IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

COMMERCIAL ARBITRATION APPLICATION NO.131 OF 2022
A N D
COMMERCIAL ARBITRATION PETITION NO.131 OF 2022

JSW Steel Limited, a company incorporated under the Companies Act, 1956, having its registered office at JSW Centre, Bandra Kurla Complex, Bandra (East), Mumbai – 400 051. …Applicant

V e r s u s

1. Bellary Oxygen Company Private Limited, a company incorporated under the Companies Act, 1956, having its registered office at 855 TPD Plant, JSW Steel Limited Premises, Torangallu, Bellary, Karnataka 583123 and also having address at 102, Haudin House, 5, Haudin Road, Bangalore – 560 042.

2. Sun Investments Private Limited, a company incorporated under the Companies Act, 1956, having its registered office at Jindal Mansion, 5-A, G. Deshmukh Marg, Mumbai – 400 026. …Respondents

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Mr.Janak Dwarkadas, Senior Advocate with Mr.Kunal Dwarkadas with Vineet Unnikrishnan with Samhita Mehra with Ms.Vaidehi Chande i/b. Cyril Amarchand Mangaldas, for the Petitioner/Applicant.

Mr.Sharan Jagtiani, Senior Advocate with Ms. Shradha Achliya, Aditya N.Raut, Nitesh Jain, Atul Jain, Mahi Mehta i/b. Desai Desai Carrimjee and Mulla, for Respondent No.1.

CORAM : G.S. KULKARNI, J.

Reserved on: 13 July 2022,
Further reserved on: 4 November 2022
Pronounced on: 18 November 2022
(Through Video Conferencing)

JUDGMENT:

The judgment has been divided into the following sections to facilitate analysis:-

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Commercial Arbitration Application No. 131 of 2022

A. Prelude:

1. This application under Section 11 of the Arbitration and Conciliation Act,1996 (for short '**the ACA**') raises an issue as to whether Clause 6 being an arbitration agreement as contained in the Shareholders Agreement dated 13 June 2005 (for short '**the Shareholders Agreement**') could be invoked and would be available to the applicant in its demand for

appointment of an arbitral tribunal for adjudication of disputes and differences, which are stated to have arisen between the parties not merely under the Shareholders Agreement but under a subsequent agreement dated 14 June 2005 (for short '**the Second Agreement**'), which does not provide for an arbitration agreement, and in which, one of the parties is also different from the parties under the Shareholders' agreement.

2. Clause 6 of the Shareholders' Agreement as invoked by the applicant reads thus:

> "**6. Governing Law and Arbitration**
>
> This Agreement shall in all respects be governed by the laws of Republic of India.
>
> In the event of any dispute, controversy or claim, arising in connection with this Agreement, or breach, termination or invalidity thereof, the Parties shall seek an amicable settlement during a sixty-day period, failing which the matter under dispute will be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 (the "Act"). The venue of arbitration shall be Mumbai. The arbitration proceedings shall be conducted before one (1) arbitrator to be mutually agreed upon by the Parties in dispute failing which the arbitrator shall be appointed in accordance with the Act.
>
> The judgment upon the award rendered may be entered in any court having jurisdiction or application for a judicial acceptance of the award may be made for enforcement. The cost of arbitration shall be borne by the Parties equally."
>
> (Emphasis supplied)

B. <u>Facts</u>:

3. The factual matrix as the application would set out, is required to be noted in some detail: The applicant formerly known as Jindal Vijayanagar Steel Ltd. (for short '**JVSL**') has its steel manufacturing plant at Toranagallu, Bellary, Karnataka (referred to as "the **Facility**").

4. In or around the year 2004, JVSL was in the process of expanding the Facility. In order to meet the additional industrial gas requirement for the expanded Facility, the JVSL entered into a Gas Supply Agreement dated 22 November 2004 (for short '**the Gas Supply Agreement**') with a company known as BOC India Limited (purchaser in interest of respondent No.1 - Bellary Oxygen Company Pvt.Ltd.)

5. Under the Gas Supply Agreement, BOC India Ltd. set up a gas supply plant near the "Facility" for the purpose of supplying industrial gas to JVSL which could be used in the manufacture of steel. Under the Gas Supply Agreement, JVSL was responsible for ensuring supply of power to BOC India Ltd. not only for the purpose of operating the Gas Supply Plant but also during its construction, commissioning and trial running phase.

6. In pursuance of its obligation under the Gas Supply Agreement, to supply power to BOC India Ltd., JVSL arranged for one of its group

companies namely 'JSW Power', to supply power to BOC India Ltd. from its thermal power plant which was located in close proximity to the Facility.

7. On 8 June 2005 the Electricity Rules, 2005 (for short "**2005 Rules**") under the Electricity Act,2003, came to be notified by virtue of which, *interalia,* the requirement of a "captive generating plant" came to be prescribed. Rule 3 of the 2005 Rules ordained that a power plant shall qualify as a "captive generating plant" under Section 9 read with Section 2(8) of the Electricity Act only if (i) less than 26% of the ownership is held by the captive user; and (ii) not less than 51% of the aggregate electricity generated in such plant, (determination on annual basis) is conceived for captive uses.

8. At the time when the 2005 Rules were notified, JSW Power was in the process of setting up an additional power plant at the Facility for captive consumption by its shareholders. As a "Captive User" of power, from the captive generation plant, BOC India Ltd. would have received power to meet its gas supply obligations at a competitive rate which would be beneficial to JVSL. For such reasons, JVSL is stated to have facilitated equity contribution by respondent No.1 (successor-in-interest of BOC India Ltd.) in JSW Power, to enable respondent No.1 to become a captive

consumer of power supply by JSW Power at competitive rates.

9. The applicant contends that keeping such objective in mind, within a period of one week of the 2005 Rules being notified, the following four agreements were executed *interalia* between the parties to this application namely between the applicant on one hand and respondent No.1 - Bellary Oxygen Company Pvt.Ltd., and respondent No.2 - Sun Investment Pvt.Ltd. :-

> (i) **The Shareholders Agreement dated 13 June 2005** by which respondent No.1 agreed to subscribe to 1,10,35,000 shares of JSW Power Ltd.at a face value of Rs.10/- each for an aggregate sum of Rs.11,03,50,000/-. Respondent No.1 in consideration of having subscribed to the said shares and thereby having qualified as "Captive User", became entitled to an assured supply of 20 MW of power generated by JSW Power's power plant;
>
> (ii) **Supplemental agreement to the Gas Supply Agreement dated 13 June 2005** (for short "**Supplemental Agreement"**) by which it was agreed that BOC India Ltd. would be permitted to assign or novate the Gas Supply Agreement to any entity which becomes an affiliate of BOC India Ltd.;
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> (iii) **Deed of Novation and Assumption dated 13 June 2005** (for short '**Novation Deed**') in respect of the Gas Supply Agreement by which it was agreed that Gas Supply Agreement would be novated to the effect that respondent No.1 would be substituted in the place of BOC India Ltd and would perform all obligations of supplying gas under the Gas Supply Agreement;
>
> (iv) **Agreement dated 14 June 2005, ('Second Agreement')** the object and purpose of which was to set out the terms and conditions on which the shares of JSW Power allotted to respondent No.1 under the Shareholders

Agreement (equity contribution made by respondent No.1) would be held by respondent No.1.

10. It is the case of the applicant that the obligations under the Supplemental Agreement and the Novation Deed have been performed, as a consequence of which, according to the applicant, respondent No.1 stepped into the shoes of BOC India Ltd. and began performing all obligations including of supplying gas to JVSL under the Gas Supply Agreement.

11. It is the applicant's case that at the time the "Shareholders Agreement" and the Second Agreement were being negotiated and executed, there was an impending merger between JSW Power and JVSL. It is stated that steps were to be taken by JSW Power, JVSL and respondent No.1 on the intended merger, hence a reference to merger was incorporated in the said agreements. It is stated that for instance the Second Agreement records that the property and liabilities of JSW Power (including captive generation plant) would stand transferred to JVSL and that the shareholders of the JSW Power would be allotted shares in JVSL on the basis of the share-exchange ratio, approved in the scheme of amalgamation. It is stated that accordingly respondent No.1 was to be issued shares of JVSL in consideration of JSW Power merging into JVSL.

12. The applicant states that at such point of time respondent No.1

wanted to ensure that its right to receive 20 MW of power as a "Captive User" was protected even after the amalgamation. The applicant states that it is for such reasons Clause (1) read with Clause (8) of the Second Agreement provided that the Scheme of Amalgamation should contain suitable conditions to protect respondent No.1's right to receive 20 MW of power and to protect its "Captive User" status. The applicant has contended that JSW Power merged into JVSL in September 2005, at which point of time JVSL was a listed entity. It is stated that JVSL continued to be a listed entity.

13. It is the case of the applicant that at the time of merger based on the share exchange ratio under the Scheme of Amalgamation, respondent No.1 was allotted 4,41,400 equity shares of JVSL (i.e. of the present applicant). Subsequently in the year 2017, (i.e. after about 12 years of the Shareholders Agreement) pursuant to share split, respondent No.1 was allotted 44,14,000 shares of JVSL ("Sale shares").

14. The applicant has contended that Clause 6 of the 'Second Agreement' sets out the consequences of termination of Gas Supply Agreement or of respondent No.1 ceasing to be a 'Captive User' of power, which is the matter of concern insofar as the reference to arbitration is concerned, inasmuch as the said clause according to the applicant

provided a buy back arrangement between the parties.

15. On 13 November 2021 the applicant and respondent No.1 entered into an "Asset Sale Agreement" under which the gas supply plant comprising *interalia* of an Area Separation Unit constituted under the Facility were transferred by respondent No.1 to the applicant, which enabled the applicant to produce and supply gas by itself. It is stated that further by a Closure Letter dated 15 November 2021 (for short "**the Closure Letter**") both the applicant and respondent No.1 agreed and acknowledged that the Gas Supply Agreement stood terminated with effect from 14 November 2021.

16. It is contended by the applicant that consequent to the execution of the Asset Sale Agreement and the Closure Letter, all three conditions stipulated in Clause 6 of the Second Agreement stood attracted namely (i) respondent No.1 ceased to have a Captive User status for 20 MW of power generated at the applicant's Facility; (ii) respondent No.1 was no longer being supplied with power under the Gas Supply Agreement; and (iii) the Gas Supply Agreement stood terminated by a mutual agreement between the applicant and respondent No.1. It is stated that these were the conditions set out in Clause 6 of the Agreement on the basis of which the respondent No.1, within five working days, was obliged to cause the sale of shares held in the applicant to be purchased by the applicant's existing

shareholders or by any other entity nominated by the applicant at a price equal to the equity contribution namely Rs.11,03,50,000/-.

17. The applicant contends that accordingly in terms of Clause 6 of the Second Agreement, the applicant issued a notice dated 17 November 2021 to respondent No.1, thereby calling upon respondent No.1 to sell the said shares to its nominee - JSW Techno Projects Management Ltd (for short '**the Purchaser**') on or before 22 November 2021, at a price equal to the equity contribution namely Rs.11,03,50,000 to be paid by the purchaser to respondent No.1. It is stated that in terms of Clause 12 of the Agreement, the applicant also called upon respondent No.1, in the meantime, not to sell the Sale shares to anyone else. It is stated that the said letter also contained the purchaser's consent to purchase the Sale shares and pay the consideration in respect thereof.

