

Synopsis

The Petitioner i.e. M/S Rotocast Industries Limited is a Public Limited Company registered under Companies Act 1956, having registered office at 591, Urla Industrial Complex, Raipur, Chhattisgarh - 493221. The Petitioner Company is involved in manufacturing of Steel Shot and Steel Grit having their plant and factory at Raipur, Chhattisgarh. With the help of its indigenous technology, it has created niche and have obtained huge reputation and goodwill for their said products in the Indian market.

Respondent No. 1 i.e. M/S Pometon India Private Limited is a private limited Company incorporated under the Companies Act, 1956 having its registered office at A, 209, 2nd Floor, Shoppers Orbit, Pune Alandi Road, Vishrantwadi, Pune, Maharashtra - 411015. Respondent No. 1 is an Indian representative of M/S Pometon Spa a Company incorporated under the appropriate Laws of Italy having a registered office at Via Circonallazione, 2, I- 24024 Maerne de Martellago, Italy (**Respondent No. 2 herein**). The

Respondent No. 2, (the Company) is involved in manufacturing, marketing of steel shot and steel grit and enjoying equal reputation and goodwill all over Europe and in the rest of the World.

Till the year 2013 the petitioner was working independently on its own technology for development with respect to manufacturing of steel grit for granite cutting purposes. Around 21.12.2012 Mr. Virendra Sud (**the managing director of Respondent No. 1**) approached the Petitioner Company on behalf of Respondent No. 2 Company for a joint venture on a project relating to steel grit. On 24.12.2012 Respondent No. 2 wrote to Respondent No. 1, seeking certain clarifications with respect to investments for the proposed joint venture projects with the Petitioner's Company. In an addition, Respondent No. 2 wanted to ascertain the prices of machineries and other technical advisory on the proposed Joint Venture. This Email was forwarded by the Respondent no. 1 to the Petitioner Company with a note that "**the Respondents wanted to expedite the process of setting up the joint venture**". On 07.02.2013 Respondent No. 1 sent a proposal Email on behalf of Respondent No. 2 to the Petitioner for entering

into two **MOUs** (memorandum of understandings), i.e. one for Iron Powder and other for Steel grits. These deals were proposed on behalf of the respondents for achieving better technological Know-How and for appropriate upgradation of the Petitioner's existing manufacturing activities, to manufacture Steel grit for granite cutting purposes. As an attachment to the Email, the proposed cost of the Projects was shared by the Respondents, which depicted the full manufacturing cost of the granite cutting steel grit to be 556 Euro per MT of the product. The total estimated Pre-tax profit was predicted to be around 5,66,614 Euros per year for the Petitioner from the said project.

Thereafter, post several negotiations and deliberations, parties (Petitioner and Respondent) agreed to enter into an Agreement which will govern the entire transaction. Pursuant to such deliberations; one Main Agreement (Principal Contract) and two other Agreements; namely Supply Agreement and Distribution Agreement which forms a part of main Agreement was signed on 23.12.2013 at the registered office of Petitioner Company. The scope and purpose of the two Agreements are incorporated in the

Main Agreement **Vide clause 7 and 8 which are reproduced hereinunder.**

Clause 7: Supply of Equipment

- a. Pometon would be supplying special equipment as documented in a separate Agreement for a fixed and agreed monetary consideration for enabling Rotocast to manufacture steel grit of acceptable quality.*
- b. The list of aforesaid equipment along with the agreed financial consideration and other terms would be laid down in a separate Agreement.*

Clause 8: Distribution Agreement for steel shot

- a. Rotocast would enter into separate distribution Agreement with Pometon under which Pometon would exclusively sell the steel shot manufactured by Rotocast in regions around the world (outside India) wherein it has an existing marketing presence at the time of signing of this Agreement. The terms of the grant of such distribution rights would be laid out in a separate Agreement.*
- b. It is expressly clarified that for regions outside India wherein Pometon does not have an existing presence at the time of this Agreement Rotocast would be free to decide the best strategy for catering to such un-represented markets or regions for steel shot and steel grit [excluding establishment of a manufacturing unit in such regions].*

A meeting was held between the representatives of the respective parties in the office of the Petitioner and on 23.12.2013, the main Agreement (Principal Contract) was executed and the following terms were specifically agreed upon:

- i.** That the Respondent no. 1 shall supply two nos. of ball mills for crushing of steel shot into steel grit along with complete electrical panel, all

available grinding media ball, available ball mill liner, related drawing and manual and any spare, if available.

- ii.** 4 nos. of calibrator sieves with all related accessories.
- iii.** 4 nos. of vibrating sieves with all related accessories.
- iv.** One number of granite cutting testing equipment with all related accessories.
- v.** It was further agreed inter alia, that Petitioner would pay the consideration amount of Euro 4,30,00/- only for the aforesaid supply in phase-wise manner covering 1 to 3 years from the shipment in Euro currency.
- vi.** That the Respondent No. 2 herein shall provide all the necessary instructions, manual, drawing, operating procedure etc. in English or Italian to the Petitioner for assembling, installation, start-up, and smooth running of the equipment to be provided by the Respondents.

