

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

+ **OMP(COMM) 404/2017 & IA 13518/2017**

Reserved on: 20th November, 2017

Date of decision: 21st December, 2017

JAYASWAL NECO INDUSTRIES LTD Petitioner
Through: Mr.Sidharth Luthra and Mr.Sachin
Datta, Sr. Advs. with
Mr.Devashish Bharuka and
Mr.Ravi Bharuka, Advs.

versus

GOYAL MG GASES PVT LTD Respondent
Through: Mr.Parag Tripathi, Sr.Adv. with
Mr.Simran Mehta, Ms.Mishika
Bajpai and Ms.Jyoti Sagar, Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act,1996 (hereinafter referred to as the 'Act') has been filed by the petitioner namely Jayaswal Neco Industries Ltd. challenging the Arbitral Award dated 04.08.2017 along with the correction made thereto on 15.09.2017 by the Sole Arbitrator.

2. The parties had entered into an "Agreement for leasing of 70 TPD Air Separation Plant/Equipment" dated 14.03.2003 (hereinafter referred to as the "Agreement") where under 70 TPD Air Separation plant/equipment was taken by the petitioner on lease for its factory located at Siltara Growth Centre, Siltara, Raipur, Chhattisgarh for a

period of 10 years from the date of commissioning of the Plant at a maximum lease charges of Rs. 30 lacs per month plus taxes. Article 14 of the Agreement provides for the date of “Commissioning of the Plant” and is reproduced herein below:

“ARTICLE – 14

DATE OF COMMISSIONING OF THE PLANT

a. On completion of erection of the Plant/Equipment including utilities and auxiliaries, preliminary cold test shall be taken up by Lessor for commissioning test of the Plant/Equipment. Lessor shall give notice in advance to Lessee for witnessing the commissioning test of the plant and equipment. The duration of commissioning test shall be for 24 hrs. on a continuous basis. Joint report will be prepared on the commissioning test of the plant and equipment, which shall be signed, by both the Lessor and the Lessee as acceptance of the Commissioning Test.

b. Commissioning of the Plant/Equipment shall be deemed to be complete when the plant/equipment gives output more than 80% of the production parameters. Subsequently, Lessor shall do adjustments in Plant/Equipment to increase the output to meet production parameters as specified in Annexure-I.

c. The date of commissioning of the Plant/Equipment shall be the date on which Lessor shall notify to Lessee that the Plant/Equipment is commissioned as defined above.”

3. Article 15 of the Agreement provides for “Performance Test Schedule” and is reproduced herein below:

“ARTICLE 15

PERFORMANCE TEST OF THE PLANT

A. PRODUCTION PARAMETERS

<i>Product</i>	<i>Quantity Produced</i>	<i>Delivery Pressure</i>	<i>Purity of Product</i>
<i>Gaseous Oxygen</i>	<i>2040 Nm³/Hr</i>	<i>30Kg/Cm² (g)</i>	<i>99.5%</i>
<i>Gaseous Nitrogen</i>	<i>2500 Nm³/Hr</i>	<i>30Kg/Cm² (g)</i>	<i>99.9%</i>

Specific Power Requirement: 0.82KWH/Nm³ calculated for above rated capacity of Oxygen [includes O₂ compression upto 30 Kg/Cm² (g) and excludes the power consumption for compression of Nitrogen].

Specific Power (N₂ Compression upto 30 Kg/Cm² (g)): 0.2 KWH/Nm³

Above production parameters are based on following ambient conditions & utilities parameters:

Ambient temperature : 35°C

Relative humidity : 55%

Power supply

a) Voltage : 6.6 kv

b) Frequency : 50 Hz

For any change in ambient conditions and utility parameters, necessary corrections as per the machinery supplier recommendations shall be taken into consideration for demonstration of performance test.

B. PERFORMANCE TEST SCHEDULE

(a) within 6 months from the date of commissioning of the Plant/Equipment, performance test of the Plant/Equipment shall be taken up by Lessor with prior notice to the Lessee to achieve the production parameters of the Plant/Equipment as stated in A above.

