 2014 IOC

raised certain issues on account of which the payment to the Respondent was held up.

5. On 22nd May, 2014 the Respondent issued a notice to IOC under Sections 434 (e) and 434 (1) (a) and (c) of the Companies Act 1956 inter

alia stating that if IOC failed to pay to Respondent Rs. 24,43,56,970/- within three weeks from the date of the receipt of the said notice, it would

be deemed to be unable to pay its debts and the Respondent would be constrained to initiate proceedings under Section 439 of the Companies

Act, 1956.

6. In response to the above notice the Petitioner replied on 4th June, 2014 denying its liability. A further detailed reply was issued on 12th

September, 2014 in which inter alia IOC stated that after adjusting the amounts already recovered from the Respondent, a sum of Rs.

3,37,32,861.43 was outstanding. Therefore, the claims made by the Respondent were untenable and ""seriously disputed"" and the notice under

Section 434 of the Companies Act 1956 was ""wholly unwarranted"".

7. Following the above notice and reply, the Respondent filed Company Petition No. 690 of 2014 in the High Court of judicature of Bombay

praying for the winding up of IOC. It appears that an order was passed in the said company petition dated 2nd December, 2014 granting leave to

the Respondent to file the petition and listing it for admission on 19th December, 2014. It, however, appears that as of date there is no order

passed by the Bombay High Court in the aforementioned petition appointing any Provisional Liquidator (PL). It is stated that the petition is listed

for hearing next on 15th June, 2015.

8. The Arbitration Clause in the agreement between the parties is Article 24.1.1 which reads as under:

24.1. Any dispute or difference between the parties hereto arising out of any notified claim of the CONSULTANT in terms hereof and/ or arising

out of any amount claim 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 CONSULTANT or from any amount paid by the OWNER to the CONSULTANT in respect of the work) shall be referred

to arbitration in accordance with the UNCITRAL Rules as adopted in India by the Arbitration and Conciliation Act, 1996.

24.1.1. The Arbitration and Conciliation Act, 1996 shall apply to all such arbitration, subject further to the following conditions:

(A) Arbitration shall be by only a sole or single arbitrator appointed by agreement between the parties, failing which the sole arbitrator shall be

appointed in accordance with the said Rules, and shall be a retired judge of a High Court or Superior Court of a Commonwealth country.

(B) The Arbitrator shall give his award separately in respect of each claim.

(C) In so far as any dispute or difference referred to arbitration shall relate to any matter or thing in respect of which the decision, opinion or

determination (howsoever expression) of the OWNER or any other person has been expressed to be Final in terms of the Contract, such decision,

opinion and/ or determination, as the case may be shall be binding upon the Arbitrator, unless the CONSULTANT has made. a notified claim in

respect thereof. in which event the Arbitrator(s) shall have full power to open up, review and revise any decision, opinion or determination as

aforesaid and neither party shall be limited in the proceedings before such Arbitrator(s) to the evidence or argument(s) put before the OWNER or

other body or authority aforesaid for the purpose of obtaining the said decision, opinion or determination.

9. While the existence of the clause and the fact that IOC has invoked it by sending the Respondent a legal demand notice dated 13th December

2014 is not in dispute, the petition is resisted on two principal grounds. The first is that since the Company Petition No. 690 of 2014 filed earlier by

the Respondent in High Court of Bombay is pending and the question whether the disputes between the parties require to be referred to arbitration

is to be considered in the said petition, this Court should not proceed with the present petition.

10. Ms. Ayushi Kiran, learned counsel for the Respondent, invoked the doctrine of lis alibi pendens and urged in order to avoid the possibility of

the decision of this Court prejudicing the case of the Respondent in the petition pending in the Bombay High Court, this Court should stay its hands

and await the disposal of the said petition. She relied on the decision of the Supreme Court in V.O. Tractoroexport, Moscow Vs. Tarapore and

Company and Another, AIR 1971 SC 1 : (1969) 3 SCC 562 : (1970) 3 SCR 53 . Secondly, on merits she submitted that with IOC already

having admitted that the Respondent"s claims are tenable, there is in fact no dispute that requires to be referred to arbitration.

11. On the other hand, Mr. V.N. Koura, learned counsel for the Petitioner, submitted that the mere pendency of the petition for winding up in the

Bombay High Court ought not to preclude this Court from proceeding to decide the present petition under Section 11 of the Act. Relying on the

decisions in Haryana Telecom Ltd. Vs. Sterlite Industries (India) Ltd., AIR 1999 SC 2354 : (1999) 2 ARBLR 685 : (1999) 97 CompCas 683 :

(1999) 3 CompLJ 161 : (1999) 4 JT 545 : (1999) 123 PLR 613 : (1999) 4 SCALE 85 : (1999) 5 SCC 688 : (1999) 3 SCR 861 : (1999) 2 UJ

1279 : (1999) AIRSCW 2456 : (1999) 6 Supreme 66 , Shamrock International Ltd. v.. Amrutanjan Ltd. 2007 (Supl) Arb LR 48(SC) and Smt.