18. The applicant contends that respondent No.1, however, failed to sell the said Sale shares to the purchaser or to take any steps in respect thereof on or before appointed dated 22 November 2021. It is stated that by failing to sell the "Sale shares" to the purchaser, respondent No.1 acted in breach of the said agreement(s), more particularly, the Second Agreement read with the Shareholders agreement. It is stated that respondent No.1 could not have denied its obligation under Clause 6 of the agreement to sell the Sale shares to the purchaser or any existing shareholder/ nominee

of the applicant at a price equal to the equity contribution.

19. The applicant has contended that it is in these circumstances disputes and differences have arisen between the parties under the Second Agreement read with the Shareholders Agreement. It is stated that the applicant is entitled to seek enforcement of respondent No.1's obligation including its obligation under Clauses 6 and 12 of the Second Agreement.

20. It is the case of the applicant that as a result of respondent No.1 denying its obligations under Clause 6 of the Second Agreement to sell the 'Sale shares' to the purchaser or any existing shareholder/ nominee of the applicant at a price equal to the equity contribution, the applicant was constrained to file a petition before this Court under Section 9 of the ACA, seeking urgent interim measures in aid of the reliefs that would be sought by the applicant in the arbitration proceedings. The applicant has stated that a reply affidavit dated 13 December 2021 was filed by respondent No.1 in the Section 9 petition raising various contentions, which according to the applicant, were baseless and false and were denied by the applicant by filing an affidavit-in-rejoinder dated 20 December 2021. The Section 9 petition is also listed along with the present proceedings.

21. The applicant contends that as per the arbitration agreement, as contained in the Shareholders Agreement, all disputes, controversies and

claims between the parties are to be referred to arbitration before a Sole Arbitrator, however, the parties are required to resort to an amicable settlement of disputes, before they go for arbitration. It is stated that accordingly, during the pendency of the Section 9 petition, the applicant through its Advocates addressed a letter dated 28 February 2022 to respondent No.1, requesting respondent No.1 to confirm if it is willing to discuss with the applicant and explore the possibility of an amicable resolution of the disputes, which had arisen under the Second Agreement read with the Shareholders Agreement. The applicant nominated its nominee to represent the applicant in a settlement discussion as also requested respondent No.1 to depute its representative with whom settlement discussion could be taken forward.

22. It is stated that respondent No.1, however, by its advocate letter dated 4 March 2022 denied and rejected the applicant's request for any discussion *interalia* contending that there is no dispute between the parties within the scope of the arbitration agreement.

23. The applicant contends that accordingly in terms of the arbitration agreement as contained in the Shareholders agreement, the applicant through its Advocates addressed a letter dated 17 March 2022 to respondent No.1 invoking the arbitration agreement, thereby calling upon the respondents to refer the disputes, controversies and claims in

connection with the Second Agreement read with the Shareholders Agreement, namely the applicant's claim arising out respondent No.1's failure to comply with Clause 6 of the Second Agreement, to a sole arbitrator. The applicant also suggested the name of the proposed arbitrator.

24. The applicant contends that respondent No.1 by its Advocate's letter dated 12 April 2022 addressed to the applicant, stated that the invocation of the arbitration was illegal and invalid, recording that respondent No.1 did not consent to the said invocation or to the appointment / nomination of any arbitrator.

25. It is in these circumstances, the applicant, has filed the present application under Section 11(6) of the ACA, praying that the Court exercises its jurisdiction and appoint an arbitral tribunal.

26. The applicant in supporting such relief as prayed for, has contended that there exists a valid and binding arbitration agreement between the parties as contained in Clause 6 of the Shareholders Agreement for adjudication of the disputes and differences which have arisen between the parties in connection with the Shareholders Agreement read with the Second Agreement. It is stated that on following counts the applicant would be entitled to refer the disputes to arbitration:-

(i) The Shareholders Agreement and the Second Agreement are

inextricably interlinked;

(ii) The Shareholders Agreement and the Second Agreement were entered into one day apart, and as a part of the same transaction and for performance of a single commercial understanding;

(iii) The equity contribution and respondent No.1's "Captive User" status consequent thereto, are captured in the Shareholders Agreement on one hand, and on the other hand, the terms on which respondent No.1 holds equity contribution as well as circumstances in which respondent No.1 ceased to be a Shareholder are captured in the Second Agreement. Both the agreements must therefore be read together and cannot be read in isolation.

(iv) The Second agreement contained multiple references to the Shareholders Agreement which makes it evident that the Second Agreement and the Shareholders Agreement are composite agreements and must therefore, be read together;

(v) The Shareholders Agreement is so inextricably interlinked with the Second Agreement that the disputes arising under the Second Agreement become disputes arising under the Shareholders Agreement and vice versa.

(vi) The language of the arbitration agreement is very wide when it uses the words "**any** dispute, controversy or claim, **arising in connection with** this Agreement". It is stated that it is well settled that such words are of the widest amplitude.

(vii) The present disputes certainly fall within the scope of the arbitration agreement contained in Clause 6 of the Shareholders Agreement as the disputes being raised are in connection with the Shareholders Agreement

and are not disputes arising only under the Second Agreement.

(viii) It is a settled law that an arbitration clause contained in one agreement can be invoked in connection with the disputes arising under another agreement provided that such other agreement is ancillary to and/or inextricably interconnected with the main agreement; or if a single commercial understanding is sought to be performed under two agreements.

(ix) It is also well settled that if from the mutual intention of the parties as well as the construction of the contracts which are subject matter of the dispute, if it is apparent that the parties have mutually intended to rely on the arbitration clause of the main agreement in case of a dispute, in such event an application for appointment of an arbitrator ought to be allowed.

27. The applicant has thus contended that the essentials which are required to be considered, are **firstly,** that this is a clear that there exists an arbitration agreement between the applicant and the respondents under Clause 6 of the Shareholders Agreement which provides for adjudication of disputes and differences which have arisen between the parties, arising in connection with the Shareholders Agreement read with the Second Agreement; **secondly**, there are disputes and differences between the applicant and respondent No.1 which squarely fall within the arbitration agreement; **thirdly** there is a failure to comply with the applicant's invocation notice/letter dated 17 November 2021, as also a rejection of an effort to amicable settlement, hence the arbitration agreement gets

triggered; **fourthly** respondent No.1 has failed and refused to consent to the appointment of an arbitrator in terms of Clause 6 of the Shareholders Agreement raising untenable contentions denying that the dispute falls under the scope of arbitration agreement and, accordingly, losing its right to participate in the appointment of an arbitrator. On such premises, the applicant has filed the present application under Section 11 of the ACA.

28. The prayer as made by the applicant is required to be noted which reads thus:

> "(a) that this Hon'ble Court be pleased to appoint an arbitrator and constitute the Arbitral Tribunal comprising of the Sole arbitrator so appointed, to adjudicate the disputes and differences arising between the parties in connection with the Agreement dated 14th June 2005 read with the Shareholders' Agreement dated 13th June 2005;"
>
> (emphasis supplied)

C. **Reply Affidavit on behalf of respondent No.1:**

29. On behalf of respondent No.1, a reply affidavit of Mr. Madhur Kabra, Authorised Signatory of respondent No.1 has been filed. At the outset, it is contended by respondent No.1 that there is no arbitration agreement between the applicant and respondent No.1 in regard to the disputes sought to be raised and/or the contract the applicant is seeking to enforce. It is stated that the applicant's alleged claim as sought to be referred to arbitration arises solely under the Second Agreement dated 14 June 2005, which does not have any arbitration clause/agreement, so that

the dispute under the Second agreement could be referred to arbitration. It is further stated that the Second agreement dated 14 June 2005 is an independent agreement and is not interlinked or connected with the shareholders agreement dated 13 June 2005. The reply affidavit further states that the applicant is making a feeble attempt to contend that the Second Agreement and the Shareholders Agreement are inextricably interlinked and/or interconnected and/or reflect the composite understanding between the parties and/or are meant to achieve a common object which, according to respondent no.1, is *ex facie* false, baseless and untenable. It is stated that the Shareholders Agreement and the Second Agreement are separate and independent agreements which have a different scope and contain independent rights and obligations of the parties as provided therein and cannot at all in any manner be treated as a composite agreement as alleged by the applicant. It is contended that these two agreements namely the Shareholders Agreement and the Second Agreement operate distinctly and independent of each other. The affidavit further contends that it is trite law that as per Section 7(5) of the ACA, if an arbitration agreement falls in another document and is incorporated in an agreement by a reference, then all of the following conditions are required to be satisfied namely (a) the contract should contain a clear reference to a document containing the arbitration clause; (b) the reference to other document would clearly indicate the intention to incorporate the

arbitration clause into the contract; (c) the arbitration clause should be appropriate that is capable of its application qua the disputes under the contract and the same should not be repugnant to any terms of the contract; and lastly, (d) there cannot be any mechanical reference of the disputes to arbitration, as it needs to be seen whether the core preliminary issue and/or dispute based on which the reference is sought to be made, has a clear co-relation to the Agreement under which the reference is sought. Respondent no.1 contends that in the present case, none of these conditions are satisfied in any manner.

30. In the reply affidavit, respondent no.1 further contends that in the present case, in the Second Agreement, there is no clear reference to the arbitration clause as contained in the Shareholders Agreement. It is thus contended that the parties never intended to refer the disputes under the Second Agreement to arbitration. It is next contended that Clause (13) of the Second Agreement sets out that in the event of any conflict between the provisions of the Second agreement and the Shareholders Agreement, the provisions of the Second Agreement shall prevail. According to respondent No.1, this clause makes it evident that the arbitration clause in the Shareholders Agreement was never intended to apply to the Second agreement. It is next contended that a perusal of the memo of the application demonstrates that the applicant has rather mechanically sought

to refer the disputes under the Second Agreement to an arbitrator based on the arbitration clause in the Shareholders Agreement, and no serious attempt has been made by the applicant to incorporate and co-relate the arbitration clause in the Shareholders Agreement. It is contended that the Shareholders agreement having an arbitration clause and the Second Agreement not having an arbitration clause, the terms of the Second Agreement shall always prevail and the present dispute between the parties cannot be subject to any arbitration. It is next contended that even assuming that the Shareholders Agreement and the Second Agreement are inextricably linked and/or connected as sought to be contended by the applicant, even then, the fact remains that these two are separate agreements. That the breaches as alleged are under the Second Agreement, hence, the genesis of the dispute arises under the Second Agreement and not either directly or indirectly under the Shareholders Agreement. It is, hence, contended that the purported disputes admittedly having arisen under the Second Agreement, the disputes cannot be referred to arbitration on the basis of the arbitration clause in the Shareholders Agreement, which is a separate and an independent agreement. It is also contended that on a reading of the Second Agreement with the Shareholders Agreement it is *ex facie* clear that the parties never intended to apply the arbitration clause under the Shareholders Agreement to the Second Agreement.

31. Also, a without prejudice contention is urged in the reply affidavit to contend that the Shareholders Agreement was executed between JSW Power Ltd. and respondent Nos.1 and 2, while the Second Agreement was executed between JPL [Jindal Vijayanagar Steel Ltd. (JVSL)], and respondent Nos.1 and 2. It is contended that when the dispute resolution clause if is "carried forward" to a later Agreement which introduces a new contract between the parties, then the arbitral intent between the original party and the assignee of the other party must be made manifest. It is contended that even the parties to the Shareholders Agreement which contains the arbitration clause, are not the same as the parties to the said Agreement, hence consent cannot be assumed for incorporating any dispute resolution clause without there being any clear intention. The affidavit further sets out a detailed paragraph-wise reply to the application, however, to avoid prolixity, the contents therein need not be discussed in detail, suffice it to observe that the case of the applicant for appointment of an arbitral tribunal is denied and disputed on the above premise as discussed above.