(b) Performance test of the Plant/Equipment shall be deemed to be complete when Plant/Equipment achieves the production parameters as per Annexure-I to this Agreement on a continuous basis for a period of 72 hours.

(c) If during the performance test, there are any interruptions due to failure of any major Plant /Equipment, the performance test shall be repeated after rectification/replacement by Lessor free of cost. However, it is clearly understood that the plant will be accepted by the Lessee only when it has achieved 95% and above of the guaranteed production parameters as defined in Article 15(A). If during the period of performance test the plant doesn't achieve 95% and above the guaranteed parameters, the plant will not be accepted and the Lessor will take all necessary steps to bring the plant performance to 95% and above of the guaranteed production parameters. During such extended period of performance test the payment will be released on pro-rata basis only. The calculation of pro-rata will be as demonstrated below. Lessor shall pay back the excess amounts /charges received for those months to Lessee within 10 days of completion of Lease Charges calculations for that month.

Follwing formula will be applicable for calculations of pro-rata:-

A=Guaranteed Production Parameter of the Plant (2040 Nm³ /hr.)

B=Lease Charges per month (Rs.30 Lacs)

*C=Total hours during the month (For i.e. 24*30=720 Hrs.will vary based on the actual days of the month).*

D= Actual production during the month

E= Production Hours lost due to reasons attributable to lessee (this includes power interruptions, non-availability of power, water, the startup time also (actual required for achieving the production parameter), low/no consumption by Lessee.

F= Average production during immediate last 7 days of normal production.

Pro-rate Lease rental (in Rs.Lacs) during the month =

$$\frac{Bx[D+(ExF)]}{A \times C}$$

However, monthly lease charges shall be limited to Rs.30 lacs only.

However, if there are any interruptions for reasons other than given above of more than one-hour duration, in such case if the Plant/Equipment operates at 95% and above of the guaranteed production parameters as defined in Article 15(A) for a cumulative period of 72 hours at production parameters as per Annexure-I of this Agreement, the plant/Equipment shall be deemed to have completed the performance test and the plant/equipment shall be accepted by the Lessee.

(d) Result of the performance test shall be jointly recorded by Lessor and Lessee and shall be considered acceptable within instrument tolerances as per applicable DIN standards.

(e) After the completion of performance test, Plant/Equipment will be taken over by Lessee for the entire Lease period.

(f) It is clearly understood, that total reduction in lease charges of lessor under this Agreement is limited to Rs.1,50,00,000/-(Rupees One Crore fifty Lakh only) as provided in Article -31 of this Agreement."

4. Article 16 of the Agreement provides for “Reduction of Lease Charge for Short Performance” and is reproduced herein below:

“ARTICLE 16

REDUCTION IN LEASE CHARGES FOR SHORT PERFORMANCE

a. The reduction in lease charges for short performance to be charged to Lessor will be as per Annexure-II to this Agreement and recoverable in equal installments from the monthly Lease charges after performance test till the balance period of lease.

b. Total reduction in lease charges of Lessor under this Agreement is limited to Rs.1,50,00,000/- (Rupees One Crore Fifty Lacs only) as provided in Article-31 of this Agreement.”

5. Article 6(f) provides the lease charges between the date of commissioning of the plant and the date of performance test. The same is reproduced herein below:

“ARTICLE -6

(f) It has been agreed between the Lessor and the Lessee that the monthly Lease charges for the period between the date of commissioning of the Plant (i.e. Plant has achieved more than 80% of the production parameters) and the date of Performance Test shall be calculated for the quantify of Oxygen produced during a month on pro-rata basis. If the Plant/Equipment gives output less than the production parameters as per Annexure-I to this Agreement during the above specified period, then Lessor shall pay back the excess amount of Lease Charges received for that month to Lessee within 10 days of completion of Lease Charges calculation for that month.”