Kalpana Kothari Vs. Smt. Sudha Yadav and Others, AIR 2002 SC 404 : (2001) 3 ARBLR 487 : (2001) 9 JT 337 : (2001) 7 SCALE 560 :

(2002) 1 SCC 203 : (2001) AIRSCW 5214 : (2001) 8 Supreme 402 , Mr. Koura submitted that the arbitration clause in the contract was binding

on the parties and as long as there were disputes between the parties remained to be resolved, the Court should not hesitate to appoint an

Arbitrator.

12. The Court is not impressed with the submission that on account of the pendency of the company petition in the Bombay High Court this Court

should defer its decision in the present petition only because a similar question is likely to be considered in said petition. In fact at the hearing on

27th March, 2015 Ms. Kiran for the Respondent made a similar plea stating that the matter in Bombay High Court was listed on 13th April 2015

and therefore this Court should stay its hands at least till then. The present petition was heard as part-heard and adjourned till today. In the

meanwhile two things have happened; one, the Respondent filed a reply on 18th April, 2015 reiterating the above submissions. Two, the Bombay

High Court did not proceed with the hearing of the petition and adjourned it to 15th June, 2015.

13. The decision in M/s. V/O. Tractoroexport, Moscow v. M/s. Tarapore and Co. (supra) is of no assistance to the Respondent. There the

Supreme Court acknowledged that it is not unusual that there may be two actions on the same subject matter initiated in two different courts. That

by itself would not prevent one of the courts from proceeding in the matter. The Court observed: ""As a rule the court has to exercise its discretion

with great circumspection for it is imperative that the right of access to the tribunals of a country should not be lightly interfered with."" The said

observation was made in the context of arbitration proceedings between parties pending in Moscow and a suit for injunction between the same

parties pending in a court in India. The Court explained:

The rule, therefore, is that a plea of lis alibi pendens will not succeed and the Court will not order a stay of proceedings unless the defendant

proves vexation in point of fact. He must show that the continued prosecution of both actions is oppressive or embarrassing, an onus which he will

find it difficult to discharge if the plaintiff can indicate some material advantage that is likely to result from each separate action. Each case,

therefore, depends upon the setting of its own facts and circumstances.

14. In Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. (supra), the Supreme Court underscored that the nature of proceedings in the two

actions - one for winding up and the other, arbitration proceedings - was different. It is observed as under:

5. The claim in a petition for winding up is not for money, the petition filed under the Companies Act would be to the effect, in a matter like this

that the company has become commercially insolvent and therefore, should be wound up. The power to order winding up of a company is

contained under the Companies Act and is conferred on the Court. An arbitrator, notwithstanding any agreement between the parties, would have

no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the

petitioner herein was relating to winding up of the company. That could obviously not be referred to the arbitration and, therefore, the High Court,

in our opinion was right in rejecting the application.

15. The decisions in Smt. Kalpana Kothari v. Smt. Sudha Yadav and Shamrock International Ltd. v. Amrutanjan Ltd. emphasise that the right of a

party to an arbitration agreement to seek reference of the disputes to arbitration cannot be taken away even if the other party has instituted other

proceedings like a civil suit in the meanwhile.

16. Consequently, this Court is not persuaded to keep the present petition in abeyance awaiting the outcome of the company petition filed by the

Respondent in the Bombay High Court.

17. As regards the second submission, it is clear from the correspondence that there are disputes between the parties which require to be

adjudicated. The replies of IOC to the legal demand notices of the Respondent do not prima facie appear to constitute an unequivocal admission

of all of the claims of the Respondent. On the contrary, IOC''s reply to the notice issued by the Respondent under Section 434 of the Companies

Act indicates that far from admitting any such claims, IOC''s case is that the Respondent owes it a substantial sum of money. Consequently, the

Court negatives the second objection raised by the Respondent to the appointment of an Arbitrator to adjudicate the disputes between the parties.

18. In the circumstances, the Court appoints Justice Sudhansu Jyoti Mukhopadhaya, a former Judge of the Supreme Court of India, residing at

Apartment No. B-3B/01/01, First Floor, Complex No. B-3B, Sushant Aquapolis, NH-24, Ghaziabad (U.P.) as sole Arbitrator to adjudicate the

disputes between the parties, including their claims and counter-claims. The arbitration shall take place under the aegis of the Delhi International

Arbitration Centre (''DAC''). The fees of the learned Arbitrator will be in terms of the Delhi International Arbitration Centre Arbitration

Proceedings (Arbitrators'' Fees) Rules.

19. The petition is disposed of. A copy of this order be delivered to the learned Arbitrator as well as Additional Coordinator, DAC forthwith.