

Digitally
signed by
SHRADDHA
KAMLESH
TALEKAR
Date:
2025.02.11
21:13:35
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

IN ITS COMMERCIAL DIVISION

COMM. ARBITRATION PETITION NO. 14 OF 2025

(Under Sec. 9 of A & C Act, 1996)

WITH

COMM. ARBITRATION APPLICATION (LODG.) NO. 1005 OF 2024

(Under Sec. 11 of A & C Act, 1996)

Lords Inn Hotels and Resorts
(Formerly known as Lords Inn Hotels
and Developers Pvt. Ltd.)

...Petitioner/Applicant

Versus

Pushpam Resorts LLP and 3 Ors.

...Respondents

Mr. Mayur Khandeparker a/w. *Aman Kacheria, Rishabh Dhanuka, Ms. Anisha Didwania and Ms. Mahima Shah i/b. Agarwal and Dhanuka Legal, for Petitioner/Applicant.*

Mr. Siddhesh Bhole a/w. *Mr. Yakshay Chheda, Ms. Praharshi Saxsena, Mr. Approva Kulkarni i/b. SSB Legal & Advisory for Respondent No.1.*

CORAM : SOMASEKHAR SUNDARESAN, J.

Reserved on : January 16, 2025

Pronounced on : February 11, 2025

JUDGEMENT :

Context and Background:

1. Whether an arbitration agreement between the parties is at all in existence, is the vexed question that falls for consideration in these proceedings under the *Arbitration and Conciliation Act, 1996* (“**Arbitration Act**”).

2. A Hotel Franchisee and Management Agreement dated February 10, 2021 (“**Resort Management Agreement**”) was executed between the Petitioner-Applicant, Lords Inn Hotels and Developers Private Ltd. (“**Lords Inn**”) and Respondent No. 1, Pushpam Resorts LLP (“**Pushpam**”). Respondent Nos. 2 to 4 are partners of Pushpam.

3. Pushpam built a resort on land owned by it at Karjat (“**Resort**”). Under the Resort Management Agreement, Lords Inn was contracted to operate and manage the Resort.

4. Disputes and differences arose between the parties. Pushpam issued a termination notice dated October 8, 2024, terminating the relationship with effect from December 15, 2024. Lords Inn replied through a letter from its advocates, dated October 26, 2024 setting out the various breaches on the part of Pushpam under the Resort Management Agreement, demanding that the termination notice be withdrawn, and called for a meeting to resolve the disputes. On November 26, 2024, Pushpam replied through its advocates, dealing with Lords Inn’s contentions and reiterated the demand that Lords Inn vacate the premises by December 15, 2024. These exchanges were preceded by e-mail correspondence from each party, alleging various shortcomings attributed to the other party.

5. By a letter dated December 7, 2024, advocates of Lords Inn pointed to a provision that dealt with a lock-in period, and invoked arbitration under Article XXIV of the Resort Management Agreement. By a letter dated December 12, 2024, Pushpam replied stating that there is no valid arbitration agreement in conformity with Section 7 of the Arbitration Act.

6. The stand-off led to the filing of Commercial Arbitration Petition No. 14 of 2025 under Section 9 of the Arbitration Act (“**Section 9 Petition**”), seeking a stay on the termination of the Resort Management Agreement, and protection against being removed from the Resort. This was followed by a Commercial Arbitration Application (L) No. 1005 of 2025 under Section 11 of the Arbitration Act (“**Section 11 Application**”), seeking appointment of an arbitrator.

7. A statement made on behalf of Pushpam on December 13, 2024 that the termination letter would not be acted upon, has continued till date.

8. Copious pleadings have been filed by the parties. However, Learned Counsel on both sides, fairly stated that the one issue that really falls for consideration is whether there is an arbitration agreement between the parties.

Arbitration Agreement – Form and Substance:

9. The Resort Management Agreement is structured in the form of Articles numbered in capitalised Roman numbers, which in turn contain Sections numbered in Arabic numerals, with decimal form for sub-sections. Article I has definitions referred to as Clauses¹ while all other Articles have decimalised Sections and then Clauses.