6. The Agreement further provides that after the expiry of the lease period, the lessor/respondent herein shall sell the plant and equipment at Rs.15 lacs plus purchase value of the spare as available in the stock at the time of sale, purchased during last two years.

7. On the same date another Agreement of Operation and Maintenance (O&M) was executed between the parties for operation and maintenance of the plant/equipment.

8. The plant was commissioned in March 2005 and therefore, the lease and the Operation and Maintenance Agreement were to remain in operation till March, 2015.

9. Certain disputes having arisen between the parties, a Minute of Meeting was drawn on 04.02.2015 wherein certain issues were agreed between the parties, while other issues remained pending. The petitioner claims that the respondent had failed to perform a Performance Test and achieve the production parameter as stated in Article 15(A) read with Article 15(B) of the Agreement and therefore, was entitled to only a pro rata lease rental during the period of the lease. The petitioner further claims that there was short production of Gaseous Oxygen and excess consumption of electricity. It was further claimed by the petitioner that under Note-1 to Annexure-I of the lease agreement, the respondent was under an obligation to replace the old and refurbished Oxygen Compressor of same capacity with a New Oxygen Compressor within 18 months from the date of signing of agreement, however, it failed to

comply with the said obligation due to which there was excess consumption of power leading to loss to the petitioner. The petitioner, therefore, claims to have debited the account of the respondent of Rs.1.72 crores for an extra cost paid by the petitioner for excess consumption of electricity from June 2011 to August 2013 vide its letter dated 09.09.2013. The petitioner further debited the account of the respondent by Rs.6,63,60,685/- for extra cost incurred by the petitioner for excess consumption of the electricity from April 2005 to March 2015 and for this purpose raised various debit notes dated 21.01.2014 to 16.10.2015.

10. It is further claimed that short fall in production of Oxygen was made up from purchase in the open market at exorbitant price (three times higher than the production cost) resulting in a loss of Rs.10,08,57,971/- to the petitioner for the period April 2005 to March 2015. In view of the above claims, the petitioner filed a Statement of Claim making the following claims before the Sole Arbitrator:

“a) To pay the amount of Rs.5,76,15,993/- (Rupees Five Crores Seventy Six Lakh Fifteen Thousand Nine Hundred and Ninety Three only) to the Petitioner for the loss caused to the Petitioner due to excess consumption of power during the period April 2005 to March 2015.

b) To pay interest on the total amount under Relief (a) at the rate of 18% from the due date upto the date of actual receipt of payment by the Petitioner.

c) To pay the amount of Rs.1 0,08,57,971/- (Rupees Ten Crores, Eight lakhs, Fifty Seven Thousand, Nine Hundred Seventy One only) to the Petitioner for the loss caused to the Petitioner due to shortfall in production of oxygen during the period April 2005 to March 2015.

d) To pay interest on the total amount under Relief (c) at the rate of 18% from the due date upto the date of actual receipt of payment by the Petitioner.

e) To provide to the Petitioner a new Oxygen Compressor as described under Annexure 1 of the Lease agreement or to pay to the Petitioner the current market value of the new Oxygen Compressor as described under Annexure-I of the O&M Agreement and as elaborated under the Annexure-I of the Lease Agreement.

f) To pay the entire costs of all legal proceedings including the present arbitral proceedings.”

11. The respondent, on the other hand, denied the claims of the petitioner and raised the following Counter Claimss:

- “1. Outstanding lease Charges, O&M Charges, Taxes, Duties and Interest on delayed payments= Rs.13,65,22,510/-*
- 2. Lease Charges along with the taxes duties and levies from 01.06.2016 till the date of final payment of all dues: @ Rs.30,00,000/- Per Month*
- 3. Possession of the Air Separation Plant and all consumable spares.*
- 4. Reimbursement of monies for repair and refurbishment of the 70 TPD ASP= Rs.3,55,26,546/-*
- 5. Possession of equipment referred in Article 2(g) of the O&M Agreement.*
- 6. Compensation/ Damages for illegal retention of the Equipment referred in Article 2(g) of the O&M Agreement=Rs.1,00,000/- per month since 01.05.2015 till equipment's are restored to GMG by JNIL.*

