2024:DHC:6808

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

\+ ARB.P. 851/2023

SIMPLEX INFRASTRUCTURES LIMITED .....Petitioner
Through: Mr. Jayant Mehta, Sr. Adv. with Mr. Aayush Agarwala, Mr. Samrat Sengupta and Mr. Parag Chaturvedi, Advs.

versus

INDIAN OIL CORPORATION LIMITED .....Respondent
Through: Mr. V.N. Koura, Ms. Paramjeet Benipal and Mr. Sumit Benipal, Advs.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

JUDGMENT (ORAL)

% 03.09.2024

1. The petitioner and the respondent entered into a Contract Agreement dated 27 July 2017 for various civil works at Haldia Refinery.

2. Clause 9.0.0.0 and its sub clauses of the contract envisaged resolution of disputes by arbitration. For ease of reference, clause 9.0.0.0 and its sub clauses 9.0.1.0, 9.0.1.1 and 9.0.2.0 are extracted as under:

> "9.0.0.0 Arbitration
>
> 9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, if the CONTRACTOR has not opted for the Alternative Dispute Resolution Machinery referred to in Clause 9.1.1.0 hereof, and any dispute arising out of any Claim(s) of the OWNER against the

CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its Claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.

9.0.2.0 Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of this Arbitration Agreement with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject- matter of any reference or submission to arbitration, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be decided by the General Manager prior to the Arbitrator proceeding with or proceeding further with the reference. The said excluded matters are:

(i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement;

(ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR is a Notified Claim;

(iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

(iv) Whether or not the CONTRACTOR has opted for the Alternative Dispute Resolution Machinery with respect to any Notified Claim included in the CONTRACTOR's Final Bill.

3. The petitioner submitted its final bill to the respondent on 19 October 2022.

4. As the final bill of the petitioner was not fully honoured, the dispute arose. The petitioner addressed a notice to the respondent on 16 May 2023, under Section 21 of the Arbitration and Conciliation Act 1996[1], and sought reference of the disputes between the parties to arbitration. The notice also proposed the name of a retired Judge of this Court to be the arbitrator.

5. The respondent replied on 29 May 2023. The arbitrability of the petitioner's claims was specifically refuted. It was contended, in the reply, that the notification of the claims by the General Manager[2]of the respondent was contractually a *sine quo non* as per clause 9.0.2.0 for claim to be arbitrable.

6. Inasmuch as the claims raised by the petitioner in its Section 21 notice had not been notified by the GM, the arbitrability of the claims was disputed. Without prejudice, however, the reply suggested the name of three retired judges, one of this Court and two of the learned district court out of whom the petitioner called upon to select any one to arbitrate on the disputes.

7. The petitioner not being in agreement with this course of action, approached this Court by means of the present petition under Section

[1] "the 1996 Act", hereinafter
[2] "the GM", hereinafter

11(6) of the 1996 Act seeking reference of the disputes to arbitration.

8. On 15 February 2024, this Court noted the objection of the respondent that only claims as certified by the GM to be notified could be referred to arbitration. The contention of the learned Senior Counsel for the petitioner made before this Court on that date, that the petitioner would represent to the GM was also noted and the petitioner was permitted to do so albeit without prejudice to the rights and contentions of both sides.

9. On the basis of the liberty so granted, the petitioner represented to the GM on 28 March 2024. The GM *vide* his response dated 13 June 2024, rejected the said representation, holding that the claims were not notified.

10. Mr. Koura, learned Counsel for the respondent submitted that the dispute is not arbitrable as no decision of the GM has been taken, prior to the Section 21 notice issued by the petitioner as required by Clause 9.0.2.0.