Thereafter, post conclusion of the Agreement dated 23.12.2013, material worth four lakhs thirty thousand Euro,

which is equivalent to INR 3.56 Crore which was shipped by the Respondent No. 2 to the Petitioner Company on 20.12.2018 pursuant to Board Resolution dated 28.11.2013 of the Respondent No. 2 Company reached the Registered Office of the Petitioner Company. These machineries pertained to manufacturing of steel grit for granite cutting purposes. Thereafter, the Petitioner started the process of manufacturing and they started remitting payments to the Respondent No. 2 Company. The payments remitted till date is **one lakh ninety three thousand five hundred Euro (1,93,500 Euros)**, which is equivalent to INR 1.62 Cr. The last payment was remitted on 09.12.2015.

On and from July 2015 till Jan 2017 Emails were sent repeatedly by the Petitioner regarding the issues faced by it in making granite cutting steel grit of adequate quality, this led to failure of the infield trials, as the quality of steel grit was extremely poor and below par. These failures were due to the faulty working of the machineries or quality of the machineries, which led to manufacture of defective product right from the beginning. Due to the failure of infield trials and poor quality of the granite cutting steel grit manufactured it could not be sold in the market. Due to the

aforesaid, these machineries are lying idle without any productivity in the factory of the Petitioner Company. Several requests were made to the Respondents on various occasions and also the Petitioner Company wrote an Email to the Respondents on 05.08.2016 expressing the challenges faced by them on the **Granite Grit Project**. The Email dated 05.08.2016 was very clear, which points out the defects in the product being produced and the machineries supplied by the respondents and it also mentioned that there was no help on the part of Respondents to solve the problems, which led to the total failure on the Joint Venture Project. It was also made clear therein that the Petitioner had incurred huge losses due to the failure; to the tune of Rs. 11.11 Crore, the details of which are **given below**:

<u>Sr.</u> <u>No.</u>	<u>Particulars</u>	<u>Amount (Cr.)</u>
1.	Payment made to Pometon till date	1.62
2.	Cost for constructions of foundation etc.	0.31
3.	Cost for custom duty, transportation,	2.38

	installation, commissioning, other accessories etc.	
4.	Allied other electrical equipment	0.06
5.	Allied other treatment equipment and refining furnace.	3.05
6.	Cost incurred for market trial.	0.75
7.	Cost of space rental for keeping the machine @ Rs. 50000 per month only. (Dec 15 to Dec 18)	0.18
8.	Interest loss on financial investment made and lying idle (on 8.35 Cr. @ 11 % for 3 years)	2.76
Total		11.11

In that very Email (5.8.2016) it was communicated by the Petitioner, that they would have remitted the payments if the Respondents had shared proper equipment and technologies Know-how. Thereafter, a legal notice was sent to the Petitioner from Milan (Italy) dated 07.09.2017, wherein the Respondents had demanded an amount of Euro 236.785,25 plus interest by 30.09.2017. The legal notice had contained a warning; in case of failure with respect to payment suitable recovery process would be initiated. Thereafter, a reply was sent on 04.10.2017 on behalf of the Petitioner, wherein it was clearly written that it was due to the supply of defective machineries, lack of know-how or both by the Respondents that the end products of adequate quality could not be made and hence could not be sold in the markets. This resulted in tremendous loss and prejudice for the Petitioner. It also mentioned that till October 2017 the Petitioner had incurred losses to the tune of Rs. 8.91 Cr. Thereafter, due to the increasing amount of losses incurred by the Petitioner, the Petitioner herein through Notice dated 28.11.2018 sought to invoke the Arbitration Clause 11 of the Principal Agreement dated 23.12.2013, which is referred **herein below:**

Clause 11: Disputes and their Resolution

a. Any dispute or difference arising between the parties hereto on relation to this Agreement it's construction and validity it's performance and breach or any other question relevant thereto shall be referred for adjudication to the Sole Arbitrator, Which the parties shall nominate under the Provisions of the Indian Arbitration and Conciliation Act, 1996 and award given in such proceeding shall be final and binding of the parties hereto.

b. The Place of arbitration shall be Kolkata, India and the arbitration shall be conducted in English language.

This Notice raised the following disputes for arbitration:

- i. Whether the Petitioner is entitled to have a sum of Rs. 11.11 Cr. only from both the respondents?
- ii. Whether the respondents are liable to take back the plant and machines, as supplied by them?
- iii. Whether the Petitioner is entitled to have an interest over the aforesaid claim amount?

Thereafter, in Para 17 of the said Notice the Petitioner recommended the name of **Mr. Joy Saha**, Sr. Advocate, R/o 7, Old Post office street, 3rd floor, Kolkata- 700001 as per Clause 11 of Principal Agreement dated 23.12.2013. The Respondent through their Counsel replied on 18.12.2018, wherein the Respondents had refused to invoke the Arbitration Clause as according to them the entire transaction was governed by the Supply Agreement dated 23.12.2013 and that Agreement does not contain any

Arbitration Clause. They have relied on Invoice No. 132943 dated 20.12.2013 Vide which machineries and associated equipment sold to the Petitioner and according to the Invoice, any dispute with respect to the machineries would be the subject matter of jurisdiction of Courts Venice, Italy. It is pertinent to note here that these machineries were supplied pursuant to the final deliberations between the Petitioners and Respondents. The Board Resolution dated 28.11.2013 of the Respondent no. 1 Company, which is the authorised representative of Respondent no. 2 Company stated that, "*the* Respondents would execute a Contract with the Petitioner Company for providing Know-how and technical guidance. It also mentions that, there would two other contracts namely, equipment purchase and Royalty Agreement in connection with the proposed mother Contract. Therefore, the aforesaid Board Resolution clearly proves the fact that there is a Principal Contract and two other Contracts, which are the parts of the Principal Contract.