10. The provision invoked by Lords Inn as being the arbitration agreement is Article XXIV of the Resort Management Agreement. It reads as follows:-

ARTICLE XXIV

GOVERNING LAW AND JURISDICTION

This Agreement shall be governed and interpreted in accordance with the laws of India and subject to the provisions of Clause (Arbitration) below, the Parties submit to the exclusive jurisdiction of the courts at Mumbai, India.

[Emphasis Supplied]

11. On a plain reading of Article XXIV, it is evident that the first limb of the provision provides that the proper law of the Resort Management Agreement is Indian law. The second limb confirms submission to the exclusive jurisdiction of the courts in Mumbai. Such submission to jurisdiction of courts in Mumbai is “*subject to the provisions of Clause*

1 Section 13.14 refers to the definition of “Deductible Expenses” as being contained in “Clause 10 of Article I”.

(Arbitration) below”. However, there is no provision below that is either titled “Arbitration”, or containing any conventional arbitration clause.

Contentions of Counsel:

12. Mr. Mayur Khandeparkar, Learned Counsel on behalf of Lords Inn would strongly urge that the reference to arbitration as contained in Article XXIV is a sufficient indication that the parties had intended to adopt arbitration as the means of resolution of disputes between them under the Resort Management Agreement. This provision suggests that there is another clause titled “Arbitration” in the Resort Management Agreement, Learned Counsel would submit, and therefore, although there is no other clause by that name, this provision by itself would indicate that the parties had resolved to arbitrate. It is not necessary, according to him, that another provision actually containing a conventionally-drafted arbitration clause has to be contained in the Resort Management Agreement. Mr. Khandeparkar would submit that so long as the intent to arbitrate is discernible in an agreement, “inartistic drafting” would not negate the existence of the arbitration agreement.

13. That apart, Mr. Khandeparkar would draw support from other provisions in the Resort Management Agreement outside Article XXIV. He

would point me to the provisions of Section 23.3 and Section 28.8 in the same Resort Management Agreement, which contain references to the word “arbitration”. Drawing upon these provisions, he would submit that when seen as a whole, these provisions collectively and inexorably point to the parties having demonstrated their intention to refer disputes to arbitration. Therefore, it would be necessary to extract these provisions too:-

Section 23.3

*In the case of any act of war, civil disturbances, acts of Governments or any other case beyond the control of the parties, having substantial adverse effect upon the operation of the Resort or an essential portion of the Resort (as hereinafter defined) shall be taken by acquisition, requisition or dispossession by proper authority, either party shall have the right by notice in writing to the other to terminate this Agreement. For the purpose of this Section, “an essential portion of the Resort” shall be deemed to have been taken where the remaining portion of the Resort cannot be efficiently or profitably operated for Resort purposes during the term for which such essential portion has been taken. The determination, as to whether the portion of the Resort taken is an essential portion or not, shall be made by mutual agreement of the Company and the Operator, and in default of such agreement by **reference to Arbitration pursuant to Article XXIV.***

Section 28.8

*Whether in a proceeding for injunctive relief **or in arbitration**, to the extent that the provisions of this Agreement do not violate the public policy or general principles of the legal system, this Agreement shall be governed by and construed in accordance with Indian Laws of land. If any individual term or provision of this Agreement violates such policy or principles so as to be invalid or unenforceable shall apply to the remainder of the Agreement and the remainder shall remain in full force and effect unless any such individual term or provision is so material to the intent and purpose of this Agreement that this Agreement should terminate.*

[Emphasis Supplied]

14. From a conjoint reading of these provisions, Mr. Khandeparkar would submit, the Resort Management Agreement, as executed and read in its

entirety, would show that it does not merely use the word “arbitration” without reference to the context of dispute resolution. On the contrary, Section 23.3 would show that where the parties cannot agree on whether the portion of the Resort taken over by requisition, acquisition or dis-possession by law, is “essential”, they would resolve such difference of opinion by reference to arbitration. Likewise, he would submit that since Clause 28.8 uses the phrase “in arbitration” after a reference to “injunctive relief”, it would follow that the reference in that provision is to Section 9 of the Arbitration Act.

15. Mr. Khandeparkar would highlight that the Resort Management Agreement is a commercial document that is not a standard form instrument and one must further business efficacy. According to him, the interpretation canvassed by him, would subserve an alternate dispute resolution forum chosen through party autonomy with a fast track redressal of disputes and limited scope of judicial intervention.