7. *Return of miscellaneous property of Respondent current market price of the equipment at Rs.1,79,66,659/-.*
8. *Claim towards cost of Arbitral proceedings.”*

12. The Arbitrator vide its impugned Award and the clarification thereto, rejected the claims made by the petitioner and allowed the Counter Claims of the respondent, so far as they fell within the period of three years prior to the date of filing of the Counter Claims i.e. prior to 07.07.2016 and not from 30.03.2005 to 31.05.2016. It further awarded interest @ 18% p.a. upto the date of Award and from the date of Award interest @ 12% p.a. till realization.

13. The petitioner challenges the impugned Award primarily on the ground that the Arbitrator has ignored the evidence led before him in concluding that the performance test would be deemed to be completed in August 2006 as the plant was producing at 100% capacity in this month. It is submitted by the learned senior counsel for the petitioner that in terms of Clause 15(B)(b) of the Agreement quoted above, the following four parameters are to be complied with for successful performance test:

- a. Quantity of Gases;
- b. Power consumption;
- c. Purity and
- d. Pressure.

14. Learned senior counsel for the petitioner submits that even assuming that the Arbitrator was correct in relying upon the annexure C-1 annexed with the Statement of Claim, which is a chart showing the “70 TPD Oxygen Plant Production & Power Consumption Report with CLARK compressor” for the period of 2005 to 2015, the same merely shows one of the parameters i.e. the monthly production capacity. He submits that the other parameters as mentioned above are not shown in the said chart and therefore, from the said chart it could not be concluded that the performance test had been completed by the respondent. He submits that there were other correspondences on record which clearly showed that the respondent also admitted that the performance test had not been conducted by it. He further submits that the Arbitrator has committed a grave error in relying upon the “Daily Production Report” for the period 03.08.2006 to 04.08.2006, 04.08.2006 to 05.08.2006 and 05.08.2006 to 06.08.2006 respectively as the same has not been proved in accordance with the law. He further submits that the very fact that only pro rata payment has been made to the respondent between 2011 to 2014 shows that the performance test was never performed by the respondent.

15. The issue of Performance Test has been discussed by the Arbitrator in paragraph 29 and paragraph 34 of the Award, which is reproduced herein below:

29) Learned Counsel for the Respondent submitted the "performance test" is not a piece of paper but instead a milestone signifying the achievement of the production parameter contemplated in Annexure-1 of the Lease Agreement, for a period of 72 hours. Learned counsel

submitted that Article 15(B) (b) of the Lease Agreement, defines, completion of performance test means 'performance test of the plant / equipment shall be deemed to be complete when plant/ equipment achieved the production parameter as per Annexure to the Lease agreement on a continuous basis for 72 hours'.

For the performance test parameters are four in numbers :

- 1. Quantity of gases,*
- 2. Power consumption,*
- 3. Purity*
- 4. Pressure*

It is admitted case of the Claimant at page 43 (Annexure C-1) of the Statement of claim, that in the month of August, 2006 the ASU was producing 100 percent capacity, for the entire month. In view of this as per Article 15 (B) (b) of the Lease Agreement, performance test, would be deemed to be completed, as is evident from the document of the Claimant, Annexure C-1 annexed with the Statement of Claim at page 43, which shows that in the month of August, 2006 the ASU was producing 100 percent capacity for the entire month, this entry, in the fifth column is against the month of August 2006, this itself shows that the performance test would be deemed to be completed.