In light of the aforesaid, the following questions arise for consideration in this Petition:

- I. Whether the Arbitration Clause in the Principal Agreement dated 23.12.2013, which refers to two other Agreements i.e. Supply Agreement and Distribution Agreement will also be read into the other two Agreements vide the theory of Incorporation?
- II. Whether the Invoice referred above will prevail over the Agreements?

It is settled Law that for Petition under Section 11 (6) read with Section 11 (12) (a) of Arbitration and Conciliation Act, 1996, the limit of scrutiny by the Courts is only to the limited extent of the following issues:

- i. Whether there is an Arbitration Agreement or Arbitration clause and whether the party who has applied, is a party to such Agreement?
- ii. Whether the claim is a life claim or time-barred claim?
- iii. The jurisdiction to entertain such application.

It has been long settled by the Hon'ble Supreme Court in the Judgment of **Today Homes & Infrastructure P. Ltd. V. Ludhiana Improvement Trust**, (2014) 5 SCC 68, wherein it was held that "*the Court is not required to undertake a detailed scrutiny of the merits and demerits of the case, almost as if he was*

deciding a suit". It is also settled by the Judgement of the Supreme Court in **Omnia technologies P. Ltd V. W.M.A. Van Loobroek, (2011) 3 SCC 682**, wherein it was held that *"Issues as to the interpretations and effect of a clause including existence of arbitrable disputes, is to be decided by the Arbitrator"*.

The Objection raised on behalf of the Respondents with respect to the Invoice and that it prevails over the Agreements with respect to the jurisdiction is not tenable in view of the Judgment of the Supreme Court in **Govind Rubber Limited V. Louis Dreyfus Commodities Asia Private Limited, (2015) 13 SCC 477**

It is settled law that, Arbitration Clause in the principal contract can be imported into the subsequent contracts, notwithstanding the fact that arbitration clause is not specifically provided for in the subsequent Agreements or Agreements which are concurrent with the Principal Contract. Such incorporation of arbitration clause to a subsequent contract has been statutorily recognized [Section 7(5) Of the Arbitration and Conciliation Act, 1996] and by the judicial precedents:

- i) National Aluminium Company Limited vs. The Doaba Industrial and Trading Co. (P) Ltd [AIR 2008 ORI 12]
- ii) Dwarkadas and Co vs. Daluram Goganmull [1950 ILR 656 (Cal.) (FB)]

Hence, in view of the aforesaid facts, it is respectfully submitted that the Principal Agreement (Principal Contract) dated 23.12.2013 incorporates the other two Agreements (Supply and Distribution), which are subsets of the aforesaid Agreement executed on the same day and reference to the other Agreements have been made therein specifically. Therefore, the question of separate Agreement and non-existence of Arbitration Clause is un-tenable and is liable to be rejected in view of the aforesaid settled position of Law.

Hence, this Petition is being filed with a humble prayer and request to appoint an Arbitrator to adjudicate the above mentioned disputes. This Petition is being preferred before this Hon'ble Court under Section 11(6) read with section 11(12) (a) as the present dispute falls within the category of International Commercial Arbitration.

Therefore, this Petition.

LIST OF DATES

1. 10.01.1990 M/S Rotocast Industries Limited, the Petitioner herein was incorporated under Companies Act, 1956. Presently it is one of the leading producers of steel grits and granites in India and enjoys almost 40 % of the market share.
2. 21.12.2012 An Email dated 21.12.2012 was sent by the managing director of the Respondent No. 1 Company, which is the Indian representative of the Respondent No. 2 Company, which is incorporated in Venice (Italy), to the Petitioner Company requesting for certain information

on the proposed steel grit project (Joint Venture). The queries related to technology and the drawing of machines. A true copy of the Email dated 21.12.2012 is annexed herewith and marked as **Annexure P-1**.

3. 24.12.2012 An Email dated 24.12.2012 was sent by the Managing Director (herein after referred to as MD), wherein certain queries raised by the Respondent No. 2 Company was forwarded to the Petitioner Company, which were related to technical specifications related to the Iron Powder Project. A true copy of an Email dated 24.12.2012 is annexed herewith and marked as **Annexure P-2**.

4. 15.01.2013 Email dated 15.01.2013 was sent by the Petitioner Company to the

Respondent No. 2 Company wherein further information on the project report related to steel grit Project was sought. It was made clear by this email that a Non-Disclosure Agreement has been signed between the Petitioner and the Respondents related to granite cutting grits. A true copy of email dated 15.01.2013 is annexed herewith and marked as **Annexure P-3**.

5. 23.01.2013 Email dated 23.01.2013 was sent by the Respondent No. 1 to the Petitioner wherein the hypothesis of the grit project along with diagrammatic representation of the equipment used in Italy were shared. A true copy of an Email dated 23.01.2013 is annexed here with and marked as **Annexure P-4**
6. 24.01.2013 Email dated 24.01.2013 was sent by

the Petitioner to the Respondents herein requesting them to assign numbers to the key equipment, for example the balls mills, Gas fired Rotary Drying Oven, Gas fired Rotary Drying Oven for heat treatment and testing machine for evaluating quality of the Grits. A true copy of an Email dated 24.01.2013 is annexed here with and marked as **Annexure P-5**.

7. 07.02.2013 Email was sent by the Respondents herein to the Petitioner, wherein draft MOU, production, forecast, and variable cost was shared. A true copy of an Email dated 07.02.2013 is annexed here with and marked as **Annexure P-6**.