D. <u>Submissions on behalf of the Applicant</u>:

32. Mr. Janak Dwarkadas, learned Senior Advocate and Mr. Kunal Dwarkadas have made elaborate submissions which can be summarised as under :

(i) In the facts and circumstances of the present case, the applicants are entitled to invoke the Arbitration Agreement as contained in Clause 6 of the 'Shareholders Agreement', for adjudication of disputes and differences which have arisen under an interconnection of the Shareholders Agreement with the Second Agreement.

(ii) The Shareholders Agreement and the Second Agreement are inextricably interlinked as both these agreements were entered between the parties only one day apart and as a part, of the same transaction and for the performance of a single commercial understanding.

(iii) The equity contribution of respondent no.1's “Captive User” status consequent thereto was captured in the Shareholders' Agreement on one hand, and on the other hand, the terms on which respondent no.1 holds the equity contribution as well as the circumstances in which respondent no.1 would cease to be a shareholder are captured in the Second Agreement. It is thus necessary that both the agreements are read together and not in isolation.

(iv) The Second Agreement contains references to the Shareholders Agreement which makes it evident that the Second Agreement and the Shareholders Agreement are composite Agreements, which necessarily are required to be read together.

(v) The disputes arising between the parties under the Second agreement are integrally connected to the Shareholders' Agreement and vice versa.

(vi) The language of the Arbitration Agreement is also very wide

when it uses the word "*any dispute, controversy or claim arising in connection with this Agreement*". These are the words of widest amplitude and accordingly ought to be given their due meaning.

(vii) The present dispute falls within the scope of the arbitration agreement which is contained in Clause 6 of the Shareholders Agreement for the reason that the disputes have arisen in connection with the Shareholders Agreement and are not the disputes arising only under the Second Agreement.

(viii) The mutual intention of the parties needs to be examined in the present case, which would go to show that the parties have intended to rely on the arbitration clause under the Shareholders Agreement which is the main agreement, in the event disputes arise between the parties. The applicant by its letter dated 28.02.2022 and 17.03.2022 addressed to the respondents has rightly invoked the Arbitration Agreement.

(ix) That clause 4.1 of the Shareholders Agreement is a 'bare bone' clause clearly providing that the Shareholders' Agreement shall come into force on the date of its execution and shall remain in force till respondent no.1 ceases to be a Shareholder of JPL or JVSL and as the case may be until terminated pursuant to the provisions of this Agreement. From the reading of clause 4.1, it is clear that the said clause does not furnish any other details as to what are the obligations between the parties. The Shareholders Agreement was entered between the parties only for respondent no.1 to be a captive power consumer.

(x) In adjudication of the present proceedings it is for the Court to examine the commercial understanding between the parties and the

intention of the parties whether there is any interconnection between the two agreements. The interconnection between the Shareholders' Agreement and the Second Agreement is clear from the combined reading of Clause 4.1 of the Shareholders' Agreement and clause 6 of the Second Agreement. It is submitted that this Shareholders' Agreement would never come to an end and the corresponding obligation of respondent no.1 to sell the shares to the applicants at the agreed price is clearly borne out from Clause 4.1 of the Shareholders' Agreement with Clause 6 of the Second Agreement.

(xi) It is a settled principle of law that when an Arbitration Agreement uses the words '*arising in connection with*' it would be interpreted by giving a meaning of the widest amplitude whereby the disputes or differences arising under the main agreement which are "connected" with disputes arising under an ancillary agreement can be referred to arbitration under the arbitration clause as contained in the main agreement.

(xii) It is well settled that an arbitration clause contained in one agreement can be invoked in connection with disputes arising under another agreement provided that such other agreement is ancillary to / inextricably interconnected with the main agreement; or if a single commercial understanding is sought to be effected through the two agreements.

(xiii) The Second Agreement and the Shareholders Agreement form part of the same transaction, as can be seen from the comments offered by the applicants in the chart describing three clauses of the Shareholders Agreement (described as Note 1, Note 2 and Note 3). it is

thus submitted that the Shareholders Agreement and the Second Agreement when read as a whole clearly show that they form a composite arrangement being interlinked.

(xiv) The Shareholders Agreement and the Second Agreement were entered into only one day apart and as part of the same transaction and for the performance of a single commercial understanding.

(xv) The Second Agreement contains multiple references to the Shareholders Agreement which makes it evident that the Second Agreement and the Shareholders' Agreement is a composite agreement and must therefore be read together.

(xvi) From the plain reading of the notices dated 28.02.2022 and 17.03.2022 it is apparent that the disputes have arisen under the Second Agreement read with the Shareholders' Agreement and not only under the Second Agreement as alleged by respondent no.1.

(xvii) The concept of “captive user” status referred to in Clause 6 of the Shareholders Agreement is captured in the Shareholders' Agreement as well as in the Second Agreement. Also, the price at which the applicant is obliged to purchase the shares held by the respondent no.1 being the equity contribution made by respondent no.1 at cost, is reflected in the Shareholders' Agreement and the equity contribution itself was made by respondent no.1 pursuant to the terms of the Shareholders' Agreement. It is for such reasons that the present disputes cannot be segregated into the disputes arising only under the Second Agreement and *de hors* the Shareholders' Agreement.

(xviii) Section 7(5) in its application to the present facts is one of the ways which recognizes that the arbitration agreement in the Shareholders Agreement would be required to be recognized in the Second Agreement. Under Section 5 of the ACA it is for the Court to examine both the documents and come to a conclusion whether they are integrally connected or not and as to what is the commercial understanding between the parties.

In support of the above submissions, reliance is made on the decisions of the Hon'ble Supreme Court in the the case of ***Olympus Superstructures Pvt. Ltd. V/s. Meena Vijay Khetan & Ors.***[1], and ***Ameet Lalchand Shah & Ors. V/s. Rishabh Enterprises & Anr.***[2]

E. Submissions on behalf of Respondent No.1.

33. Mr. Sharan Jagtiani, learned Senior Advocate has made the following submissions on behalf of respondent No.1:

(i) The disputes between the parties have arisen under the Second Agreement under which, there is no arbitration agreement between the parties, which is the cause of action the applicant intends to pursue after invoking the arbitration agreement. This submission is supported by drawing the Court's attention to the fact that whenever the parties intended to have an arbitration agreement, they have so provided in the respective agreements. The submission is to the effect that in so far as the Second Agreement is concerned, the parties have categorically excluded the arbitration agreement and hence, in respect of any dispute under the Second Agreement, there is no question of the parties being referred to arbitration.

(ii) The case of the applicant that there is an inextricable

[1] (1999) 5 SCC 651
[2] (2018) 15 SCC 678

connection between the Shareholders Agreement and the Second Agreement, is totally unfounded much less for the reference of disputes to arbitration is concerned.

(iii) If the case of the applicant is accepted so as to read the arbitration agreement between the parties in the Second Agreement, it would amount to re-writing of the contract, also, it would amount to totally negating the effect of Section 7(5) of the ACA as Section 7(5) would not admit of such interpretation.

(iv) The purpose and scope of the two agreements is totally different. This being so, it is not correct for the applicant to contend that both the agreements for any purposes go hand in hand, more particularly when the applicant contends that the main agreement is the Second Agreement, however, the Shareholders Agreement has nothing to do with the Second Agreement. It is submitted that in fact it is clear that there is no dispute under the Shareholders Agreement.

(v) A mere making of a reference to the other agreement or borrowing of the context from the other agreements is of no consequence/relevance, when it comes to the reading of the Second Agreement.

(vi) The applicant's understanding of its case in paragraphs 6, 7, 8 and 9 of the Section 9 petition itself would show that the Second agreement is a standalone agreement.

(vii) That the termination of the Shareholders Agreement does not infer termination of the other. It is clear from paragraph 6 of the letter

dated 17 November 2021 addressed by the applicant to respondent No.1, that what was sought to be asserted and enforced on behalf of respondent No.1 was Clause 6 of the Second Agreement which is under an eventuality, namely, that if respondent No.1 does not have captive user status or is not supplied with power under the Gas Supply Agreement or if the Gas Supply Agreement is terminated, then the consequence as brought about between the parties was as to what was set out in Clause 6. Such an eventuality in Clause 6 would be confined only to the Second Agreement and not to the Shareholders Agreement, and being confined to the Second Agreement, there was no question of any reference of disputes to arbitration, as there is no arbitration agreement under the Second Agreement.

(viii) It is submitted that the purported dispute if at all has arisen, has arisen under Clause (6) of the Second Agreement. It is thus submitted that the main agreement is the Second Agreement, which has no arbitration agreement. In the context of the decision of the Supreme Court in ***Olympus Superstructures Pvt. Ltd.*** (supra), the Second Agreement is required to be considered to be the main agreement.

(ix) The scope of the Shareholders Agreement which contains an arbitration clause is to explain the circumstances in which respondent No.1 would subscribe to and invest in the equity shares of JSW Power Ltd. (JPL) and to record the terms and conditions "*governing the shareholding and rights of the parties and other matters as hereinafter provided in writing*".

(x) The substantive covenants and/or obligations under the SHA, being the rights of parties and other matters in writing, show that they do not

overlap and are not interlinked with the substantive covenants and the obligations contained in the Second Agreement, which admittedly does not contain an arbitration clause.

(xi) The Second Agreement although executed a day later, deals with an entirely different situation and pertains to the date and time when the respondent was already a shareholder of JPL after it had made its equity contribution. It is submitted that the substantive covenants and obligations under the Second Agreement pertain to the matters which are not regulated or governed by the Shareholders Agreement. A mere reference to SHA or "Shareholders Agreement dated 13 June 2005" as a narrative in the context of these distinct covenants and obligations, does not bring a dispute under the Second Agreement, within the scope of the arbitration clause contained in the Shareholders Agreement.

(xii) In fact, there is no dispute that the Shareholders Agreement is a distinct agreement from the Second Agreement which is clear from paragraph 26 of the Section 9 petition, that the applicants are seeking enforcement of the rights under the Second Agreement which does not have an arbitration clause. Also, the parties to the arbitration agreement contained in the Shareholders Agreement are different than the parties to the Second Agreement.

(xiii) The fact that the Second Agreement is executed one day later to the Shareholders Agreement would, if at all, operate against the applicant because it highlights the obvious conscious choice to leave the arbitration clause out of the Second Agreement.

(xiv) A mere reference to the Shareholders Agreement in some of the

clauses of the Second Agreement does not satisfy the reading of an arbitration clause contained in the Shareholders Agreement into the Second Agreement.

(xv) It is submitted that during 2004-2005, the parties had executed five agreements namely;

(I) Gas Supply Agreement dated 22 November 2004;

(II) Shareholders Agreement dated 13 June 2005;

(III) Supplemental Agreement dated 13 June 2005;

(IV) Deed of Novation and Assumption dated 13 June 2005; and

(V) Second Agreement dated 14 June 2005.