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34. On the other hand, the Claimant has disputed about the completion of the performance test in accordance with Article 15 of the lease Agreement to say so, and to justify the payment of lease rental on pro rata basis instead of the full amount of the lease rental of Rs. 30 lakhs per month plus all taxes and duties. According to the Respondent the performance test as contemplated in Annexure-1 of the lease agreement is only for a period of 72 hours i.e. for 3 days only. Article 15 (B) (b) of the lease agreement speaks

performance test to mean performance test of the plant equipment shall be deemed to be completed when the plant/equipment achieves the production parameters as per Annexure 1 to this agreement on a continuous basis of 72 hours. Meaning thereby the parameters are 4 in numbers i.e., quantity of gases, power consumption, purity and pressure as Article 15 (a) of the lease agreement. It is admitted by the Claimant in the statement of claim that in the month of August 2006 the ASU was producing 100% capacity for the entire month. That shows that there was no fall below the figure of 100% even of a fractional value. In such circumstances, requirement of Article 15 of performance test is successfully done for 72 hours does not carry any meaning on the Claimant's own admission of production of 100% capacity for 31 days in August, 2006. A bare perusal of Annexure C1 also show that there was no excess power for oxygen production in the month of August, 2006. All these above facts clearly establish that Air Separation unit achieved 100% capacity in the month of August, 2006 is Optimum Power Consumption accordingly the Respondent raised the bills for entire lease rental plus taxes i.e., Rs. 31,20,000/- after August, 2006. The bills sent were not disputed or objected or not received, hence the plea of not holding performance test has no force. In view of all the above facts, the Respondent's submission that the plea of the Claimant is that deficiency of gas without any details and without production reports is an afterthought. The above is also conduct of the Claimant that for a period more than 4 years from 2005 to 23.12.2009 the Claimant never made any complaint/grievance about the non achievement of the performance parameters by Air Separation Unit on account of quantum of gas, power consumption, purity and pressure which is the requirement of Article 15(B)(b) which speaks only the achievement of the production parameters on a continuous basis for a period 72 hours. In any case the Claimant could have made a deduction if there was a short fall or non achievement the Claimant could have made a deduction from the O&M

charges that was also not done, therefore, the submission of the Claimant that performance test of the ASU was not completed has no force. Besides, the Respondent had produced the document Exhibit RW1/23 which was proved though the Claimant had submitted that the signature of Mr. Sudhir Bhatt are forged if that was so, the Claimant could have examined Mr. Sudhir Bhatt or in his absence the handwriting expert that having not being done it cannot be said that Exhibit RW1/23 is a forged one. On the other hand Exhibit RW1/23 shows the production figures, contrary to the figures, the Claimant could have produced actual production figures of ASU that was also not done by the Claimant in such circumstances the Claimant cannot deny the correctness of the production figures nor it can be said that the document Exhibit RW1/23 (Daily Production Report) is a forged document. In view of the above, the Counter Claims of the Respondent is allowed to the extent that the Respondent would be entitled to amount falling within the period of 3 years prior to the date of filing of the Counter Claims i.e. prior to 07.07.2016 and not from 30.3.2005 to 31.5.2016. The respondent would be entitled to Rs. 9,40,88,383/- with simple interest at the rate of 18% p.a. as per the agreement upto the date of the award and from the date of the award @ 12% per annum till realization.”

16. Annexure C-1 had been filed by the petitioner before the Sole Arbitrator. A perusal of the same would show that in the month of August 2006 not only the production was 100% but also there was no excess power consumption for Oxygen production. The Daily Production Report referred above also showed the purity of the Oxygen at 99.5%. In my opinion, therefore, the Arbitrator was correct in drawing a conclusion that the Performance Test should be deemed to have been achieved in August 2006. It may be correct that a formal performance test was never conducted by the parties, however, once the parameters as prescribed

under the performance test had been achieved, the Arbitrator found that there was no justification for the petitioner not to have paid the full amount under the Lease Agreement. I do not find anything perverse in that approach. It is well settled that this Court, in exercise of its power under Section 34 of the Act, does not sit as a Court of Appeal over the decision of the Arbitrator. The Arbitrator being the final judge of the quality and quantity of evidence led before him and being the Arbitrator appointed by the parties, his conclusion has to be respected and until and unless it is shown that such conclusion is so perverse so as to shock the conscience of the Court, the Award cannot be set aside. I do not find any such ground being made out, so far as the challenge on this issue is concerned.