16. In sharp contrast, Mr. Siddhesh Bhole, Learned Counsel on behalf of Pushpam, would argue that the submissions made by Mr. Khandeparkar, placing reliance on other provisions of the Resort Management Agreement are not to be found in the pleadings. However, taking a cue from the invocation of extrinsic evidence, he would point out that in fact, the doctrine

of business efficacy would actually point to how the parties never intended to arbitrate. According to Mr. Bhole, the termination was validly effected, and was effected well outside the lock-in period. He would submit that an operating agreement cannot lend itself to specific relief and it involves performance of a continuous duty at the Resort, which the Court cannot supervise.

17. Mr. Bhole would fairly state that Pushpam's case would hinge on the Resort Management Agreement not containing a valid and enforceable arbitration clause. He would submit that Article XXIV of the Resort Management Agreement does not envisage making a reference to arbitration. It is a clause that provides for governing law and jurisdiction, and provides that the jurisdiction of courts of Mumbai would be subject to a clause on arbitration, but there is actually no arbitration clause in the Resort Management Agreement.

18. As regards Mr. Khandeparkar's reliance on Section 23.3 and Section 28.8 of the Resort Management Agreement, Mr. Bhole would take me through three rounds of drafts of the Resort Management Agreement exchanged between the parties before its execution and the email correspondence exchanged between the parties about such drafts. According to him, such correspondence would point to the fact that the parties meant to

not have a reference to arbitration for dispute resolution. He would point to the first draft of the document containing an arbitration clause in Article XXV, which was deleted in the next draft, and remained out of the drafts right until the final execution draft. Mr. Bhole would argue that if extrinsic evidence outside Article XXIV is to be considered, such conduct of parties too would have to be considered to truly examine business efficacy in resolving any perceived ambiguity about consent of the parties to resort to arbitration.

19. These draft versions of the draft of the Resort Management Agreement are appended to the affidavit in reply of Pushpam in the Section 11 Application. Mr. Bhole would submit that this is not a case of any inartistic drafting of a conscious choice to go to arbitration, but a bungled final execution draft, which wrongly brought in references in Section 23.3 and Section 28.8, even when Article XXV was not re-introduced. He would submit that this would show that the parties have not actually agreed to arbitrate on their disputes.

Analysis and Findings:

20. Upon a careful reading of the record with the assistance of Learned Counsel for the parties, and the provisions of Section 7 of the Arbitration Act, and applying the business efficacy test, the vexed question posed is answered by me by holding that an intent of the parties to arbitrate can be discerned.

Since a plain and ordinary reading of the Resort Management Agreement does not lend itself to a fully satisfactory conclusion, I have had to apply the five-fold business efficacy test, to arrive at this view. It would still be open to the Arbitral Tribunal to examine any further material on record that the parties may feel is necessary to deal with substantial existence of the arbitration agreement under Section 16 of the Arbitration Act.

Section 7 of the Arbitration Act:

21. Section 7 of the Arbitration Act governs the discernment of an arbitration agreement. Section 7 reads thus:-

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]

22. A plain reading of Section 7(1) of the Arbitration Act would show that an “arbitration agreement” is an agreement by which the parties to the agreement have ***agreed to submit*** to arbitration ***all or certain disputes*** between them in respect of a defined legal relationship. Under Section 7(2), the arbitration agreement may be in the form of a clause in another agreement or in the form of a separate agreement. Under Section 7(3), the arbitration agreement ought to be in writing. Under Section 7(4), an arbitration agreement would be regarded as being in writing in the eyes of law, if it is contained in a document signed by the parties; or in an exchange of letters, or other means of communication, including electronic communication, which provide a record of the agreement; or in an exchange of claims and defences in which the existence of an arbitration is alleged by one party and not denied by the other. Under Section 7(5), a reference in a contract, to a document containing an arbitration clause would constitute an arbitration agreement, if the contract is in writing and the reference is such as to make that arbitration clause a part of the contract.

23. Article XXIV of the Resort Management Agreement must be read for what it is. It is a provision that has two limbs – the first limb records the

intention of the parties that Indian law would govern the contract; while the second limb records the fact that courts in Mumbai would have jurisdiction. What Article XXIV deals with, is governing law and jurisdiction of Mumbai courts. What it is “subject to” is a “Clause (Arbitration) below”, which on the face of the document, does not exist.