Each of the above agreements, contain an arbitration clause except the Second Agreement (dated 14 June 2005). This according to the respondent No.1, militates against the intention or presumed intention as canvassed by the applicant. It is submitted that in contrast, the parties were meticulous to have a separate arbitration clause in the Gas Supply Agreement dated 22 November 2004, Supplemental Agreement to GSA dated 13 June 2005 and Deed of Novation and Assumption dated 13 June 2005. It is hence, submitted that leaving out the Second Agreement can never be regarded as inconsequential merely because it was always presumed that the arbitration clause of the Shareholders Agreement would apply to the Second Agreement.

(xvi) It is submitted that the applicant has invoked arbitration by notice dated 17 March 2022, the contents of which did not relate to breach of the terms of the Shareholders Agreement but squarely deal with enforcement of the terms under the Second Agreement.

(xvii) It is on such submissions, it is prayed that the applicant is not

entitled to the reliefs of the dispute be referred to arbitration.

In support of his submission, reliance is placed on the judgment in (a) **Duro Felguera S.A. V. Gangavaram Port Ltd.**[3]; (b) **M.R.Engineers and Contractors Pvt. Ltd. V. Som Datt Builders Ltd.**[4]; (c) **Vishranti CHSL Vs. Tattva Mittal Corporation Pvt.Ltd.**[5]

F. <u>Analysis and Conclusion</u>

34. The question which falls for consideration in the present proceedings is as to whether Clause 6 of the Shareholders Agreement, being the arbitration agreement, could be invoked by the applicant for the stated disputes to be referred to arbitration?

35. For such determination, there are two basic issues which are required to be considered, **firstly**, from the nature of the invocation of the arbitration agreement, under which of the two agreements, disputes between the parties have arisen; and whether there exists an arbitration agreement between the parties qua such agreement; **secondly,** in the event, if there is no arbitration agreement qua the agreement under which disputes have arisen, then whether, there is any inextricable connection between the two agreements, so that the arbitration agreement under one of the agreement can be construed to be an arbitration agreement for both the agreements. Such is the nature of the controversy.

36. As noted above, the applicant intends to rely and invoke Clause 6 of

[3] (2017)9 SCC 729
[4] (2009)7 SCC 696
[5] 2020 SCC OnLine Bom 7618

the Shareholders Agreement dated 13 June 2005 which is the only arbitration agreement between the parties, qua the two agreements in question. It is required to be noted that the parties to the Shareholders Agreement are (i) JSW Power Ltd.(which stood merged with the applicant and which no more is an existing legal entity), (ii) Sun Investments Pvt.Ltd. (respondent No.2) and (iii) Bellary Oxygen Company Pvt.Ltd. (respondent No.1). Insofar as the Second Agreement is concerned, the parties to the Second Agreement are (i) JSW Power Ltd., (ii) Sun Investments Pvt.Ltd. (respondent No.2), (iii) Jindal Vijayanagar Steel Ltd. (the applicant) and (iv) Bellary Oxygen Company Pvt.Ltd. (respondent No.1). Thus, on the face of these two agreements, it is clear that the parties to these agreements are not the same inasmuch as the Shareholders Agreement was with JSW Power Ltd. which has stood merged with the applicant.

37. The plinth of the applicant’s case is that the Shareholders Agreement and the Second Agreement are inextricably connected or both are integral to each other. To appreciate such contention, it would be necessary to examine as to what is the nature of the dispute as sought to be raised by the applicant.

38. The dispute between the parties as raised by the applicant can be seen from the applicant's letter dated 28 February 2022 read with the

invocation notice dated 17 March 2022 as addressed by the Advocate for the applicant to respondent No.1. In such invocation notice, the applicant stated that pursuant to the Shareholders Agreement dated 13 June 2005, respondent No.1 had subscribed to 1,10,35,000 shares of JSW Power Ltd. (JPL) in order to become a 'Captive User' of the power generated by JPL Facility at Toranagallu, Bellary, Karnataka. It is stated that by virtue of such equity contribution JPL was to supply 20 MW powers to respondent No.1 for the purpose of manufacturing and supplying gas to the applicant under the Gas Supply Agreement dated 22 November 2004 under which *interalia* power was supplied by the applicant to respondent No.1. It is also stated that the relevant terms relating to respondent No.1's equity contribution and "Captive User" status consequent thereto, were compositely and together recorded in the Shareholders Agreement read with the Second Agreement and that both these agreements are connected inextricably and are interlinking agreements reflecting the commercial arrangement between the parties. It is next stated that the JSW Power Ltd (JPL) having merged into the applicant, pursuant to such merger, respondent No.1 was allotted 4,41,400 equity shares of JVSL. It is stated that subsequently in the year 2017, pursuant to the share split, respondent No.1 was allotted 44,14,000 shares of JVSL to the applicant. The invocation notice then referred to Clause (6) of the Second Agreement which reads thus:

"6. If for any reason:

a) BELLOXY does not have captive user status for any reason whatsoever including without limitation change of law, post-merger dilution in shareholding, etc.; or
b) BELLOXY is not supplied with power as provided in the Gas Supply Agreement dated November 22, 2004 read with the Supplemental Agreement to the Gas Supply Agreement dated 13th June 2005; or
c) the Gas Supply Agreement dated November 22, 2004 read with the Supplemental Agreement to the Gas Supply Agreement dated 13th June, 2005 is terminated in accordance with the provisions of the Gas Supply Agreement.

then JPL or JVSL, as the case may be, shall within five working days cause BELLOXY's equity shares in JPL or JVSL to be purchased by the existing shareholders or by any other entity nominated by JVSL at a price equal to the face value of the shares of JPL or the corresponding value of shares in JVSL arrived at based on the share exchange ratio under the Scheme of Amalgamation referred to above. It is clarified that the aforesaid price shall not be less than the full amount of BELLOXY's equity contribution. It is further clarified that, in the event the share purchase transaction pursuant to the foregoing paragraph is triggered by Agreement and the Supplemental Agreement to the Gas Supply Agreement shall remain in full force and effect, including in particular the obligation under the Gas Supply Agreement to supply BELLOXY with power at the price and quantity specified therein."

(Emphasis supplied)

39. The applicant qua the above clause as contained in the second agreement, which was sought to be enforced by the applicant, stated in the invocation notice that on 13 November 2021 the applicant and respondent No.1 entered into an 'Asset Sale Agreement' under which *interalia* certain assets comprising the air separation unit situated at the applicant's Facility at Toranagallu, Bellary, Karnataka, were transferred by respondent No.1 to the applicant on the terms as set out therein. The applicant stated that

further by a Closure letter dated 15 November 2021 addressed by respondent No.1 to the applicant and duly agreed and accepted by the applicant, it was recorded that the Gas Supply Agreement stands terminated and consequently all the three conditions stipulated in Clause 6 of the Second Agreement (supra) stood attracted, namely (i) Respondent No.1 ceased to have captive user status for 20MW of power generated at the applicant's facility; (ii) Respondent No.1 was no longer being supplied with power under the Gas Supply Agreement; and (iii) the termination of Gas Supply Agreement.

40. In these circumstances, in the invocation letter, it is the case of the applicant that in terms of Clause 6 of the Second Agreement, the applicant became entitled within five working days of the Gas Supply Agreement being terminated, to cause the 'Sale Shares', held by respondent No.1 in the applicant, to be purchased by the applicant's existing shareholders or by any other entity nominated by the applicant at a price equal to the equity contribution of Rs.11,03,50,000/-. The applicant recorded that for such reasons, by a notice dated 17 November 2021 the applicant called upon respondent No.1 to *interalia*, sell the Sale Shares to its nominee JSW Techno Projects Management Ltd. on or before 22 November 2021, at a price equal to the equity contribution namely Rs.11,03,50,000/- to be paid by the purchaser to respondent No.1. The notice stated that in the

meantime, in terms of Clause 12 of the Second Agreement, respondent No.1 should not sell the 'sale shares' to anyone else. It also recorded that the purchaser's consent to purchase the 'sale shares' and pay the consideration in respect thereof was obtained. In the invocation letter, the applicant also stated that respondent No.1 had however, failed to sell the Sale Shares to the purchaser in terms of notice dated 17 November 2021, or take any steps in respect thereof on or before the appointed date i.e. 22 November 2021 or thereafter. The applicant thus recorded that respondent No.1 was in breach of the Second Agreement, more particularly, 'Clause 6' thereof and hence was entitled to seek enforcement of respondent No.1's obligations under the Second Agreement, including its obligation under Clauses 6 and 12 of the Second Agreement. It is in these circumstances, the applicant stated that disputes and differences had arisen under the Second Agreement read with the Shareholders Agreement as the applicant was desirous of seeking legal enforcement of respondent No.1's obligations under the Second Agreement including its obligation under Clauses 6 and 12 of the Second Agreement.

41. The gravamen of the applicant's invocation is clearly seen in paragraphs 8, 9, 10 and 12 of the invocation notice, which read thus:-

> "8. Consequently, all three conditions stipulated in Clause 6 of the Agreement stood attracted, namely: (i) Belloxy ceased to have captive user status for 20 MW of power generate at JSW Steel's facility; (ii) Belloxy was no longer being supplied with power under the Gas Supply Agreement; and (iii) the termination of Gas

> Supply Agreement. Accordingly, in terms of Clause 6 of the Agreement, JSW Steel became obligated to, within five working days, cause the Sale Shares held by Belloxy in JSW Steel to be purchased by JSW Steel's existing shareholders or by any other entity nominated by JSW Steel at a price equal to the Equity Contribution, viz. Rs.11,03,50,000/-.
>
> 9. Therefore, by a notice dated 17th November 2021 ("Notice"), inter alia, JSW Steel called upon Belloxy to, on or before 22° November 2021, sell the Sale Shares to its nominee JSW Techno Projects Management Limited ("Purchaser"), at a price equal to the Equity Contribution namely Rs. 11,03,50,000/- to be paid by the Purchaser to Belloxy. In terms of Clause 12 of the Agreement, JSW Steel also called upon Belloxy to not sell the Sale Shares to anyone else in the meantime. The said letter also contained the Purchaser's consent to purchase the Sale Shares and pay the consideration in respect thereof.
>
> 10. However, Belloxy failed to sell the Sale Shares to the Purchaser in terms of the Notice or take any steps in respect thereof on or before the appointed date, i.e. 22nd November 2021 or thereafter. Belloxy is in breach of the Agreement more particularly Clause 6 thereof. JSW Steel is entitled to seek enforcement of Belloxy's obligations under the Agreement including its obligations under Clauses 6 and 12 of the Agreement.
>
> …. … … … … ..
>
> 12. In the circumstances, disputes have arisen under the Agreement read with the SHA and JSW Steel is desirous of seeking legal enforcement of Belloxy's obligations under the Agreement including its obligations under Clauses 6 and 12 of the Agreement."

It is thus clearly noticed that the dispute as sought to be raised by the applicant in the invocation notice primarily pertains only under the Second Agreement.

42. The respondent No.1's case on the invocation notice of the applicant can be examined: The applicant's invocation notice was replied by

respondent No.1's Advocate's letter dated 4 March 2022, wherein Respondent No.1 stated that the Shareholders Agreement dated 13 June 2005 or any clause therein can, in no manner be linked or read with the Second Agreement dated 14 June 2005. It was stated that the case of the applicant to contend that the disputes under the Second Agreement, would fall under the Shareholders' agreement was only to utilise the arbitration clause in the Shareholders' Agreement. It was stated that the disputes in no manner whatsoever, could fall within the ambit of the arbitration clause under the Shareholders Agreement. It was contended by respondent No.1 that the case of the applicant was *ex facie* misplaced and untenable. Respondent No.1 also stated that it would rely on the reply affidavit dated 13 December 2021 filed in the Section 9 proceedings (companion petition) and accordingly, rejected the request as made by the applicant in the invocation notice. The applicant however by its Advocate's letter dated 17 March 2022 reiterated its contentions in regard to the invocation and as respondent No.1 did not agree to refer the disputes to arbitration, the present proceedings were filed.