11. As, even on the date of filing of this petition, there was no decision of the GM to the effect that the claims raised by the petitioner were notified and after this petition was filed, a representation to that effect made to the GM, was decided against the petitioner. He places reliance on the judgment of the Supreme Court in ***IOCL v NCC Ltd***[3], which dealt with an identical clause 9.0.2.0 and observes in paras 84,

[3] **(2023) 2 SCC 539**

85 and 96 thus:

> "84. Clause 9.0.2.0 is an exclusion clause by which, certain matters are specifically excluded from the scope, purview and ambit of the arbitration agreement. It provides that disputes or differences with respect to or concerning or relating to any of the matters mentioned/specified in Clause 9.0.2.0 are excluded from the scope, purview and ambit of the arbitration agreement. It further provides that any such matter which is specifically excluded viz.:
>
> (*i*) with respect to or concerning the scope or existence or otherwise of the arbitration agreement;
>
> (*ii*) whether or not a claim sought to be referred to arbitration by the contractor is a notified claim;
>
> (*iii*) whether or not a notified claim is included in the contractor's final bill in accordance with the provisions of Clause 6.6.3.0; and
>
> (*iv*) whether or not the contractor has opted for the alternative dispute resolution machinery with respect to any notified claim included in the contractor's final bill shall have to be decided by the General Manager prior to the arbitration proceeding with or proceeding further with the reference and the arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect to such matters.
>
> 85. Thus, on a fair reading of Clause 9.0.0.0, only the dispute arising out of a NOTIFIED CLAIM of the contractor included in the FINAL BILL in accordance with the provisions of Clause 6.6.3.0 shall be referred to arbitration, that too, subject to Clause 9.0.2.0 and any dispute/matter falling within Clause 9.0.2.0 shall have to be first decided by the General Manager, including, whether or not a claim sought to be referred to arbitration by the contractor is a notified claim. Therefore, if the claim is not a notified claim, as per Clause 6.6.1.0 and the same is not included in the final bill, such a claim is outside the purview of the arbitration agreement. Whether or not a claim sought for arbitration by the contractor is a notified claim or any such matter/dispute is specifically excluded from the scope, purview and ambit of arbitration agreement, such matter/dispute shall have to be first decided by the General Manager prior to the arbitral proceeding with or proceeding further with the reference. Thus, unless there is a decision by the General Manager on whether or not a claim sought to be referred to arbitration by the contractor is a notified claim or not, the arbitrator or Arbitral Tribunal shall have no jurisdiction to entertain such a

dispute.

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96. Therefore, on a fair and conjoint reading of Clauses 9.0.1.0 and 9.0.2.0, it can safely be concluded that:

> (*i*) only the notified claims of the contractor included in the final bill of the contractor in accordance with the provisions of Clause 6.6.3.0 shall have to be referred to arbitration;
>
> (*ii*) whether or not a claim sought to be referred to arbitration by the contractor is a notified claim or not, the arbitrator or Arbitral Tribunal shall have no jurisdiction at all;
>
> (*iii*) whether or not a claim is a notified claim or not shall have to be decided by the General Manager and that too, prior to arbitration proceeding with or proceeding further with the reference.

Therefore, once the General Manager, on the basis of the material on record takes a conscious decision that a particular claim sought to be referred to arbitration is not a notified claim, such a claim thereafter cannot be referred to arbitration. The language used in Clauses 9.0.1.0 and 9.0.2.0 is very clear and unambiguous."

12. Mr. Jayant Mehta, learned Senior Counsel for the petitioner points out that the aforesaid decision of ***IOCL*** rendered by two Hon'ble Judges, was considered subsequently by a three-Judge Bench of the Supreme Court in ***SBI General Insurance Co Ltd v Krish Spinning***[4].

13. Apropos the decision in ***IOCL***, paras 88 and 89 of the report in ***SBI General Insurance Co Ltd*** observe and hold thus:

> "88. The decision in *Vidya Drolia* (supra) was applied in the context of "accord and satisfaction" by a two-Judge Bench of this Court in *Indian Oil Corporation Limited* v. *NCC Limited* reported