8. 20.02.2013 Email dated 20.02.2013 was sent by the Petitioner to the respondents enclosing the profitability projections for the JV related to

steel grit. The projected pre-tax profit was estimated at 7,45,544 Euros. A true copy of an Email dated 20.02.2013 is annexed here with and marked as **Annexure P-7**.

9. 24.04.2013 Email dated 24.04.2013 was sent by the Respondents to the Petitioner annexing the business project report on the proposed JV on Steel grit. A true copy of an Email dated 24.04.2013 is annexed here with and marked as **Annexure P-8**.

10. 16.05.2013 Email dated 16.05.2013 was sent by the Petitioner to the Respondents, wherein comments were sent on the proposed MOU related to the steel grit JV. A true copy of an Email dated 16.05.2013 is annexed here with and marked as **Annexure P-9**.

11. 28.11.2013 A Board Resolution dated 28.11.2013 was passed by the

Respondents herein. The Board Resolution speaks about a main contract, which was to be executed between the Petitioner and the Respondents for exchange of technical Know-how and technical guidance with respect to steel grits. It also speaks about accompanying Agreements with the proposed Contract, which would relate to equipment purchase and royalty. A true copy of an Email dated 28.11.2013 is annexed here with and marked as **Annexure P-10**.

12. 20.12.2013

Invoice dated 20.12.2013 was sent along with the equipment worth 4,30,000 Euros as per the proposed MOU for the steel grit JV to the Petitioner herein. A true copy of an Email dated 20.12.2013 is annexed here with and marked as **Annexure P-11**.

13. 23.12.2013 Three Agreements were executed between the Petitioner and the Respondents at the registered office of the Petitioner herein. The three Agreements were the Principal Agreement, the Supply Agreement and the Distribution Agreement. The Principal Agreement incorporates the other two Agreements Vide Clauses 7 and 8. The Principal Agreement, which governs this JV (Joint Venture) has an Arbitration Clause, wherein the jurisdiction is Kolkata. A true copy of the Agreements dated 23.12.2013 are annexed here with and marked as **Annexure P-12 (COLLY)**.
14. 18.09.2014 Email dated 18.09.2014 was sent by the Petitioner to the Respondents wherein queries related to the Operations of Ball mills and its

commissioning were raised, which was duly replied by the Respondents on 26.09.2014. The true copy of an Email dated 18.09.2014 is annexed herewith and marked as **Annexure P-13**.

15. 15.07.2015 Email dated 15.07.2015 was sent by the Petitioner to the Respondents, wherein issues relating to the quality of grit, which led to the failure of infield trials of granite cutting was shared. The issue mainly related to the Ball mills and its accompanying equipment supplied by the Respondents herein. Serious concern was raised as the project was leading to failure due to the poor quality of equipment supplied by the Respondents. A true copy of an Email dated 15.07.2015 is annexed here with and marked as **Annexure**

P-14.

16. 27.07.2015 Email dated 27.07.2015 was sent by the Respondents demanding payments as per the due instalment. A true copy of an Email dated 27.07.2015 is annexed herewith and marked as Annexure P-15.

17. 10.12.2015 Email dated 10.12.2015 was sent by the Respondent No.2 to the Petitioner acknowledging the payment of 20,000 Euros, which was remitted to the Respondents on 9.12.2015. As on that date INR 1.62 Cr. was remitted to the Respondents. Email dated 10.12.2015 sent by the Respondents confirming the receipt of 20,000 Euro sent by the Petitioner on 9.12.2015 is annexed herewith and marked as Annexure **P-16.**

18. 05.08.2016 Email dated 05.08.2016 was sent by

the Petitioner to the Respondents, wherein the Petitioner Company duly acknowledged the payment reminders, but clearly reiterated its earlier stand that as the project was complete failure due to defective machineries and non-cooperation on the part of the Respondents. It was also made clear that payments cannot be disbursed as there was zero profit and zero productivity. The Petitioner made it clear that it had incurred huge losses due to defective products manufactured, defective machineries & lack of know how supplied by the Respondents. A true copy of an Email dated 05.08.2016 is annexed herewith and marked as Annexure **P- 17.**

19 07.09.2017

Legal notice was sent to the Petitioner Company demanding

the balance payment of 236.785,25 Euro by 30.09.2017, failing which legal recourses was to be taken. A true copy of legal Notice 07.09.2017 is annexed herewith and marked as **Annexure P-18.**

20 04.10.2017 Reply dated 04.10.2017 was sent to the Respondents wherein the loss incurred by the Petitioner Company to the tune of 11.11 Cr. was intimated and the claim for balance payment was refuted with due explanations. A true copy of reply dated 04.10.2017 is annexed herewith and marked as **Annexure P-19.**

21 28.11.2018 Legal notice dated 28.11.2018 was sent to the Respondents invoking the Arbitration Clause and requesting for the appointment of an Arbitrator for adjudication of claim. A true copy of legal notice

dated 28.11.2018 invoking Arbitration Clause is annexed herewith and marked as **Annexure P-20**.

22 18.12.2018 Reply dated 18.12.2018 were sent by the Respondents to the aforesaid notice refusing to invoke the Arbitration Clause as according to them the supply of equipment was governed by the Supply Agreement and Invoice dated 20.12.2013, which does not contain an Arbitration Clause. A true copy of reply dated 18.12.2018 is annexed herewith and marked as **Annexure P-21**.