43. On such backdrop both the agreements would be required to be discussed. Firstly, on a perusal of the Shareholders Agreement, the intention of the parties to such agreement namely JSW Power Ltd. (JPL), Sun Investments Pvt.Ltd. (respondent No.2) and Bellary Oxygen

Company Pvt.Ltd. (respondent No.1) to enter into such agreement can be seen from paragraphs 1 to 6 of such agreement, which read thus:-

> **"1.** ***The generation of electricity in India is now delicensed and captive generation is freely permitted, pursuant to The Electricity Act, 2003,***
>
> ***2. JPL is a public limited company whose primary business is to build, own and/or operate power plants for captive consumption of power by the shareholders of the Company and other persons and to generate, develop and accumulate electrical power at any place or places in India and to transmit, distribute and supply such power including to its shareholders and other persons,***
>
> *3. JPL has set up a Thermal Power Plant of 100 MW and is in the process of setting up an additional 130 MW power plant at Toranagallu, Karnataka and 60 MW power plant at 'Salem, Tamil Nadu for captive consumption by the shareholders of JPI.;*
>
> *4. BELLOXY had expressed its desire to participate in the setting up of the power plant by JPL and JPL has agreed for BELLOXY's participation in the setting up of the power plant.*
>
> *5.* ***BELLOXY desires to invest a sum of Rs. 11,03,50,000/- (Eleven Crores Three Lakhs and Fifty Thousand only) to buy the equity shares in JPL at par at face value of Rs.10/each;***
>
> *6. The Board of Directors of JPL and the Board of Directors of Jindal Vijayanagar Steel Limited, a company incorporated under the Companies Act, 1956 and having its registered office at Jindal Mansion, 5-A, G. Deshmukh Marg, Mumbai 400 026 (hereinafter "JVSL"), in their respective Board meetings held on May 9, 2005, have passed resolutions approving the merger of JPL and JVSL;*
>
> ***The Parties hereto are desirous of recording the terms and conditions governing the shareholding and the rights of the parties and other matters as hereinafter provided in writing****;*
>
> *NOW, THEREFORE, in consideration of the foregoing*

> *premises and the mutual covenants and agreements herein below contained, it is hereby mutually agreed by and between the parties as follows.*"
>
> (Emphasis supplied)

44. On the basis of such intention between the parties as reflected in the above introductory paragraphs of the Shareholders Agreement, the primary clauses of the said agreement being Clauses 1 to 7 are also required to be noted as they have been a subject matter of extensive deliberation at the bar. The said clauses read thus:-

> "1. **COVENANTS BY THE PARTIES**
>
> **1.1 By virtue of equity contribution of Rs. 11,03,50,000 by BELLOXY, the Parties agree that in proportion to its shareholding in JPL, BELLOXY is entitled to 20 MWs of power generated by JPL.**
>
> 1.2 BELLOXY shall subscribe for 11035000 equity shares in JPL and shall make an equity contribution in the amount of Rs. 11,03,50,000/- in respect of such shares and upon receipt of such payment **JPL shall issue one or more share certificates to BELLOXY evidencing the issuance of such shares in accordance with the Articles of Association of JPL.**
>
> 1.3 BELLOXY agrees that it shall not object to the merger of JPL and JVSL, and once the merger is approved, BELLOXY shall obtain equity shares of JVSL pursuant to Scheme of Amalgamation as approved by the Honourable High Court.
>
> 1.4 Terms and conditions for use of power shall be as agreed between the Parties.
>
> 1.5 The Company may take up projects from time to time for setting up of power plants.
>
> 1.6 Neither party shall be entitled to assign its rights and obligations under this Agreement, to any other person without the consent of the other Parties in writing.

1.7 If the lenders of JPL so require, BELILOXY shall offer its shares in JPL to be pledged in quantum to be decided by the Company and the lenders.

1.8 The Power Plants shall be operated and maintained in accordance with accepted international utility practices.

2. DISTRIBUTION OF PROFITS

Distribution of profits by way of dividends shall be as per the recommendations of the Board of JPL and approval of shareholders (as required under the Companies Act, 1956) and of the JPL's lenders, if there be any covenant to obtain the consent of the JPL's lenders.

3. GENERAL

3.1 This Agreement may be executed simultaneously in two or more counterparts each of which shall be deemed to be an original but all of which together shall constitute one instrument.

3.2 Each signatory to this Agreement represents and warrants that he is duly authorised by the Party for and on whose behalf he is signing this Agreement to execute the same in a manner binding upon the said Party and all corporate approvals and procedures necessary for vesting such authority in him have been duly obtained and complied with.

3.3 This Agreement may be amended only with the prior written consent of the Parties hereto.

4. DURATION AND TERMINATION OF THE AGREEMENT

4.1 This Agreement shall come into force on the date of its execution and shall remain to force till BELLOXY ceases to be a shareholders of JPL or JVSL, as the case may be, or <u>until terminated pursuant to the provisions of this Agreement</u>.

4.2 Section 6 of this Agreement shall survive the termination of this Agreement.

> 5. SEVERABILITY
>
> If any of the provisions of this Agreement are found by any court or other competent authority to be void or unenforceable, such provision or provisions shall be severed from this Agreement and shall be considered divisible as to such provision or part thereof and such provision or part thereof shall be inoperative between the Parties hereto and shall not be considered to be part of this Agreement and the remaining provisions of this Agreement shall continue in full force and effect. Notwithstanding the foregoing, the Parties shall thereupon negotiate in good faith in order to agree the terms of mutually Satisfactory provisions to be substituted for the provisions so found to be void or unenforceable.
>
> 6. GOVERNING LAW AND ARBITRATION
>
> This Agreement shall in all respects be governed by the laws of Republic of India.
>
> In the event of any dispute, controversy or claim, arising in connection with this Agreement, or breach, termination or invalidity thereof, the Parties shall seek an amicable settlement during a sixty-day period, failing which the matter under dispute will be settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996 (the "**Act**"). The venue of arbitration shall be Mumbai. The arbitration proceedings shall be conducted before one (1) arbitrator to be mutually agreed upon by the Parties in dispute failing which the arbitrator shall be appointed in accordance with the Act.
>
> The judgment upon the award rendered may be entered in any court having jurisdiction or application for a judicial acceptance of the award may be made for enforcement. The cost of arbitration shall be borne by the Parties equally."
>
> (Emphasis supplied)

45. The salient features of the Shareholders Agreement can briefly be discussed: This agreement sets out that JSW Power Ltd. (JPL) had set up a thermal power plant of 100 MW and was in the process of setting up an

additional 130 MW power plant at Toranagallu, Karnataka and 60MW power plant at Salem, Tamil Nadu, for captive consumption by the shareholders of JPL, as captive generation was freely permitted in pursuance of the Electricity Act,2003, when the generation of electricity in India was delicenced. Respondent No.1 expressed its desire to participate in setting up the power plant by JPL, and JPL agreed for respondent No.1's participation. For such purpose, respondent No.1 desired to invest a sum of Rs.11,03,50,000/- to buy equity shares of JPL at par at face value of Rs.10/- each and as a shareholder became entitled *interalia* for profits in the dividends being distributed as agreed in Clause 2 of the Shareholders Agreement. At the same time, the Board of Directors of JPL and the Board of Directors of JVSL – another company had also passed resolutions approving the merger of JPL and JVSL being Resolution dated 9 May 2005, approving such merger. At such time, thus, the merged entity of JPL into JVSL was yet to have any legal existence. It is in such situation, respondent No.1 made equity contribution of Rs.11,03,50,000/- in the shareholding of JPL. Respondent No.1 accordingly became entitled to 20 MWs of power generated by JPL which was in terms of the Gas Supply Agreement. Respondent No.1 also agreed that it shall not object to the merger and once the merger is approved, respondent No.1 "*shall obtain equity shares"* of JVSL pursuant to the scheme of amalgamation as may be approved. As to what would happen to the respondent no.1's

acquisition of such shares or even a consequence of respondent no.1 becoming entitled to any bonus or split shares of JVSL was not the subject matter of the Shareholders' agreement.

46. Thus, the whole intention of the parties in the Shareholders' agreement was that by virtue of the equity contribution by respondent no.1, it became entitled to 20 MW power generated by JPL proportionate to its shareholding. If the agreement was to be terminated as agreed in Clause 4.1, respondent no. 1 would cease to have the benefit of its entitlement of 20 MW power supply. Most pertinently, in the Shareholders Agreement, the parties did not make any provision for any buy back or anything concerning respondent no.1's rights and liabilities in the capacity as a shareholder of JPL or for that matter of the merged entity. Also, the Shareholders Agreement did not provide that in relation to any such matters, a separate agreement would be entered between the parties which would become part and parcel of the Shareholders Agreement and/or an integral part of the Shareholders Agreement. This, possibly being conscious of the fact that once respondent no.1 subscribes to the shareholding of JPL, respondent no.1 being a shareholder cannot be treated differently, namely, as a shareholder who would not have all rights and liabilities as any other shareholder would otherwise possess. Thus, consciously, the rights of respondent no.1 in the capacity of JPL's

shareholders in no manner whatsoever were circumscribed in the Shareholders' agreement. It appears that the intention of the parties clearly was to confine themselves within the four corners of the Shareholders' agreement when it came to anything to be done with or being provided under the Shareholders' agreement including confining the arbitration agreement only to the Shareholders' agreement.

47. Also in Clause (4) of the Shareholders' agreement, which pertains to '*Duration and Termination of the Agreement*', it was agreed that the shareholders agreement shall come into force on the date of its execution and shall remain in force till respondent No.1 ceases to be a shareholder of JPL or JVSL, as the case may be, or until terminated pursuant to the provisions of the said Agreement, and Clause (6) of the agreement namely, that the arbitration agreement shall survive termination of the said agreement. It is in such context the arbitration agreement as contained in Clause (6) is required to be seen. The arbitration agreement very clearly provides that in the event of any dispute, controversy or claim, arising "in connection with the Shareholders Agreement", or breach, termination or invalidity thereof, the parties shall seek an amicable settlement during a sixty-day period, failing which the matter under dispute would be settled by arbitration. Thus, to read into the arbitration agreement, something which would fall outside the Shareholders' agreement is certainly not the

intention of the parties, as the parties have clearly intended to restrict the operation of the arbitration clause only and only to the Shareholders' agreement.

