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

+ **ARB.P. 392/2025**

ADARSH NOBLE CORPORATION LTDPetitioner

Through: Mr. Dhananjaya Mishra, Mr. Aimen Singh Kler, Mr. Amritesh Mohanty, Advs.

versus

INDIAN OIL CORPORATION LIMITEDRespondent

Through: Mr. Abhishek Birthray, Advocate

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% **28.02.2025**

I.A. 5296/2025 (Exemption)

Allowed, subject to all just exceptions.

ARB.P. 392/2025

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 by the Petitioners seeking appointment of an Arbitrator to adjudicate upon the disputes which have arisen under a Contract Agreement dated 23.01.2017 entered into between the Petitioner and the Respondent for the work of "Fabrication and erection of 03 (three) nos. HSD Tanks at Paradip Refinery".

2. Material on record indicates that out of the three tanks, one tank was made available on 30.03.2017 and the remaining two tanks were made available on 19.04.2017 and 03.05.2017 respectively. According to the Petitioner, the work has been successfully completed in the year 2021 and



the final bill has been raised on 22.12.2021. Disputes have arisen between the parties under the defect liability clause and the Respondent has encashed the Bank Guarantee. Notice under Section 21 of the Arbitration and Conciliation Act, 1996 invoking arbitration was sent by the Petitioner to the Respondent on 05.06.2024 claiming a sum of Rs.33,89,92,786/- as on 31.05.2024. The said notice was replied to by the Respondent on 05.07.2024 stating that disputes so raised by the Petitioner is not arbitrable. The Respondent also took a stand that the disputes sought to be raised is not covered under the arbitration clause.

3. At this juncture, it is relevant to reproduce Clause 9 of the General Conditions of Contract which contains the arbitration clause. The same reads 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.

9.0.3.0 The provisions of the Indian Arbitration and Conciliation Act, 1996 and any re- enactment(s) and/or modification(s) thereof and of the Rules framed thereunder shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

(a) The Arbitrator shall give his Award separately in respect of each claim and Counter-Claim; and

(b) The Arbitrator shall not be entitled to review any decision, opinion or determination (howsoever expressed) which is stated to be final and/or binding on the CONTRACTOR in terms of the Contract Documents.

9.0.4.0 The venue of the arbitration shall be New Delhi, provide that the Arbitrator may with the consent of the OWNER and the CONTRACTOR agree upon any other venue."

4. It is the case of the Petitioner that disputes as to whether it is arbitrable or not is in the realm of the Arbitrator and should not be considered by the Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996. Learned Counsel for the Petitioner places reliance upon a Judgment passed by a Co-ordinate Bench of this Court in Simplex Infrastructure Limited vs. Indian Oil Corporation Limited, 2024 SCC OnLine Del 6203 wherein the very same arbitration clause has been considered. The Co-ordinate Bench of this Court after placing reliance upon Judgment passed by the Apex Court in SBI General Insurance Co. Ltd vs. Krish Spinning, 2024 SCC OnLine SC 1754 has observed as under:



“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 Corporation⁵ and NTPC v. SPML Infra⁶ 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 : Interplay⁷.

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.

5. In view of the aforesaid judgment Simplex Infrastructure Limited (supra) passed by the Co-ordinate Bench of this Court wherein the same arbitration clause has been considered which is in question in the present case, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the parties.

6. Accordingly, Justice Hima Kohli, Former Judge of the Hon'ble Supreme Court, (Mob. No.9871300036) is appointed as the Arbitrator to adjudicate upon the disputes between the Parties.

7. The arbitration will take place under the aegis of the Delhi International Arbitration Centre (DIAC).

8. The learned Arbitrator is requested to file the requisite disclosure under Section 12(2) of the 1996 Act within two weeks of entering on reference.

9. All rights and contentions of the parties in relation to the



claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

10. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

11. The present petition stands disposed of in the above terms, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

FEBRUARY 28, 2025

S. Zakir