23 .03.2019 Present Petition is being filed under Section 11(6) read with 11 (12) (a) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. OF 2019

[UNDER SECTION 11(6) READ WITH 11(12) (a) OF THE
INDIAN ARBITRATION AND CONCILIATION ACT,
1996]

BETWEEN

M/S Rotocast Industries
Limited, a company
incorporated under the
Companies Act, 1956 carrying
on its business, inter alia, from
591, URLA INDUSTRIAL
COMPLEX RIAPUR- 493221,
Chhattisgarh, India
Through its Director

...Petitioner

-VERSUS-

1. M/S Pometon India Private
Limited, a company
incorporated under the
Companies Act, 1956 having its
office at A, 209, 2nd Floor,
Shoppers Orbit, Pune Alandi
Road, Vishrantwadi, Pune,
Maharashtra-411015.
Through its Directors

2. M/S Pometon Spa, a Company,
a body corporate incorporated under
the relevant laws of Italy having its
office at Via Circonallazione, 2, I- 24024 Maerne de
Martellago, Italy

Through its Directors

...Respondents

To,

HON'BLE CHIEF JUSTICE OF INDIA,
AND HIS COMPANION JUSTICES OF THE
SUPREME COURT OF INDIA.

THE HUMBLE PETITIONERS OF THE ABOVE NAMED
MOST RESPECTFULLY SHOWETH:

1. This request to the Hon'ble Chief Justice of India is made under Section 11(6) read with Section 11(12)(a) of the Arbitration and Conciliation Act, 1996, and with the Appointment of Arbitrators by the Chief Justice of India Scheme, 1996. The following particulars are submitted herewith, as required by the Scheme :-

1.1. Rule 2(a) of the Scheme – the original arbitration agreement or a duly certified copy thereof: the arbitration clause is contained in Clause 11 of the Principal Agreement dated 23.12.2013 entered into between the present Petitioner and the Respondents.

A copy of the Principal Agreement dated 23.12.2013 is annexed herewith and marked as **Annexure P/12** (page no. to).

An application seeking exemption from filing the original/certified copy of the Principal Agreement dated 23.12.2013 is also being filed.

1.2. Rule 2(b) of the Scheme – the names and addresses of the parties to the arbitration Agreement: pursuant to the above-referenced Principal Agreement dated 23.12.2013, the names and addresses of the parties to the arbitration Agreement are as stated in the cause title above.

1.3. Rule 2(c) of the Scheme – The names and addresses of the arbitrators, if any, already appointed: The present Petitioner has recommended the name of Mr. Joy Saha Sr. Advocate as their Arbitrator. The address of the Mr. Joy Saha, Sr. Advocate is Old Post Office Street, 3rd Floor, Kolkata- 700001:

Mr. Joy Saha, Sr. Advocate,
High Court at Calcutta.

- 1.4. Rule 2(d) of the Scheme – the name and address of the person or institution, if any, to whom or which any function has been entrusted by the parties to the arbitration Agreement under the appointment procedure agreed upon by them:
The parties have not specified scheme of appointment of Arbitrator. The petitioner proposes for the appointment of a Sole Arbitrator.
- 1.5. Rule 2(e) of the Scheme – the qualifications required, if any, of the arbitrators by the Agreement of the parties:- The parties have not specified any qualifications required. Hence the provision as to qualification is not applicable.
- 1.6. Rule 2(f) of the Scheme – a brief written statement describing the general nature of the dispute and the points at issue: a brief written statement describing the general nature of dispute and the points at issue is contained in paragraph 5 of the present Petition.

1.7. Rule 2(g) of the Scheme – the relief or remedy sought: The relief sought by the present Petitioner has been stated in paragraph 15 of the present Petition.

1.8. Rule 2(h) of the Scheme – an affidavit, supported by relevant documents, to the effect that the condition to be satisfied under subsection (4) or sub section (5) or sub section (6) of Section 11, as the case may be, before making the request to the Chief Justice, has been satisfied: an affidavit supporting the present Petition to the effect that conditions under sub section (6) of Section 11 of the Act have been satisfied before making this application, is submitted along with this Petition.

2. The addresses of the Petitioner and Respondents for the purpose of service of summons, notices and other documents are as set out in the cause title above. The present Petitioner may also be served through its counsel, Ms. Pallavi Pratap, Advocate-on-Record, Supreme Court of India, A-69, Lower Ground Floor, Nizamuddin East, Delhi.

3. The present Petitioner is a company incorporated under the Companies Act, 1956 of India, having its registered office as mentioned in the cause-title. The same is represented by Mr. Manish Mohta (the Whole time Director), who is the duly authorised representative of the Company to file, institute and pursue the present Petition, pursuant to the Petitioner's Board Resolution dated 18.02.2019.

4. The Respondent No. 1 is a company incorporated under the Companies Act, 1956 of India, having its registered office as mentioned in the cause-title, Respondent No. 2 is a company incorporated under the appropriate laws of Italy.

5. The facts and circumstances in the present matter as set out hereinafter:

5.1. M/S Rotocast Industries Limited, the Petitioner herein was incorporated under Companies Act, 1956. Presently it is one of the leading producers of steel grits and granites in India and enjoys almost 40 % of the market share.

5.2. An Email dated 21.12.2012 was sent by the managing director of the Respondent No. 1

Company, which is the Indian representative of the Respondent No. 2 Company, which is incorporated in Venice (Italy), to the Petitioner Company requesting for certain information on the proposed steel grit project (Joint Venture). The queries related to technology and the drawing of machines. A true copy of the Email dated 21.12.2012 is annexed herewith and marked as **Annexure P-1**.