17. The next ground of challenge is to the Award of Counter Claims of the respondent towards the recovery of the lease charges, O&M charges, taxes, duties, levies and interest under the Counter Claims No.1. The Arbitrator has allowed the said Counter Claims for a period of three years prior to the date of filing of the Counter Claims i.e. prior to 31.05.2016 and not from 30.03.2005 to 31.05.2016.

18. It is the contention of the petitioner that the Award has been passed in favour of the respondent relying upon an electronic document, being the alleged ledger (Ex.RW1/39). It is submitted that the said ledger was sought to be proved by the respondent through its witness Mr.K.K. Dhar who had neither made any entry in the ledger nor maintained the ledger account. In absence of the primary evidence i.e. cash book, bills etc. and

non-examination of the witness who maintained the ledger, the said ledger was inadmissible in evidence and could not be relied upon. Relying upon the Section 34 of the Evidence Act, 1872, it is submitted that the ledger entries themselves are not sufficient to charge a person with liability. It is submitted that the Arbitrator has committed an error in shifting the burden on the petitioner to prove that there is no outstanding as claimed by the respondent. It is further submitted that the Arbitrator has erred in law in holding that the account is a running account.

19. The Arbitrator has dealt with the above issue in paragraphs 32 and 33 of the Award and the same are quoted herein below:

“32. True the Respondent has produced the witness who has not maintained the accounts however, it is not disputed that there was a relationship of supplier and customer between the Respondent and the Claimant, therefore, the Claimant also must be maintaining the accounts but the Claimant in fact has not adduced the best evidence available with him of supply of the gas, its receipt and payments made therein by cheque or otherwise. It is well settled that irrespective of the burden of proof if the accounts are maintained then the best available evidence i.e. the accounts are to be produced. Therefore, in a case like, this the Claimant was to prove that the Claimant has paid all the amounts and nothing is due to him that having not done it cannot be said that the Claimant was not liable to pay the amount as claimed by the Respondent. On the other hand, the Respondent to prove its Claim has examined Shri K.K. Dhar who was cross examined on his affidavit Annexure A exhibited as RW1/39. A ledger account commencing from 30.3.2005 to 31.5.2016 wherein credit and debit entries after showing balance payable by the Claimant is of Rs. 13,65,22,510/- .

33. Besides, the parties were in regular transactions and the accounts were running accounts and the invoices were raised by the Respondent from time to time for supply of gases and of their payments used to be made to the Respondent not relatable to particular invoices. From these payments accounts the Claimant could have shown that the alleged claims of the Respondent are not outstanding, and to prove that the Claimant ought to have produced their account books or bills, payment and receipts to show that the amount so claimed is not due, or something different is due that having not been done it cannot be said that the Claimant is not liable to pay the amount of Rs. 13,65,22,510/-. Though the Claimant has opposed the admissibility of Exhibit RW1 /39 by resorting to Section 32 and 65 (B) of the Indian Evidence Act, but it is well settled that the arbitral Tribunal shall not be bound of the Civil Procedure Code, 1908 or the Indian Evidence Act but the principles are applicable but while deciding in Arbitral matters the principles can be applied, however, the principles' are applicable as laid down in Section 19(1) of the Arbitration and Conciliation Act, 1996. In any case when the accounts were running and that the Respondent has produced the computation showing the due against the Claimant, the Claimant ought to have produced their own account showing that nothing is payable and all the amounts have been cleared. It has also come in evidence that the payments used to be made by cheque. Claimant could have produced the copy of the cheque the counter file or the statement of bank account showing the payments made by the Claimant to demonstrate that nothing is due and the statement of account filed by the Respondent is incorrect."