24. There is no other provision (much less a “Clause” – that would have to be sub-provision to an Article or to a Section) placed after Article XXIV that actually records that the parties would refer all disputes and differences on any facet of the Resort Management Agreement, to arbitration.

25. If one were to discount the word “below” used in Article XXIV, one would find that Section 23.3 indeed could show an intention of the parties to refer differences between them to arbitration. However, on the face of it, Section 23.3 only points to the intention of the parties to refer differences over a specific subject matter to arbitration – the question of whether a portion of the Resort taken over by law is an essential portion of the Resort. The language used in Section 23.3 is that the parties would resort to “*arbitration pursuant to Article XXIV*”, which brings us back to that provision not being in itself, an arbitration clause. Despite the impediment posed by XXIV, one could conclude that Section 23.3 demonstrates the intention of the parties to refer to arbitration any difference between them about whether the

portion of the Resort that has been acquired, requisitioned or dis-posessed is “essential” to running the Resort. One could still infer that there is an intent between the parties, to arbitrate on that subject.

26. Section 7(1) of the Arbitration Act makes it clear that the arbitration agreement would mean an agreement by which the parties would submit “all or *certain* disputes” to arbitration. The best case for reading Section 23.3 in favour of existence of an arbitration agreement is that the provision enables arbitration for the subject matter of that provision.

27. The reference to “arbitration” in Section 28.8 would also become meaningful by such reading of Section 23.3. Section 28.8 too provides for applicability of Indian law in, among others, any arbitration proceeding. Article XXIV already contains provisions that make Indian law the proper law of contract. If the “arbitration” referred to in Section 28.8 were the arbitration pursuant to Section 23.3, in that arbitration, principles of Indian law and public policy would apply and the position of Indian law being applicable would stand reiterated.

28. That apart, with the mere use of the phrase “Clause (Arbitration) below” (which is non-existent), Article XXIV would not automatically become an arbitration agreement, as canvassed by Mr. Khandeparkar. Under Section 7(5) of the Arbitration Act, a reference in a document to an instrument that has an arbitration clause would constitute an arbitration agreement, provided that other document exists with an arbitration clause in it. In the instant case, Article XXIV makes a reference to a non-existent clause.

29. Consequently, the picture that emerges is that there is evident and manifest ambiguity in the scheme of the Resort Management Agreement when it comes to discerning an intent to arbitrate on all matters. Therefore, one would necessarily have to apply the “business efficacy test” to determine the existence of intent of the parties to arbitrate, in view of the ambiguity in this regard, in the Resort Management Agreement.

Business Efficacy Test:

30. It is normally not for the Court to comment on the quality of the drafting of a contract. However, the Court would need to examine if any implied term could be inferred in view of the unsatisfactory nature of the provisions reduced to writing in the contract. The Court’s role is to interpret the language of a contract as it stands and give it meaning within the

parameters of the law. Only because there is a demonstrated ambiguity in how the arbitration-related provisions in the Resort Management Agreement have been drafted and executed, it would be sensible to examine if the business efficacy test could lead to a reasonable and logical inference of whether the parties had agreed to resort to arbitration, by applying commercial common sense.

31. It is in that context that I have chosen not to ignore correspondence contemporaneous with the execution of very same Resort Management Agreement, that is contained in the material brought on record in Pushpam's affidavit in reply. The Resort Management Agreement was executed on February 10, 2021 and e-mail correspondence over the few days prior to the execution of the agreement, when drafts were exchanged, have been brought on record by Pushpam.

32. On January 29, 2021, Lords Inn sent a draft of the Resort Management Agreement to Pushpam ahead of a conference call scheduled for the next day. That draft had Section 23.3 and Section 28.8 in the same form that is found in the finally executed Resort Management Agreement. Article XXIV too is the same form as found in the executed Resort Management Agreement – it refers to the “Clause (Arbitration) below”. However, the very next provision below i.e. Article XXV in that draft, provided for detailed arbitration

provisions spread across Section 25.1 to Section 25.3. Indeed, that draft provision has a reference to “Arbitration and Conciliation Act, 2005” – perhaps, an error based on a template the parties copied from. However, what is pertinent to note is that, at least in draft form, there indeed was a proposed arbitration agreement for the parties to negotiate, and that draft covered all disputes and differences between the parties under the agreement.