48. Having noticed the relevant terms and conditions of the Shareholders Agreement and the consequences emanating therefrom, the Second agreement between the parties dated 14 June 2005 would be required to be seen. As noted earlier, a new party to this agreement is "JVSL" the other parties being JSW Power Ltd. (JPL), Bellary Oxygen Company Pvt. Ltd. (respondent No.1), and Sun Investments Pvt. Ltd. (respondent No.2). Hence the terms and conditions of this agreement are the terms and conditions between JPL, JVSL, Sun Investments Pvt.Ltd (which represented the existing shareholders) and respondent No.1, where-under the following was mutually agreed between the parties. As the clauses in this agreement were a subject matter of intense debate between the parties, the same are required to be noted which read thus:

> "1. The Board of Directors of JPL and the Board of Directors of JVSL in their respective Board meetings held on May 9, 2005, have passed resolutions approving the merger of JPL and JVSL whereby pursuant to the sanctioning of the Scheme of Amalgamation by the High Court of Judicature at Mumbai and the filing of such sanction with the office of the Registrar of Companies, the whole of the undertaking, property, liabilities of JPL shall stand transferred to JVSL and the shareholders of JPL will be allotted shares in JVSL on the basis of the share exchange ratio approved in the Scheme;
>
> 2. In terms of Deed of Novation and Assumption

between BOC India Limited, an existing Company under the provisions of the Companies Act, 1956 and having its registered office at Oxygen House, P-43, Taratala Road, Kolkata 700 088 (hereinafter referred to a "BOCI"), BELLOXY and JVSL, BELLOXY is a party to a Gas Supply Agreement dated November 22, 2004 with JVSL whereby JVSL is obligated to supply power to BELLOXY in the quantity and at the price specified in the Gas Supply Agreement read with the Supplemental Agreement to the Gas Supply Agreement dated 13 June, 2005.

3. The terms and conditions of supply of power to BELLOXY shall be as set out in the Gas Supply Agreement dated November 22, 2004 between BOCI and JVSL read with the Supplemental Agreement to the Gas Supply Agreement dated 13™ June, 2005.

4. Unless agreed otherwise between the parties; BELLOXY shall not be called upon or required to make any investment beyond the equity contribution agreed to be made pursuant to the Shareholders Agreement dated 13° June 2005, in order to retain its captive users status.. JPL and/or JVSL shall indemnify BELLOXY for any additional expenditure that may be necessary for this purpose. For the purposes of this Agreement, the term 'equity contribution' shall mean BELLOXY's subscription for 11035000 equity shares in JPL and its corresponding equity contribution in the amount of Rs.11,03,50,000/- in respect of such shares.

5. BELLOXY's total liability in connection with the equity contribution and the restructuring of the transactions related to the Gas Supply Agreement shall be limited to the amount of equity contribution. JPL or JVSL, as the case may be, shall indemnify and hold harmless BELLOXY from and against any and all losses, claims, and liability arising out of or in connection with the equity contribution and/or the operation and corporate activities of JPL, JVSL, and/or any merged entity comprised of JPL and JVSL.

6. If for any reason:

a) BELLOXY does not have captive user status for any reason whatsoever including without limitation change of law, post-merger dilution in shareholding, etc; or

b) BELLOXY is not supplied with power as

provided in the Gas Supply Agreement dated November 22, 2004 read with the Supplemental Agreement to the Gas Supply Agreement dated 13th June 2005; or

c) the Gas Supply Agreement dated November 22, 2004 read with the Supplemental Agreement to the Gas Supply Agreement dated 13" June, 2005 is terminated in accordance with the provisions of the Gas Supply Agreement,

then JPL or JVSL, as the case may be, shall within five working days cause BELLOXY's equity shares in JPL or JVSL to be purchased by the existing shareholders or by any other entity nominated by JVSL at a price equal to the face value of the shares of JPL or the corresponding value of shares in JVSL arrived at based on the share exchange ratio under the Scheme of Amalgamation referred to above. It is clarified that the aforesaid price shall not be less than the full amount of BELLOXY's equity contribution. It is further clarified that, in the event the share purchase transaction pursuant to the foregoing paragraph is trigerred by operation of eityer sub clause a) or b) above, then in such case both the Gas Supply Agreement and the Supplemental Agreement to the Gas Supply Agreement shall remain in full force and effect, including in particular the obligation under the Gas Supply Agreement to supply BELLOXY with power at the price and quantity specified therein.

7. BELLOXY shall not participate in the management of the Company.

8. The Company may take up projects from time to time for setting up of power plants provided that such projects shall not affect BELLOXY's captive user status for 20 MW failing which, any consequences as a result thereof, shall be the responsibility of JPL or JVSL, as the case may be. In the event of a merger of JPL. and JYSL, JPL shall cause JVSL to ensure that suitable conditions are incorporated in the scheme of merger to be entered into between JPL and JVSL, to protect the right of BELLOXY to receive 20 MW of power from the power plant to be owned by the merged entity, and to protect BELLOXY's captive user status for 20 MW.

9. The Articles of Association of JPL and JVSL shall at

all times be consistent with the terms of this Agreement to the extent permitted by law.

10. All costs, charges taxes, duties and expenses including stamp duty in relation to this Agreement shall be borne and paid for by the Company alone. Legal expenses of the respective parties shall be borne by the respective parties.

Il. In case of breach of the' provisions of this Agreement by any Party, the other Party shall be entitled to terminate the Agreement and the consequences as set out in clause 6 above relating to the purchase of the shares of BELLOXY by the Existing Shareholders or by any other entity nominated by JVSL shall follow, provided that, notwithstanding such termination and share purchase, both the Gas Supply Agreement and the Supplemental Agreement to the Gas Supply Agreement shall remain in full force and effect, including in particular the obligation under the Gas Supply Agreement to supply BELLOXY with power at the price and quantity specified therein.

12. BELLOXY agrees and undertakes that it shall not during the term of this Agreement sell, pledge (except to the lenders of JPL pursuant to clause 1.7 of the Shareholders' Agreement dated 13th June 2005) or otherwise deal in any manner whatsoever, the equity shares of JPL or as the case may be, of JVSL.

12. **Clauses 4, 5 & 6 of this Agreement shall survive the termination of the Shareholders Agreement dated 13th June 2005.**

13. **In the event of any conflict between the provisions of this Agreement and those of the Shareholders Agreement, the provisions of this Agreement shall prevail.**"

(Emphasis supplied)

49. From the perusal of the above clauses of the Second Agreement, it is quite clear that the arrangement/agreement between the parties as contained in its different clauses was wholly independent, having no bearing or relation whatsoever to the Shareholders' agreement. Clauses 4,

5 and 6 of the Second Agreement explicitly brings about a totally distinct, a well defined and a divergent understanding between the parties, under which the parties have agreed that these clauses shall survive even the termination of the Shareholders' agreement, as set out in Clause 12. Thus, even if the Shareholders Agreement was to be put off or extinguished, Clauses 4, 5 and 6 of the Second Agreement were to survive. Most significantly in Clause 13 thereof in no uncertain terms qua the Second Agreement, the parties clearly disassociate and untie themselves from the shareholders agreement when they agree, that in the event of any conflict between the provisions of the Second Agreement and those of Shareholders' agreement, the Second Agreement shall prevail.

50. It is on the above backdrop, the invocation notice assumes significance and would be required to be considered. As observed above, the invocation notice concerns the enforcement and compliance of Clause 6 of the Second Agreement by respondent No.1. However, what is material is that the same is preceded by certain events, namely, on 13 November 2021 the applicant and respondent No.1 entered into an Asset Sale Agreement under which *interalia* certain assets comprising of an Area Separation Unit constituted under the applicant’s Facility at Toranagallu, Bellary, Karnataka were transferred by respondent No.1 to the applicant (JSW Steel Ltd.) on terms and conditions as set out therein.

By a Closure Letter dated 15 November 2021 addressed by respondent No.1 to the applicant, it was recorded that the Gas Supply Agreement stood terminated. It is thus seen, that as a consequence of such events taking place in paragraph (8) of the applicant's invocation Letter, addressed to respondent No.1, it has been clearly set out that due to the happening of such events, Clause 6 of the Second Agreement comes into play and as a consequence of non-compliance of its obligations by respondent No.1, necessarily, disputes have arisen under the Second Agreement, however, under which, the parties have categorically avoided to incorporate an arbitration agreement. The applicant thus cannot overcome such specific exclusion of any arbitration agreement by invoking the arbitration agreement as contained in the Shareholders Agreement, which has no bearing whatsoever or anything to do, as to what was agreed between the parties under the terms and conditions of the Second Agreement.

51. Thus, in the context of Clause 6 of the Shareholders Agreement read with Clause 12 of the Second Agreement and even considering Clause 4.1 of the Shareholders Agreement which is being described as a ‘bare-bone’ clause, the applicant is not correct in its case that there is any inextricable connection between the Shareholders Agreement and the Second Agreement.

52. In my view, respondent No.1 would be correct in its contention that both the agreements stand independent of each other, inasmuch as the consequences as brought about by both these agreements are totally distinct and separate, more particularly looked from the point of view of the applicant's grievance which is in respect of breach of Clause 6 of the Second Agreement, which has no bearing or is totally disconnected and/or independent of the Shareholders Agreement.

53. Under the Shareholders Agreement, respondent No.1 subscribed to the shareholding of JPL, for the purpose of taking benefits as a “Captive User”, and it is only in the context of any dispute arising between the parties under the Shareholders Agreement, the dispute could be referred to arbitration. *Per contra*, under the Second Agreement apart from the intention of the parties to have a distinct agreement of the nature, as set out, different consequences are brought about under this agreement. Merely because under the Shareholders' agreement respondent No.1 becomes a Shareholder of the merged entity, an inextricable connection between both the agreements should be presumed, is not an acceptable proposition. In the Second Agreement for whatever disputes which may arise between the parties, who are independent parties to this agreement, the parties have consciously not provided for any arbitration agreement. Also, the parties have not left any scope for any such inclusion, which

could have been the easiest possible avenue available to them to connect both the agreements in a direct manner, so as to bring both the agreements under the umbrella of the Dispute Resolution Mechanism namely the arbitration clause as contained in the Shareholders Agreement. Possibly, the reason for such specific exclusion of an arbitration agreement, can be many- one of them which is quite apparent is that the parties are distinct as also the consequences under both the agreements are distinct. The other commercial reasons need not be imagined or guessed by the Court. Thus, to lift the arbitration clause under the Shareholders Agreement and foist the same on the Second Agreement would in fact amount to re-writing of the Second Agreement. It would amount to imposing on the parties, something which the parties themselves have not desired. This becomes more apparent from the reading of the invocation notice itself as issued by the applicant to respondent No.1. It may be stated that when the parties in their commercial wisdom decide to formulate commercial terms and confine themselves to specific agreements, it cannot be an endeavour and province of the Court to alter the commercial wisdom of the parties so as to create obligations not desired by the parties and compel them to choose an avenue not desired by them by a judicial dictum.

54. In the present case, the parties are experts in the commercial field. Thus, apart from the commercial wisdom of the parties, the parties with

their expert resources decided to have such multiple agreements with specific understanding as contained in each of these agreements. In these circumstances, it certainly cannot be an endeavour of the Court to tinker with these agreements, so as to bring about consequences which were excluded and not intended by the parties.

55. In so far as the applicant's contention that both the agreements are inextricably connected, is certainly not a sound argument considering the nature of both these agreements. Merely because there are recitals in regard to the background facts, a clear intention much less in a manner known to law to bring about an arbitration agreement in relation to the disputes which may arise between the parties under the Second Agreement, is certainly not to be seen.