20. The Arbitrator, in my view has rightly relying upon Section 19(1) of the Act has held that the Arbitral Tribunal shall not be bound by the Indian Evidence Act, 1872. The Arbitrator has thereafter drawn an

adverse inference against the petitioner for not having produced its books of account. Even before me, it was not contended that any entry in the ledger produced by the respondent was incorrect or any transaction was not truly reflected in the same. The Arbitrator has therefore weighed the evidence led before him to arrive at the conclusion of liability of the petitioner to the respondent.

21. In *Associate Builders v. DDA*. (2015) 3 SCC 49, Supreme Court has questioned the Court exercising the power under Section 34 of the Act as under:

“33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts.”

22. In the view of the above, the challenge to the Award cannot be sustained.

23. As far as the finding that the account is a running account, it would have no relevance inasmuch as the Arbitrator has granted the relief confined to the period of three years prior to the date of filing of the Counter Claims. Therefore, he has not applied the principle of Article 1

of the Schedule to the Limitation Act. That being the case, the submission of the learned counsel for the petitioner cannot be sustained.

24. It is next contended by the learned counsel for the petitioner that the Arbitrator has erred in allowing the Counter Claim No.2 in favour of the respondent. It is submitted that Article 1 of the Agreement, which provides that extension of the lease, would not be applicable to the fact of the case as till 04.02.2015 there was no claim made by the respondent based upon the bills raised by it. Article 1 of the Agreement is reproduced herein below:

“Article 1

LEASE PERIOD

a. the lessee hereby agrees to take on lease from lessor 70 TPD Air Separation Plant/Equipment, more specifically defined in Annexure No.1 to this Agreement at their factory at Siltara Growth Centre, Siltara, Raipur-493111 for a period of 10 (ten) years (hereinafter referred to as 'lease period') from the date of commissioning of the Plant/Equipment.

b. After the expiry of 'lease period' , lessor shall sell the plant/equipment at Rs. 15 lakhs (Rupees fifteen lakhs) plus purchase value of the spares as available in the stock at the time of sale, purchased during last two years. The sale of Plant/Equipment shall be made by GMG only if all bills raised by GMG in terms of this Agreement are duly paid by JNL. If there is any Payment under dispute then the Lease period will extend automatically till such time lessee has cleared all outstanding payments. During such period of extended lease all terms and conditions of the Agreement shall holds good except the Lease Period of 10 years. All levies, taxes, duties etc. if any, on such sale shall be borne and payable by lessee in addition to the above amount."

25. The Arbitrator has allowed the above claim as the lease continued in view of the fact that dispute had arisen between the parties and the respondent was not permitted to remove the plant and machinery and the consumables. In fact, even in the Minutes of Meeting dated 04.02.2015, it had been recorded that the petitioner had agreed to make all the payments as per the contract before transfer of the plant in its favour. Therefore, the Arbitrator has rightly recorded that Article 1 of the Agreement would become applicable to the facts of the case, resulting in extension of lease as the respondent had failed to make the payment in accordance with the Agreement.

26. With respect to the Counter Claim No.3 i.e. Return of the Air Separation plant, again relying upon the submission made against the Award of Counter Claims No.1, it is submitted that the outstanding amount was not proved by the respondent, thus this claim could not have been allowed in favour of the respondent. I find nothing wrong with the finding of the Arbitrator which records that as the claimant has failed to make the payment under the lease, the respondent is entitled to remove and take possession of the Air Separation Plant.

27. Certain submissions were made even with respect to the grant of Counter Claims No.4 to 7, however, it was not shown how any of these grounds fall within the scope of the limited jurisdiction granted to this Court to interfere with the Arbitrator Award under Section 34 of the Act. Therefore, barring making a passing reference to such objection, these objections were not seriously pressed before me.