33. On February 1, 2021, Lords Inn turned around another draft after a video call held on that day, and that draft was further turned around by Pushpam on the next day i.e. February 2, 2021. This draft was remarkably different on the subject of arbitration. Every reference to “arbitration” in Section 23.3, Article XXIV, and in Section 28.8 stood meticulously deleted. Article XXV (which was the arbitration clause in the earlier draft) stood deleted in this draft. In short, by this draft, arbitration was sought to be taken off the table altogether, wiping the draft clean of all references to arbitration. In this draft, Article XXV is a provision titled “Adverse and Exceptional Circumstances”.

34. One more draft was circulated by Lords Inn on February 6, 2021 by an email, attaching a draft, after further negotiations between the parties. The covering mail, which points to the provisions that had been amended in that

round of drafting, makes no mention of Section 23.3, Article XXIV or to Section 28.8. However, remarkably, references to “arbitration” as found in the first draft have re-entered this draft, in Section 23.3, Article XXIV and Section 28.8. However, Article XXV (the draft arbitration clause) that had been contained in the original draft and had been deleted, is not found in this draft. Article XXV in this draft continues to be the provision titled “Adverse and Exceptional Circumstances”.

35. Eventually on February 9, 2021, the “Final Agreement” was circulated by Lords Inn, stating that all the changes discussed between the parties had been incorporated in that draft. This draft conforms to the finally executed Resort Management Agreement appended to the pleadings by the parties in the proceedings. Article XXV is the provision titled “Adverse and Exceptional Circumstances” and the arbitration clause of the first draft remained absent. However, every reference to “arbitration” contained in Section 23.3, Article XXIV and Section 28.8 continued in the draft. The Resort Management Agreement was executed on the next date (February 10, 2021).

36. I am conscious that the Resort Management Agreement also has a standard “Entire Agreement” provision in Section 28.5, which would confirm that the signed agreement would override and supersede all prior discussions and understandings, whether written or oral. Therefore, I must hasten to add

that the aforesaid four paragraphs in this judgement are not even meant to interpret the Resort Management Agreement, but are aimed at the exercise of ascertaining if the apparent ambiguity in the executed Resort Management Agreement is capable of being solved by discerning an intention to arbitrate.

37. In my view, it would be necessary to look at what commonsensical business people could have meant by their contract and their conduct. To reiterate, this exercise can only be done when there is an evident ambiguity in the express language of the contract, and not when the position is explicitly spelt out in an agreement.

Five-Fold Test for Business Efficacy:

38. It is well settled law that a conclusion drawn by applying the business efficacy test ought to positively answer the five questions :

- a. is it reasonable and equitable;
- b. is it necessary to give business efficacy to the contract;
- c. does it go without saying (the officious bystander test);
- d. is it capable of clear expression; and
- e. does it contradict any express term of the contract.

39. A court can never re-write a contract. However, where the court is called upon to rule that an implied term can be inferred, if all the foregoing

five tests are met, the court may infer the implied term. In *Nabha Power*², the Supreme Court has analysed and adopted the business efficacy test articulated by English Courts, and declared how it should be applied under Indian law. In the words of the Supreme Court:-

“49. Needless to say that the application of these principles would not be to substitute this Court's own view of the presumed understanding of commercial terms by the parties if the terms are explicit in their expression. The explicit terms of a contract are always the final word with regards to the intention of the parties. The multi-clause contract inter se the parties has, thus, to be understood and interpreted in a manner that any view, on a particular clause of the contract, should not do violence to another part of the contract.

.....