56. In my opinion, it would be absurd to accept a blanket proposition that mere reference or recital of an earlier agreement in the subsequent agreement would bring about any integral connection between the two agreements when the two agreements do not *per se* reflect such position. The real test to determine whether the two agreements are integral to each other, would be to examine whether either of the agreement becomes unworkable in the absence of the other agreement or in other words whether both the agreements are inter-dependent on each other and

accordingly become unworkable without each other. Thus, the integral and involute relation between the two agreements would be the sine qua non. Applying this test to the present facts and circumstances, it certainly cannot be said that the Shareholders' Agreement finds for itself such an unimpeachable position in the Second Agreement that the Second Agreement would fail/collapse in the absence of the Shareholders' agreement.

57. For such reasons, it needs to be concluded there was no conscious intention of the parties to subject the disputes to arbitration under the Second Agreement. Thus, to forcibly stretch the Second Agreement so as to make it fall within the Shareholders Agreement only for the purpose of adopting the dispute resolution mechanism under the Shareholders Agreement, in my opinion, would be opposed to what can be conceived as an arbitration agreement, as Section 7 of the ACA would provide.

58. Now coming to the decision in ***Olympus Superstructures Pvt. Ltd.*** (supra) as relied on behalf of the applicant. The contention of Mr. Dwarkadas that the Shareholders Agreement and the Second Agreement are required to be treated as composite agreements and integral to each other, and hence, a reference to arbitration be made in regard to the disputes which have arisen under the Second Agreement, is premised relying on the decision of the Supreme Court in ***Olympus Superstructures***

Pvt. Ltd. (supra). As to whether this decision would at all carry forward the case of the applicant, can be examined. The decision arose from the proceedings of the award rendered by an arbitral tribunal having attained finality before the High Court, in Section 34 and Section 37 proceedings. In this case, the disputes between the parties revolved around two sets of agreements dated 9 March 1994 and one dated 29 June 1994 which were to sell three flats and three related agreements in relation to the interior design of the said flats. The respondent/flat purchaser entered into the three agreements for sale of the flats, possession thereof was handed over along with the amenities by 30 October 1994. It was stipulated that time was essence of the contract, also the time schedule for payments by the purchasers was provided. The purchasers were to pay 21% interest in case of default. The sellers (appellants) had the power to terminate the contract however only after giving 15 days prior notice in writing and also giving the purchasers an opportunity, to make up for any breaches committed. Disputes and differences had arisen between the parties, after the respondent wrote to the appellant on 24 April 1995 seeking information regarding the stage of construction of the flats. The appellants charged the respondent with defaulting in payments and issued a 15 days notice of termination of all three agreements. The respondents contended that their dishonoured cheques had been substituted by banker's cheques or cash and thus the termination was not valid. As the appellants did not respond,

the respondent had invoked the arbitration agreement and called upon the appellants to refer the disputes to arbitration. The appellants failed to reply, consequently, the respondents filed a petition under Section 11 of the ACA which came to be allowed by the High Court by appointing an arbitrator. The respondent filed their claim before the Arbitrator. The arbitral proceedings culminated into an award granting relief of specific performance to the respondent in respect of three main as well as three interior design agreements. The appellant challenged the award under Section 34 of the Act. The objections to the award were dismissed by the learned Single Judge as well as by the Division Bench. In these circumstances, on behalf of the appellant, it was contended before the Supreme Court that the arbitrator could not have decided the dispute regarding three interior design agreements, as the reference to arbitration was based only on the three main agreements for sale, and the interior design agreements, contained their own arbitration clauses which could not be superseded. The question before the Supreme Court was whether the disputes and differences arising under the Interior Design Agreement were integrally “connected with” the disputes and differences arising from the main contract. Answering the question in the affirmative, the Supreme Court considering the arbitration agreement in the main agreement being Clause 39, held that in a situation wherein there were disputes and differences in connection with the main agreement, as also disputes in

regard to the “other matters” “connected” with the subject matter of the main agreement, they would be governed by the general arbitration clause of the main agreement, under which, disputes not only under the main agreement but disputes connected therewith “were referred” to the same arbitral tribunal. The Court held that it was a case where the disputes and differences covered the main agreement (sale of flats agreement) as well as the Interior Design Agreement. The relevant paragraph in that regard are required to be noted which read thus:-

> “25. It is true that there are two agreements in each of the three appeals before us. One is the main agreement relating to construction of flats and the arbitration clause 39 there is general and does not refer to any named arbitrator. It is also true that there is a separate arbitration clause 5 in the Interior Design Agreement which gives the names of specific arbitrators. But it must be noticed that clause 39 permits reference to arbitration not only of issues arising under the main agreement but also those disputes or differences which are "connected" with disputes arising under the main agreement. The following words in the main agreement are important.
>
> "Otherwise as to any other method in any way connected with, arising out of or in relation to the subject matter of this agreement."
>
> In other words, clause 39 refers to the `subject matter' of the main agreement and also to `any other matters' and these `any other matters' if they are "connected" with or arise out of or are in relation to the subject matter of the main agreement, the disputes and differences concerning those `other matters' can also be referred to arbitration under clause 39 of the main agreement. In other words, parties intended arbitration in respect of the main disputes and connected disputes before one arbitral tribunal.
>
> … .. … .. .
>
> 27. Question is whether the disputes and differences arising under the Interior Design Agreement are integrally

"connected with" the disputes and differences arising from the main contract? In our view, they are. The main agreement refers to the payment of the last installment of Rs.17 lakhs against `taking of possession' of the flats. Therefore the main agreements extended upto the time of taking of possession by the purchasers. Para 8 of the main agreement states that the fixtures, fittings and amenities to be provided by the Developers in the said building and the flat/unit are those that are set out in Annexure E annexed to the main agreement. Now annexure E refers not only to the building but to the type of doors, corridors, fixtures, the nature of the flooring, the bathroom tiles and fittings, the Kitchen, the W.C. and the nature of the Electric Wiring. When we come to the Interior Design Agreement, Annexure A itself refers to the element of designs, Interior finishes/fittings/services and deals with the Walls, Balcony, type of Main Door and Internal Doors, External Doors. It also deals with the type of staircase, the flooring (Italian marbles for Hall room, Bed rooms and passages), Toilet (Italian Marbles, Designed Basin Ceiling Valve plastering, bathtub/Jacuzzi, all hardware fitting inclusively Germany range), marble skirting, Lobby & entrance (Italian Marble Flooring), plumbring, Gas system, Electrical (heavy duty ISI quality concealed copper wiring) etc.

28. Thus it will be noticed that there are several items in Schedule E of the main agreement which overlap the items in Schedule A of the Interior Design Agreement. In view of the overlapping, in our opinion it has to be said that several items in the Schedule A of the Interior Design Agreement are in modification/substitution of the items in the Main Agreement. Therefore the coverage of the two agreements makes it clear that the execution of the Interior Design Agreement is `connected with' the execution of the main Agreement. It may also be noted that the date of the main agreement and the Interior Design Agreement is the same in each of the three cases and clause 3 of the Interior Design Agreement states specifically that `the work of the said renovation, designing and installation shall commence from the execution thereof' which means that the execution of the Interior Design agreement and the main agreement is to be simultaneous.

… … … … ...

30. If there is a situation where there are disputes and differences in connection with the main agreement, and also disputes in regard to "other matters" "connected" with

subject matter of the main agreement then in such a situation, in our view, we are governed by the general arbitration clause 39 of the main agreement under which disputes under the main agreement and disputes connected therewith can be referred to the same arbitral tribunal. This clause 39 no doubt does not refer to any named arbitrators. So far as Clause 5 of the Interior Decorator Agreement is concerned, it refers to disputes and differences arising from that agreement which can be referred to named arbitrators and said clause 5, in our opinion, comes into play only in a situation where there are no disputes and differences in relation to the main agreement and the disputes and differences are solely confined to the Interior Design Agreement. That, in our view, is the true intention of parties and that is the only way by which the general arbitration provision in clause 39 of the main agreement and the arbitration provision for named arbitrator contained in clause 5 of the Interior Design Agreement can be harmonised or reconciled. Therefore, in a case like the present where the disputes and differences cover the main agreement as well as the Interior Design Agreement, - (that there are disputes arising under the main agreement and the Interior Design Agreement is not in dispute) - it is the general arbitration clause 39 in the main agreement that governs because the questions arise also in regard to disputes relating to the overlapping items in the Schedule to the main agreement and the Interior Design Agreement, as detailed earlier. There cannot be conflicting awards in regard to items which, overlap in the two agreements. Such a situation was never contemplated by the parties. The intention of the parties when they incorporated clause 39 in the main agreement and clause 5 in the Interior Design agreement was that the former clause was to apply to situations when there were disputes arising under both agreements and the latter was to apply to a situation where there were no disputes or differences arising under the main contract but the disputes and differences were confined only to the Interior Design Agreement. A case containing two agreements with arbitration clauses arose before this Court in *Aggarwal Engineering Co. vs. T.H. Machine Industries [AIR 1977 S.C. 2122]*. There were arbitration clauses in two contracts one for sale of two machines to the appellant and the other appointing the appellant as sales-representative. On the facts of the case, it was held that both the clauses operated separately and this conclusion was based on the specific clause in the sale contract that it was the "sole repository" of the sale transaction of the two

> machines. Krishna Iyer,J. held that if that were so, then there was no jurisdiction for travelling beyond the sale contract. The language of the other agreement appointing the appellant as sales representative was prospective and related to a sales agency and `later purchases', other than the purchases of these two machines. There was therefore no overlapping. The case before us and the above case exemplify contrary situations. In one case the disputes are connected and in the other they are distinct and not connected. Thus, in the present case, clause 39 of the main agreement applies. Points 1 and 2 are decided accordingly in favour of the respondents."

59. It is thus seen that the decision in ***Olympus Superstructures Pvt. Ltd.*** (supra) was completely in a different context and in variance with the issue in hand. In all the agreements, there were arbitration agreements between the parties and on construing of the arbitration clause, the Supreme Court held that the arbitration clause was couched in such a language that the disputes and differences arising under the Interior Design Agreements were integrally connected with the disputes and differences arising from the main contract, as they related to the same subject matter, namely that of the sale of flats in question, being the subject matter of the main agreements. Such is not the reading of the arbitration agreement in the present case [Clause (6) of the Shareholders Agreement] and in fact the parties have consciously avoided to have any arbitration clause / arbitration agreement in the Second Agreement.

60. In so far as the case of the applicant based on sub-section (5) of Section 7 of the ACA is concerned, at the outset, it would be appropriate

to note Section 7, which reads thus :

> Section 7. Arbitration agreement :
>
> (1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.
>
> (2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
>
> (3) An arbitration agreement shall be in writing.
>
> (4) An arbitration agreement is in writing if it is contained in— (*a*) a document signed by the parties; (*b*) an exchange of letters, telex, telegrams or other means of telecommunication [including communication through electronic means] which provide a record of the agreement; or (*c*) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.
>
> (5) **The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract."**
>
> (Emphasis supplied)

61. The applicant's contention based on sub-section (5) of Section 7, cannot be accepted, inasmuch as sub-section (5) of Section 7 clearly provides that a reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, if the contract is in writing and the reference is such, so as to make, the arbitration clause part of the contract. Plainly applying the said provision in the present context,

in my opinion, firstly, mere reference to the Shareholders Agreement in Clause (4) of the Second Agreement cannot be construed to be of a nature and effect as to what sub-section (5) of Section 7 would envisage, so as to bring about a consequence that the arbitration agreement in the Shareholders Agreement is incorporated into the Second Agreement. A mere reference of the Shareholders Agreement in Clause (4) is of no consequence when the same is tested on the touchstone of requirement of sub-section (5) of Section 7 of the ACA, which ordains that the reference should be such so as to make that arbitration clause part of the contract.