28. It was further contended before me that the Arbitrator has wrongly denied the claim of the petitioner with respect to the loss suffered by it due to excess consumption of electricity and due to short supply of Oxygen, which allegedly forced the petitioner to purchase Oxygen from open market at excessive price. These claims of the petitioner have been extensively discussed by the Arbitrator. The Arbitrator has come to a conclusion that the petitioner has not given any details or produced any report showing deficiency of gas for a period from 2005 to 23.12.2009. No such complaint was also made. With respect to excess consumption of energy is concerned, it was further observed that the petitioner had also not made any deduction on this account from the payable of O&M charges to be made to the respondent. I may only quote paragraphs 25 and 28 from the Arbitral Award, which clearly shows that the Arbitrator has discussed the evidence led before him with respect to the above claims of the petitioner and the rejection thereof cannot be said to be perverse so as to shock the conscience of this Court into interfering with the same:

“25. After going through the record and evidence led by the parties it is evident that the Claimant has not filed any document relating to excess power consumption i.e., Meter readings, proof of payment of power bill actually paid and also has not produced any account of the Respondent which was maintained by the Claimant to show that against the Respondent debit entry was made from time to time on the account of alleged power consumption, nor the Claimant examined any witness to prove, the excess power consumption. As per Article 8 of O & M Agreement the Claimant's right is there in case any, excess power of consumption is there, to deduct upto Rs. 2.5 lakh per month for that month, but, no such deduction was ever made from

2005 to 2015. This further shows that there was no excess power consumption which is evident from the conduct of the Claimant, as such the Claim of the Claimant is an afterthought and is rejected.

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28. On the basis of the record and evidence, in the circumstances which have come on record, the claim for short supply of gases is an afterthought, as admittedly, the plant/equipment was commissioned in March 2005 but it is for the first time the Claimant wrote a letter to the Respondent in the year 2009 for short supply of gases. In this letter too, no quantification or specification for short supply of gases was made. Besides, as per Article 8 if there is any short supply of gases by the Respondent the Claimant has a right to deduct upto Rs. 2.5 lakh per month as per O & M Contract but, that was not done. Further, the Claimant has not adduced any evidence by examining the witness or producing the bills of purchase of supply of gases that the gas was purchased from the open market. This shows the claim of the Claimant for short supply of gases is an afterthought and is liable to be rejected and accordingly is rejected.”

29. The last submission of the learned counsel for the petitioner is with respect to the claim for new Oxygen Compressor. This objection is again based on the submission which requires re-appreciation of evidence, which in my opinion cannot be done by this Court in exercise of its power under Section 34 of the Act. The Arbitrator has taken into consideration Article 16 of the O&M Agreement and has held as under:

Re: Claim No.3 relates to the Claimant's entitlement for New Oxygen Compressor or in lieu of that market value of the new compressor in terms of O&M Agreement and Lease Agreement. Article 16 of the O&M Agreement /contract, requires repair /replacement of equipment in good working condition which reads thus:

"Article 16: Loss and Damages:

After commissioning of the Plant and acceptance of the Plant/ Equipment by JNL, JNL shall hand over the plant to GMG for operation and maintenance. GMG shall bear the entire risk of loss and damage to and destruction of the "Plant/ Equipment" from any cause of whatsoever nature except for the act of God to the "Plant/Equipment". In the event of any such loss or damage during the period of Operation and Maintenance Contract, GMG shall repair or replace at its own cost, the "Plant/ Equipment" with "Plant/ Equipment", in good working condition."

It is not disputed that the Respondent replaced, one, New Oxygen Compressor and one, compressor was repaired/ changed from the Old one compressor of Clark made which was in good working condition during the period of O&M Contract. It is also not disputed that as per Article 16 of the Respondent has fully complied with this obligation. In view of this, and evidence on record, in the opinion of this Tribunal, the Claimant is not entitled to claim for New Oxygen Compressor from the Respondent.

30. In view of the above, I find no merit in the present objection petition and the same is accordingly dismissed, however, with no order as to cost.

NAVIN CHAWLA, J

DECEMBER 21, 2017/vp