[4] **2024 SCC OnLine SC 1754**

in (2023) 2 SCC 539. It was held that although the referral court under Section 11 of the 1996 Act may look into the aspect of "accord and satisfaction", yet it is advisable that in debatable cases and disputable facts, more particularly in reasonably arguable cases, the determination of whether accord and satisfaction was actually present or not should be left to the arbitral tribunal. This Court also expressed disagreement with the High Court which had held that post the insertion of Section 11(6-A) to the Act, 1996, the scope of interference of the referral court in a Section 11 petition was limited to the aspect of examining the existence of a binding arbitration agreement qua the parties before it. Relevant extracts are reproduced hereinbelow:

> *"90. […] Therefore, even when it is observed and held that such an aspect with regard to "accord and satisfaction" of the claims may/can be considered by the Court at the stage of deciding Section 11 application, it is always advisable and appropriate that in cases of debatable and disputable facts, good reasonably arguable case, the same should be left to the Arbitral Tribunal. Similar view is expressed by this Court in* Vidya Drolia [Vidya Drolia *v.* Durga Trading Corpn., *(2021) 2 SCC 1 : (2021) 1 SCC (Civ) 549].*
>
> *91. Therefore, in the facts and circumstances of the case, though it is specifically observed and held that aspects with regard to "accord and satisfaction" of the claims can be considered by the Court at the stage of deciding Section 11(6) application, in the facts and circumstances of the case, the High Court has not committed any error in observing that aspects with regard to "accord and satisfaction" of the claims or where there is a serious dispute will have to be left to the Arbitral Tribunal.*
>
> *92. However, at the same time, we do not agree with the conclusion arrived at by the High Court that after the insertion of sub-section (6-A) in Section 11 of the Arbitration Act, scope of inquiry by the Court in Section 11 petition is confined only to ascertain as to whether or not a binding arbitration agreement exists qua the parties before it, which is relatable to the disputes at hand.*
>
> *93. We are of the opinion that though the Arbitral Tribunal may have jurisdiction and authority to decide the disputes including the question of jurisdiction and non-arbitrability, the same can also be considered by the Court at the stage of deciding Section 11 application if the facts are very clear and glaring and in view of the specific*

clauses in the agreement binding between the parties, whether the dispute is non-arbitrable and/or it falls within the excepted clause. Even at the stage of deciding Section 11 application, the Court may prima facie consider even the aspect with regard to "accord and satisfaction" of the claims.

94. Now, so far as the submission on behalf of the respective parties on the decision of the General Manager on notified claims in Civil Appeal No. 341 of 2022 arising out of SLP (C) No. 13161 of 2019 is concerned, the General Manager has decided/declared that the claims are not arbitrable since they had been settled and the arbitration agreement has been discharged under Clause 6.7.2.0 of GCC and no longer existed/subsisted. As observed hereinabove, the claims had been settled or not is a debatable and disputable question, which is to be left to be decided by the Arbitral Tribunal. Therefore, matters related to the notified claims in the facts and circumstances of the case also shall have to be left to be decided by the Arbitral Tribunal as in the fact situation the aspect of "accord and satisfaction" and "notified claims" both are interconnected and interlinked."

(Emphasis supplied)

89. We find it difficult to agree with the dictum of law as laid in *Indian Oil* (supra). While the dictum in *Vidya Drolia* (supra) allows for interference by the referral court, it only allows so as an exception in cases where *exfacie* meritless claims are sought to be referred to arbitration. However, the view taken in *Indian Oil* (supra) takes a position which was taken by this Court in *Boghara Polyfab* (supra), wherein it was held that the issue of accord and satisfaction could either be decided by the referring authority or be left for the arbitrator to decide. This pre-2015 position, as was also pointed in *Mayavati Trading* (supra), was legislatively overruled by the 2015 amendment to the Act, 1996 and the introduction of Section 11(6-A). Thus, in our view, the intention of this Court in *Vidya Drolia* (supra) was not to hold that despite the 2015 amendment, the position regarding "accord and satisfaction" would continue to be one which was taken in *Boghara Polyfab* (supra). *Vidya Drolia* (supra) only went a step ahead from the position in *Mayavati Trading* (supra) to create an exception that although the rule is to refer all questions of "accord and satisfaction" to the arbitral tribunal, yet in exceptional cases and in the interest of expediency, *ex facie* meritless claims could be struck down."