62. In this context Mr.Jagtiani has rightly placed reliance on the decision of the Supreme Court in **Duro Felguera S.A.** (supra) wherein in the context of Section 7(5) the Supreme Court has clearly observed that Section 7(5) requires conscious acceptance of the arbitration clause from the other document, as a part of the contract, before such arbitration clause is read as a part of the contract between the parties. In this decision, the Supreme Court referring to its decision in **M. R. Engineers and Contractors Pvt. Ltd.** (supra) did not accept the contention as urged on behalf the respondent therein that various agreements constitute a composite transaction. It was held that the Court can refer disputes to arbitration if all ancillary agreements are relatable to the principal agreement and performance of one agreement is so intrinsically

interlinked with other agreements. Referring to the decision in "**Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc. and Others (2013) 1 SCC 641**", the Supreme Court considered the doctrine of "composite reference", "composite performance" and held that the ratio in **Chloro Controls** (supra), would not be applicable in the facts at hand, as in **Chloro Controls** (supra), the arbitration clause in the principal agreement required that any dispute or difference arising under or in connection with the principal (mother) agreement, which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with Rules of ICC. It was observed that the words "*under and in connection with*" in the principal agreement were very wide to make it more comprehensive. In the present case such wide connotation itself is lacking, as the parties have clearly confined the applicability of the arbitration agreement only to the Shareholders' agreement, when the arbitration clause categorically uses the words *"in connection with this agreement"*. Hence the analogy as in ***Olympus Superstructures Pvt. Ltd.*** (supra) or in ***Chloro Controls India Pvt.Ltd.*** (supra), would not be applicable in the facts of the present case.

63. The Supreme Court in **M. R. Engineers and Contractors Pvt. Ltd.** (supra) has clearly held that a general reference to another contract will not be sufficient to incorporate the arbitration clause from the referred

contract into the contract under consideration. It was observed that there should be a special reference indicating a mutual intention to incorporate the arbitration clause from an other document into the contract. The Supreme Court in paragraph 24 of **M. R. Engineers and Contractors Pvt. Ltd.** (supra) has summarized the intention of Section 7(5) as under:-

> **"**24. The scope and intent of Section 7(5) of the Act may therefore be summarized thus:
>
> (i) An arbitration clause in another document, would get incorporated into a contract by reference, if the following conditions are fulfilled :
>
> (1) the contract should contain a clear reference to the documents containing arbitration clause,
>
> (2) the reference to the other document should clearly indicate an intention to incorporate the arbitration clause into the contract,
>
> (3) The arbitration clause should be appropriate, that is capable of application in respect of disputes under the contract and should not be repugnant to any term of the contract.
>
> (ii) When the parties enter into a contract, making a general reference to another contract, such general reference would not have the effect of incorporating the arbitration clause from the referred document into the contract between the parties. The arbitration clause from another contract can be incorporated into the contract (where such reference is made), only by a specific reference to arbitration clause.
>
> (iii) Where a contract between the parties provides that the execution or performance of that contract shall be in terms of another contract (which contains the terms and conditions relating to performance and a provision for settlement of disputes by arbitration), then, the terms of the referred contract in regard to execution/performance alone will apply, and not the arbitration agreement in the referred contract, unless there is special reference to the arbitration clause also.
>
> (iv) Where the contract provides that the standard form of terms and conditions of an independent Trade or Professional Institution (as for example the Standard Terms & Conditions of a Trade Association or Architects Association) will bind them or apply to the contract, such standard form of terms and

> conditions including any provision for arbitration in such standard terms and conditions, shall be deemed to be incorporated by reference. Sometimes the contract may also say that the parties are familiar with those terms and conditions or that the parties have read and understood the said terms and conditions.
>
> (v) Where the contract between the parties stipulates that the Conditions of Contract of one of the parties to the contract shall form a part of their contract (as for example the General Conditions of Contract of the Government where Government is a party), the arbitration clause forming part of such General Conditions of contract will apply to the contract between the parties."

64. As to whether the decision of the Supreme Court in **Ameet Lalchand Shah** (supra), would assist the applicant, can now be examined: Although the applicant's reliance on such decision at the first blush seemed attractive, however a deeper scrutiny of the facts of the said case under which such decision was rendered, would clearly show that this decision is not applicable to the facts in hand. In **Ameet Lalchand Shah** (supra), the respondents therein, namely, Rishabh Enterprises had entered into a total of four agreements with three different parties. The first two agreements were entered on 1 February 2012 with Juwi Renewable Energy Pvt Ltd and were termed as the "Equipment and Material Supply Contract" which was for the purchase of equipments in respect of a solar power plant at Jhansi and the second contract was the "Engineering, Installation and Commissioning Contract" for installation and commissioning of the same solar power plant. Subsequently, Rishabh Enterprises then entered into a third agreement dated 5 March 2012

termed as the "Sale and Purchase Agreement" with one Astonfield Renewables Pvt Ltd. for purchase of photovoltaic products to be leased to Dante Energy for the solar power plant. Lastly, Rishabh Enterprises entered into the fourth agreement on 14 March 2012 with Dante Energy called the "Equipment Lease Agreement" in respect of the lease money that was payable by Dante Energy to Rishabh Enterprises for the equipments purchased by Rishabh Enterprises under the third agreement. It needs to be noted that out of the four agreements, only the "Equipment and Material Supply Contract with Astonfield Renewables did not have an arbitration agreement and all the other agreements had an arbitration agreement with the seat of arbitration at Bombay. On such conspectus, the Supreme Court considered as to whether there was a composite agreement between the parties to refer a non-signatory like Astonfield Renewables to arbitration under Section 8 of the ACA. In the facts of the case, the Supreme Court held that all four agreements entered by Rishabh Enterprises were in respect of "a single commercial project", namely, the setting up of the solar power plant at Jhansi. In the facts of the case, it was held that the Equipment Lease Agreement was the principal agreement, and that the other agreements were inter-connected and integrally connected for the commissioning of the said solar power plant, hence any disputes between the parties under such agreements could be resolved only by referring all four agreements to arbitration. The relevant

observations of the Supreme Court in this regard are as under:

> 24. In a case like the present one, though there are different agreements involving several parties, as discussed above, it is a single commercial project namely operating a 2 MWp Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh. Commissioning of the Solar Plant, which is the commercial understanding between the parties and it has been effected through several agreements. The agreement – Equipment Lease Agreement (14.03.2012) for commissioning of the Solar Plant is the principal/main agreement. The two agreements of Rishabh with Juwi India:- (i) Equipment and Material Supply Contract (01.02.2012); and (ii) Engineering, Installation and Commissioning Contract (01.02.2012) and the Rishabh's Sale and Purchase Agreement with Astonfield (05.03.2012) are ancillary agreements which led to the main purpose of commissioning the Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, Uttar Pradesh by Dante Energy (Lessee). Even though, the Sale and Purchase Agreement (05.03.2012) between Rishabh and Astonfield does not contain arbitration clause, it is integrally connected with the commissioning of the Solar Plant at Dongri, Raksa, District Jhansi, U.P. by Dante Energy. Juwi India, even though, not a party to the suit and even though, Astonfield and appellant No.1 – Ameet Lalchand Shah are not signatories to the main agreement viz. Equipment Lease Agreement (14.03.2012), it is a commercial transaction integrally connected with commissioning of Photovoltaic Solar Plant at Dongri, Raksa, District Jhansi, U.P. Be it noted, as per clause(v) of Article 4, parties have agreed that the entire risk, cost of the delivery and installation shall be at the cost of the Rishabh (Lessor). Here again, we may recapitulate that engineering and installation is to be done by Juwi India. <u>What is evident from the facts and intention of the parties is to facilitate procurement of equipments, sale and purchase of equipments, installation and leasing out the equipments to Dante Energy. The dispute between the parties to various agreements could be resolved only by referring all the four agreements and the parties thereon to arbitration.</u>
>
> 25. Parties to the agreements namely Rishabh and Juwi India:- (i) Equipment and Material Supply Agreement; and (ii) Engineering, Installation and Commissioning Contract

> and the parties to Sale and Purchase Agreement between Rishabh and Astonfield are one and the same as that of the parties in the main agreement namely Equipment Lease Agreement (14.03.2012). All the four agreements are inter-connected. This is a case where several parties are involved in a single commercial project (Solar Plant at Dongri) executed through several agreements/contracts. In such a case, all the parties can be covered by the arbitration clause in the main agreement i.e. Equipment Lease Agreement (14.03.2012).
>
> 26. Since all the three agreements of Rishabh with Juwi India and Astonfield had the purpose of commissioning the Photovoltaic Solar Plant project at Dongri, Raksa, District Jhansi, Uttar Pradesh, the High Court was not right in saying that the Sale and Purchase Agreement (05.03.2012) is the main agreement. The High Court, in our view, erred in not keeping in view the various clauses in all the three agreements which make them as an integral part of the principal agreement namely Equipment Lease Agreement (14.03.2012) and the impugned order of the High Court cannot be sustained.
>
> (emphasis supplied)

65. The decision in **Ameet Lalchand Shah** (supra), in my opinion, would not assist the applicants for more than one reason. It is difficult to accept an analogy relatable to "Equipment and Material Supply Agreement", "Engineering, Installation and Commissioning Contract", "Sale and Purchase Agreement" with third party Astonfield and "Equipment Lease Agreement" with Dante Energy to be compared with a Shareholders' Agreement, the purpose of which was to enable the applicant to subscribe to the shares of JPL so as to avail of power supply of 20 MW. The situation in **Ameet Lalchand Shah** (supra) cannot even remotely be comparable as to what has been agreed between the parties in

the Shareholders' Agreement and the Second Agreement. A contract for works, supply and/or procurement in law has a different connotation from what the parties may agree under a Shareholders Agreement. It would be an incongruity and a mismatch to hold that the analogy of such agreements which fell for consideration in **Ameet Lalchand Shah**(supra), could be comparable with the Shareholders Agreement. Similar was the situation as discussed above in **Olympus Superstructures Pvt. Ltd.** (supra). Thus, in my opinion, the reliance of the applicant on the decision in **Ameet Lalchand Shah** (supra), is not well founded not only on this count but looked at from any angle.

66. In any event, as discussed above, on a perusal of both the agreements in question, namely the Shareholders' Agreement and the Second Agreement, it is not possible to come to a conclusion that a composite transaction or single transaction exists between the parties. The Shareholders' Agreement cannot be called as the principal agreement between the parties, as both the agreements operate independently and cannot be considered and termed to be interconnected, so that arbitration of disputes under the Second Agreement could get facilitated by taking recourse to the arbitration clause in the Shareholders' Agreement.

67. As a result of the above discussion, in my opinion, no case is made out by the applicant for appointment of an arbitral tribunal, as there exists

no arbitration agreement between the parties. The Section 11 application accordingly stands dismissed. No costs.

Commercial Arbitration Petition no. 131 of 2022

In view of the orders passed on the Section 11 proceedings, this petition under Section 9 of the Arbitration and Conciliation Act, 1996 would not be maintainable, as there is no arbitration agreement between the parties. The petition is accordingly dismissed, leaving the petitioner to take recourse to appropriate remedy as available in law. All contentions of the parties are expressly kept open. No costs.

[G.S. KULKARNI, J.]