5.3. An Email dated 24.12.2012 was sent by the Managing Director (herein after referred to as MD), wherein certain queries raised by the Respondent No. 2 Company was forwarded to the Petitioner Company, which were related to technical specifications related to the Iron Powder Project. A true copy of an Email dated 24.12.2012 is annexed herewith and marked as **Annexure P-2**.

5.4. Email dated 15.01.2013 was sent by the Petitioner Company to the Respondent No. 2 Company wherein further information on the project report related to steel grit Project was sought. It was made clear by this email that a Non-Disclosure Agreement has been signed between the Petitioner and the Respondents related to granite cutting

grits. A true copy of email dated 15.01.2013 is annexed herewith and marked as **Annexure P-3**.

- 5.5. Email dated 23.01.2013 was sent by the Respondent No. 1 to the Petitioner wherein the hypothesis of the grit project along with diagrammatic representation of the equipment used in Italy were shared. A true copy of an Email dated 23.01.2013 is annexed here with and marked as **Annexure P-4**
- 5.6. Email dated 24.01.2013 was sent by the Petitioner to the Respondents herein requesting them to assign numbers to the key equipment, for example the balls mills, Gas fired Rotary Drying Oven, Gas fired Rotary Drying Oven for heat treatment and testing machine for evaluating quality of the Grits. A true copy of an Email dated 24.01.2013 is annexed here with and marked as **Annexure P-5**.
- 5.7. Email was sent by the Respondents herein to the Petitioner, wherein draft MOU, production, forecast, and variable cost was shared. A true copy of an Email dated 07.02.2013 is annexed here with and marked as **Annexure P-6**.
- 5.8. Email dated 20.02.2013 was sent by the Petitioner to the respondents enclosing the profitability

projections for the JV (Joint Venture) related to steel grit. The projected pre-tax profit was estimated at 7,45,544 Euros. A true copy of an Email dated 20.02.2013 is annexed here with and marked as **Annexure P-7**.

5.9. Email dated 24.04.2013 was sent by the Respondents to the Petitioner annexing the business project report on the proposed JV on Steel grit. A true copy of an Email dated 24.04.2013 is annexed here with and marked as **Annexure P-8**.

5.10. Email dated 16.05.2013 was sent by the Petitioner to the Respondents, wherein comments were sent on the proposed MOU related to the steel grit JV. A true copy of an Email dated 16.05.2013 is annexed here with and marked as **Annexure P-9**[pages...to..].

5.11. A Board Resolution dated 28.11.2013 was passed by the Respondents herein. The Board Resolution speaks about a main contract, which was to be executed between the Petitioner and the Respondents for exchange of technical Know-how and technical guidance with respect to steel grits. It also speaks about accompanying Agreements with

the proposed Contract, which would relate to equipment purchase and royalty. A true copy of an Email dated 28.11.2013 is annexed here with and marked as **Annexure P-10 [pages.....to.....]**.

5.12. Invoice dated 20.12.2013 was sent along with the equipment worth 4,30,000 Euros as per the proposed MOU for the Steel Grit Joint Venture (JV) to the Petitioner herein. A true copy of an Email dated 20.12.2013 is annexed here with and marked as **Annexure P-11[pages.....to.....]**.

5.13. Three Agreements were executed between the Petitioner and the Respondents at the registered office of the Petitioner herein. The three Agreements were the Principal Agreement, the Supply Agreement and the Distribution Agreement. The Principal Agreement incorporates the other two Agreements Vide Clauses 7 and 8. The Principal Agreement, which governs this JV (Joint Venture) has an Arbitration Clause, wherein the jurisdiction is Kolkata. A true copy of the Agreements dated 23.12.2013 are annexed here with and marked as **Annexure P-12 (COLLY)[pages....to.....]**.

5.14. Email dated 18.09.2014 was sent by the Petitioner to the Respondents wherein queries related to the Operations of Ball mills and its commissioning were raised, which was duly replied by the Respondents on 26.09.2014. The true copy of an Email dated 18.09.2014 is annexed herewith and marked as **Annexure P-13 [pages....to.....]**.

5.15. Email dated 15.07.2015 was sent by the Petitioner to the Respondents, wherein issues relating to the quality of grit, which led to the failure of infield trials of granite cutting was shared. The issue mainly related to the Ball mills and its accompanying equipment supplied by the Respondents herein. Serious concern was raised as the project was leading to failure due to the poor quality of equipment supplied by the Respondents. A copy of the Email dated 15.07.2015 is annexed here with and marked as **Annexure P-14 [pages..to....]**.

5.16. Email dated 27.07.2015 was sent by the Respondents demanding payments as per the due instalment. A true copy of an Email dated

27.07.2015 is annexed herewith and marked as **Annexure P-15 [pages.....to.....]**.