72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any 'implied term' but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”

[Emphasis Supplied]

40. Applying the foregoing principles, I find that the arbitration agreement discernible in the express language of the Resort Management Agreement is evidently skewed in its plain language. According to Pushpam, there is no arbitration agreement at all, even in relation to the subject matter of Section

² *Nabha Power Limited vs. Punjab State Power Corporation Limited & Anr.* – (2018) 11 SCC 508

23.3 because that provision leads one to Article XXIV, which itself is not an arbitration clause. On the other hand, as reasoned above, Section 23.3 can be reconciled with Section 28.8 and it would defy logic that there would be an arbitration agreement on the subject matter of Section 23.3 to the exclusion of all other facets. That position coupled with the flow of the drafts that were negotiated and the e-mails exchanged between the parties in the run-up to the execution of the Resort Management Agreement, makes it necessary to apply the business efficacy test. To rule out three provisions in the Resort Management Agreement that have references to “arbitration” as being utterly meaningless, appears absurd and therefore, it is necessary to examine if the agreement would make more sense by applying the business efficacy test.

41. Convinced that it is necessary to apply the business efficacy test, when the material on record is examined, the conclusion that the parties indeed had agreed to have an arbitration agreement appears to meet the standard stipulated in all the five tests. Indeed, the parties took arbitration totally off the table in the second draft – this is when the draft was wiped clean of references to arbitration in every clause in question. However, if the parties brought back the reference to “arbitration” in every single provision that referred to the arbitration clause in the first draft, and only did not bring in the arbitration clause itself, it stands to reason that they had agreement on

reintroducing arbitration as the forum of choice for dispute resolution, and in all likelihood there was a slip-up on re-inserting the deleted version of the old Article XXV.

42. Now, applying the five-fold test, such a conclusion, appeals to my mind as being reasonable and equitable, considering the material on record and on examining how the parties approached the negotiations for the agreement.

43. *First*, it is plausible and reasonable to conclude that the parties had intended to have an arbitration agreement to cover all their disputes and differences in connection with the Resort Management Agreement (as opposed to just a certain area of dispute – whether a portion of the Resort taken over is essential, under Section 23.3). It is apparent that every reference was re-inserted into the provisions that had references to arbitration and the only missing piece is the clause originally envisaged as Article XXV, is the provision “below” Article XXIV.

44. *Second*, there is nothing special about just the type of situation contemplated in Section 23.3 being covered by arbitration to the exclusion of all other disputes. To give meaning to, and make efficacious, the three re-introduced provisions that referred to “arbitration” it is necessary to examine if inferring the commitment to arbitrate would make sense of all the re-

introduced provisions. If the parties had been willing to arbitrate about one facet, and they re-introduced three out of four references to arbitration, it stands to reason they meant to have the fourth provision back in. Therefore, the second of the five-fold test is also met.

45. *Third*, a review of the flow of negotiations and drafts exchanged and eventually executed (between January 29, 2021 and February 10, 2021) would also meet the “officious bystander test” also known as the “goes without saying” test. Since three out of four references to arbitration, were re-introduced in clauses had remained in the near-original form in the draft, and the only provision left out was the one that had been totally deleted, one can reasonably state that it goes without saying that the omission was an unintended error in handling the draft.

46. *Fourth*, such an implied term is capable of clear expression. The very reason that Article XXIV is drafted in the form it does, would show that it was meant to have Article XXV below it, and that was missed in the flurry of drafts.

47. *Fifth*, by inferring that the parties intended to arbitrate, no violence is inflicted to any other provision of the Resort Management Agreement. On the contrary, it gives a legitimate and harmonious completion to the

otherwise inchoate and cures the commercial absurdity of having meaningless provisions in three places.

48. I must underline that the exercise conducted above is not without statutory basis under the Arbitration Act. One must remember that Section 7(4)(b) of the Arbitration Act envisages examining e-mail correspondence to discern an arbitration agreement and this is why examination of the e-mail exchanges immediately preceding the executed agreement point to the fact that the parties had originally envisaged arbitration, then wanted to give it a complete go-by, and then brought it back. When doing so, they missed out on one provision, rendering three provisions commercially absurd. This is why it is truly necessary to apply the business efficacy test.

49. Since it is not logical or commonsensical that arbitration would be re-introduced in the agreement merely marginally, without anything special about the type of dispute covered by Section 23.3, in my considered opinion, the “penta test” is well met in the peculiar facts of the case.