14. Mr. Mehta's contention is that, after having extracted paras 90 to 94 of the IOCL, in which, in para 93, the Supreme Court had clearly held that the arbitral tribunal had the jurisdiction and authority to decide the questions including the issue of non-arbitrability, where the facts were very clear and glaring in view of specific clauses in the agreement binding the parties, the Supreme Court nonetheless went on to commence in para 89 of the decision by observing that it was difficult to agree with the dictum of law laid down in ***IOCL***. This disagreement with IOCL, submits Mr. Mehta, would also extend to the ratio declared in para 93 of the said decision.

15. The issue is arguable.

16. The decision in ***SBI General Insurance Co Ltd*** has substantially reduced the scope of examination by a court exercising jurisdiction under Section 11 of the 1996 Act. The opening sentence in the para 114 of the report in ***SBI General Insurance Co Ltd*** read thus:

> "114. In view of the observations made by this Court in *In Re: Interplay* (supra), it is clear that the scope of enquiry at the stage of appointment of arbitrator is limited to the scrutiny of prima facie existence of the arbitration agreement, and nothing else. For this reason, we find it difficult to hold that the observations made in *Vidya Drolia* (supra) and adopted in *NTPC* v. *SPML* (supra) that the jurisdiction of the referral court when dealing with the issue of "accord and satisfaction" under Section 11 extends to weeding out *ex-facie* non-arbitrable and frivolous disputes would continue to apply despite the subsequent decision in *In Re: Interplay* (supra)."

17. This court has had earlier occasions to examine paras 110 to 134 of the decision in ***SBI General Insurance Co Ltd***. The position

that emerges from the said decision is that a Section 11(6) court is entitled only to examine two aspects.

18. The first is whether there exists arbitration agreement between the parties. The second is whether the Section 11(6) petition has been filed within three years of the issuance of Section 21 notice.

19. All other issues have to be left for decision of the learned Arbitral Tribunal. The Supreme Court has specifically held that the earlier decisions on the point, including ***Vidya Drolia v. Durga Trading Corporation***[5] and ***NTPC v. SPML Infra***[6] cannot continue to apply. In arriving at the aforesaid decisions, the Supreme Court has followed the decision of the earlier seven-Judge bench decision in ***Re: Interplay***[7].

20. In the present case, there is undisputedly an arbitration clause between the parties. The issue of whether the disputes between the parties are arbitrable in view of clause 9.0.2.0 has, after the judgment in ***SBI General Insurance Co Ltd***, to be left for decision by the learned Arbitral Tribunal.

21. This Court does not express any view thereon.

22. Both sides would be at liberty to argue the point before the learned Arbitral Tribunal.

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[5] **(2021) 2 SCC 1**
[6] **(2023) 9 SCC 385**
[7] **In Re: Interplay between Arbitration Agreements under Arbitration & Conciliation Act, 1996 and Stamp Act, 1889, (2024) 6 SCC 1**

23. Mr. Koura sought for a direction to the learned Arbitral Tribunal to decide the issue of arbitrability at the beginning of the arbitral proceedings.

24. This Court expresses no view thereon. It would be open to the respondent to make such a request before the learned Arbitral Tribunal. If and when such a request is made, the learned Arbitral Tribunal would take a decision thereon in accordance with the law.

25. The claim of the petitioner is stated to be in the region of ₹ 36 crores.

26. In the circumstances, this Court requests Hon'ble Dr. Justice S. Muralidhar (Tel. 9872727986), an eminent Judge of this Court and former Chief Justice of the High court of Odisha, as the arbitrator to arbitrate on the dispute.

27. The arbitrator would be entitled to charge fees in accordance with the Fourth schedule to the 1996 Act.

28. The learned arbitrator is requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on the reference.

29. All other objections are left open to be agitated by the parties before the learned Arbitral Tribunal in accordance with law.

30. The petition is allowed in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 3, 2024
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Click here to check corrigendum, if any