5.17. On 10.12.2015, Respondent No.2 sent an email to the Petitioner Company herein acknowledging the payment of 20,000 Euro, which was remitted to the Respondents on 9.12.2015 by the Petitioner Company. As on that date INR 1.62 Cr. was remitted to the Respondents. A true copy of email dated 10.12.2015 acknowledging the receipt of 20,000 Euro is annexed herewith and marked as **Annexure P-16 [pages.....to.....]**

5.18. Email dated 05.08.2016 was sent by the Petitioner to the Respondents, wherein the Petitioner Company duly acknowledged the payment reminders, but clearly reiterated its earlier stand that as the project was complete failure due to defective products manufactured, defective machineries and non-cooperation/non-transfer of know-how on the part of the Respondents. It was also made clear that payments cannot be disbursed as there was zero profit and zero productivity. The Petitioner made it clear that it had incurred huge losses due to defective machineries supplied by the

Respondents. A true copy of an Email dated 05.08.2016 is annexed herewith and marked as **Annexure P- 17 [pages.....to.....].**

5.19. Legal notice was sent to the Petitioner Company demanding the balance payment of 236.785,25 Euro by 30.09.2017, failing which legal recourses was to be taken. A true copy of legal Notice 07.09.2017 is annexed herewith and marked as **Annexure P-18 [pages.....to.....].**

5.20. Reply dated 04.10.2017 was sent to the Respondents wherein the loss incurred by the Petitioner Company to the tune of 11.11 Cr. was intimated and the claim for balance payment was refuted with due explanations. A true copy of reply dated 04.10.2017 is annexed herewith and marked as **Annexure P-19 [pages.....to.....].**

5.21. Legal notice dated 28.11.2018 was sent to the Respondents invoking the Arbitration Clause and requesting for the appointment of an Arbitrator for adjudication of claim. A true copy of legal notice dated 28.11.2018 invoking Arbitration Clause is annexed herewith and marked as **Annexure P-20 [pages.....to.....].**

5.22. Reply dated 18.12.2018 were sent by the Respondents to the aforesaid notice refusing to invoke the Arbitration Clause as according to them the supply of equipment was governed by the Supply Agreement and Invoice dated 20.12.2013, which does not contain an Arbitration Clause. A true copy of reply dated 18.12.2018 is annexed herewith and marked as **Annexure P-21 [pages...]**.

5.23. That as per the arbitration clause, the petitioner proposed to appoint Mr. Jay Saha, Senior Advocate,, High Court at Calcutta to adjudicate the disputes between the parties.

5.24. The dispute to be adjudicated upon included the following:

(i) Whether the Arbitration Clause in the Principal Agreement dated 23.12.2013, which refers to two other Agreements i.e. Supply Agreement and Distribution Agreement will also be read into two other Agreements vide the theory of Incorporation?

(ii) Whether the Invoice referred above will prevail over the Agreements?

(iii) Whether the Respondents are liable to pay for the losses to the tune of Rs. 11.11 Cr to the Petitioner herein?

(iv) Whether the machinery supplied by Respondent No. 2 herein and the know-how was defective or lacking since products manufactured were defective?

5.25. The disputes have arisen out of Principal Agreement wherein the petitioner as well as the respondents have right therein and as such are bound by the arbitration clause. The arbitration clause is valid in nature and there are live disputes pending between the parties. The respondent no.1 is the Indian agent and the respondent no.2, which is a body corporate, incorporated in a country other than India; Italy herein. The disputes relate to failure of the infield trials as the quality of steel grit was extremely poor and below par. These failures were due to the fault of the machineries or quality of the machineries, which were defective right from the beginning. Due to the failure of infield trials the final products could not be sold in the market. Due to the aforesaid, these machineries are lying idle

without any productivity in the factory of the Petitioner Company. Several requests were made to the Respondents on various occasions and also the Petitioner Company wrote an Email to the Respondents on 05.08.2016 expressing the challenges faced by them on the **Granite Grit Project**. The Email was very clear, which points out the defects in the machineries supplied by the respondents and it also mentioned that there was no help on the part of Respondents to solve the problems, which led to the total failure on the Joint Venture Project. It was also made clear therein that the Petitioner had incurred huge losses due to the failure; to the tune of Rs. 11.11 Crore, the details of which are **given below**:

<u>Sr.</u> <u>No.</u>	<u>Particulars</u>	<u>Amount (Cr.)</u>
1.	Payment made to Pometon till date	1.62
2.	Cost for constructions of foundation etc.	0.31
3.	Cost for custom duty,	2.38

	transportation, installation, commissioning, other accessories etc.	
4.	Allied other electrical equipment	0.06
5.	Allied other treatment equipment and refining furnace.	3.05
6.	Cost incurred for market trial.	0.75
7.	Cost of space rental for keeping the machine @ Rs. 50000 per month only. (Dec 15 to Dec 18)	0.18
8.	Interest loss on financial investment made and lying idle (on 8.35 Cr. @ 11 % for 3 years)	2.76
Total		11.11

The dispute relates to Supply of faulty and poor quality of machinery pursuant to Agreements

dated 23.12.2018, which contains Arbitration Clause and any dispute arising out of Principal Agreement is to be delivered by way of arbitration which the petitioner has availed by invocation of the arbitration clause. The instant arbitration is an **“international commercial arbitration”** as defined under Section 2(1) (f) of the Arbitration & Conciliation Act 1996 (as Amended by the Act of 2015) since one of the parties being the respondent no.2 herein is a body corporate incorporated in a country other than India.

5.26. The respondent no.1 being the Indian agent of the respondent no.2 is intrinsically connected with the disputes between the parties and as such the respondent no.1 cannot be separated from the cause of action with the petitioner as ventilated in the invocation notice as well as herein. Respondent No. 2 supplied the machineries through Respondent No. 1 to the Petitioner herein. As Respondent No. 2 is a Company registered in Italy and the goods have been supplied from Italy, the transaction falls within the domain of International Commercial Arbitration. Hence this Petition under

Section 11(6) read with Section 11(12) (a) of Arbitration and Conciliation Act, 1996.