Case Law Cited:

50. Each party has sought to rely on ***Jagdish Chander***³ invoking the principles enunciated in it as the basis to rule in that party’s favour – in particular, Paragraph 8 of the judgement. The principles set out in

3 *Jagdish Chander vs. Ramesh Chander and Others* – (2007) 5 SCC 719

Paragraph 8 support and give me guidance in arriving at the view I have formed. Arbitration is not being discerned merely because of the use of the word “arbitration”, without a discernible intent to arbitrate. The intent to arbitrate at least on one subject matter is writ large on the face of Section 23.3. That the parties envisaged arbitration, is also seen in Section 28.8. Therefore, it has become necessary to delve deeper by applying the business efficacy test to make the agreement efficacious and rational from a commercially commonsensical perspective. The principles declared in *Jagdish Chander* read with the principles declared in *Nabha Power* have been helpful in arriving at an appropriate resolution of this rather vexed question posed by the Resort Management Agreement.

51. I must also hasten to add that nothing contained in the analysis above would erode or curtail the right of Pushpam to make submissions under Section 16 of the Arbitration Act before the Arbitral Tribunal, appointed in subsequent paragraphs. The views expressed here are primarily the basis of my satisfaction that the parties had exercised their autonomy and agreed to arbitrate. That view shall not preclude them from bring to bear all the evidence necessary including other emails and similar correspondence that may bolster or vary this conclusion when they are before the Arbitral Tribunal.

52. In the case at hand, it is only by deploying the business efficacy test in the wake of the evident ambiguity arising from the Resort Management Agreement, that I have discerned the intent of the parties to arbitrate. It is not necessary to burden this judgement with more prolix extracts from case law cited by each side. Suffice it to say, that the reliance by Pushpam on ***Mahanadi Coalfields***⁴ would not alter my view since in that case, the Supreme Court interpreted a dispute resolution clause that did not entail arbitration, to hold that it was not an arbitration clause. On facts, there was no necessity to invoke the business efficacy test in that case. So also, in ***Pure Diets***⁵, which is cited on behalf of Pushpam, stands on a different footing. There was a mere passing reference to interlocutory relief pending arbitration proceedings in that case, that formed the basis of purporting the existence of an arbitration agreement. In this judgement too, there was no felt necessity to invoke the business efficacy test and the fact pattern as obtaining in the matter at hand, is not seen.

53. Both the Learned Counsel fairly stated that there is no case law squarely dealing with the peculiar situation at hand. Consequently, I have

⁴ *Mahanadi Coalfields Ltd. And Anr vs. IVRCL AMR Joint Venture* – 2022 SCC OnLine SC 960

⁵ *Pure Diets India Limited vs. Lokmangal Agro Industries Ltd.* – 2023 SCC OnLine Del 4486

focused on dealing with the case law that the Counsel chose to rely on as the linchpin to their submissions.

Directions:

54. Therefore, having found that an arbitration agreement can be discerned between the parties, the Section 11 Application is hereby disposed of in the following terms:-

A] Mr. Kunal Bhanage, a learned Advocate of this Court, (email ID: kunal.bhanage@gmail.com) is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;

B] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the parties within a period of two weeks from receipt of a copy of this Order;

C] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline

numbers of the respective Advocates of the parties to the Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

D] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

55. The parties shall approach the Learned Sole Arbitrator appointed hereby, no later than one week from the date on which this judgement is pronounced and uploaded on this Court's website. The Arbitral Tribunal is requested to convene as soon as practicable upon being approached by the parties, and convene a hearing under Section 17 of the Arbitration Act. The Section 9 Petition shall be treated as such an application. Until such time the Arbitral Tribunal convenes, the statement made by Pushpam shall be continued as an order of this Court.

56. It is made clear that the protection by way of the statement made by Pushpam that continues till date and is extended until the Arbitral Tribunal convenes, is purely a *pro tem* holding position and was not at all an outcome of any assessment of merits even of a *prima facie* case. Pushpam has argued that the Resort Management Agreement entails continuing obligations, does not lend itself to being monitored, and therefore, is not amenable to specific

relief. This contention may be made before the Arbitral Tribunal, which shall factor in all relevant facets and arrive at a view in dealing with appropriate interlocutory reliefs, if at all any are found necessary, under Section 17 of the Arbitration Act.

57. Both the proceedings are *finally disposed of* in the aforesaid terms. In the peculiar facts and circumstances of this case, although these are proceedings that attract the *Commercial Courts Act, 2015*, there shall be no order as to costs.

58. All actions required to be taken pursuant to this order, shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]