5.27. Legal Notice dated 28.11.2018 was sent to the Respondents invoking the Arbitration Clause and requesting for the appointment of an Arbitrator for adjudication of claim. Despite this Legal Notice sent by the Petitioner for appointment of an Arbitrator, the Respondents has refused to nominate an Arbitrator on its behalf and mentioned in its reply dated 18.12.2018 that according to them the Supply of equipment was governed by the Supply Agreement and Invoice dated 20.12.2013, which does not contain an Arbitration Clause. The Petitioner submits that the parties are bound by the terms of the Principal Agreement dated 23.12.2013 and the Principal Agreement contains an arbitration clause as Clause No. 11 which reads as follows:

“Clause 11: Disputes and their Resolutions.

a. Any dispute or difference arising between the parties hereto on relation to this Agreement it's construction and validity it's performance and breach or any other question relevant thereto shall be

referred for adjudication to the Sole Arbitrator, Which the parties shall nominate under the Provisions of the Indian Arbitration and Conciliation Act, 1996 and award given in such proceeding shall be final and binding of the parties hereto.

b. The Place of arbitration shall be Kolkata, India and the arbitration shall be conducted in English language”.

5.28. It is humbly submitted that nomination of the Arbitrator is quintessential for final adjudication of disputes between the parties. As a result of the Respondents non-responsive and indifferent attitude, the Petitioner is precluded from taking further course of action towards resolution of disputes between the parties and also on account of failure of the other party to appoint its Arbitrator in the current dispute falling under international commercial arbitration, the current Petition has been made under Section 11 (6) read with 11(12)(a) of the Indian Arbitration and Conciliation Act, 1996 seeking appointment of Arbitrator.

6. Despite several requests made by the Petitioner as set out hereinabove for appointment of an Arbitrator the

Respondents has failed to nominate an Arbitrator on its behalf rather has rebutted the notice of Arbitration vide Reply dated 18.12.2018. The Petitioner submits that the parties are bound by the terms of the Arbitration clause contained in Clause 11 of the Principal Agreement dated 23.12.2013. It is submitted that nomination of the arbitrator is quintessential for final adjudication of disputes between the parties. As a result of the Respondent's malafide, non-responsive and indifferent attitude, the Petitioner is precluded from taking further course of action towards resolution of disputes between the parties.

7. Further, the Petitioner submits that the Petitioner's invocation of its rights to arbitrate and that the existence of an arbitral dispute is beyond doubt. In such circumstances, the Petitioner Company herein is constrained to move before this Hon'ble Court for appointment of an Arbitrator and to refer the matter/dispute to arbitration.
8. The Petitioner submits that on account of failure of the other party to appoint its Arbitrator in the current dispute falling under international commercial arbitration, the

current Petition has been made under Section 11(12)(a) of the Indian Arbitration and Conciliation Act, 1996. The said section is reproduced below:

“11. Appointment of Arbitrators.

(6) Where, under an appointment procedure agreed upon by the parties, —

- a. A party fails to act as required under that procedure; or
- b. The parties, or the two appointed arbitrators, fail to reach an Agreement expected of them under that procedure; or
- c. A person, including an institution, fails to perform any function entrusted to him or it under that procedure, a party may request the Chief Justice or any person or institution designated by him to take the necessary measure, unless the Agreement on the appointment procedure provides other means for securing the appointment.

(12) (a) Where the matters referred to in sub-section (4), (5), (6),(7),(8) and (10) arise in an international commercial arbitration, the reference to “Chief Justice” in those sub-sections shall be construed as reference to the “Chief Justice of India”.”

9. Since the Respondents has failed to nominate an Arbitrator, thereby displaying utter disregard of the terms of the Agreement, the Petitioner has no recourse but to approach this Hon'ble Court for the purposes of appointment of an Arbitrator on behalf of the Respondents.

10. The Petitioner craves leave to add, alter, amend or delete any of the foregoing paragraphs of this Petition as and when required.

11. The Petitioner humbly submits that the jurisdiction lies with the Supreme Court as it is International Commercial Arbitration. The jurisdiction clause of the Contract provides for the seat of Arbitration to be Kolkata. Also under the said Principal Agreement dated 23.12.2013 the Jurisdiction, to decide all matters, disputes and controversies relating to the Agreement, including the Arbitration proceedings, has been conferred exclusively on Courts in India. The present matter arises out of an International commercial arbitration and therefore this Hon'ble Court has jurisdiction to entertain, try and dispose off the present Petition.

12.No claim is being made herein which is barred by the Law of Limitation.

13.The Petitioner has paid the fixed necessary Court Fees on this petition.

14.The present Petitioner has not filed any other similar petition in any other Court.

PRAYER

Under the circumstance, it is most respectfully prayed that this Hon'ble Court may be pleased to -

- a. Appoint a Sole Arbitrator to adjudicate all disputes and difference between the Petitioner and the Respondents that have arisen under the Principal Agreement dated 23.12.2013 and/or in connection thereof and/or incidental thereto; and
- b. Designate Kolkata as the seat and venue of Arbitration; and
- c. Direct the present Respondents to pay costs, to the present Petitioner, as this Hon'ble Court may deem fit; and
- d. Pass such other or further orders/directions as this Hon'ble Court may deem fit and proper in the facts and circumstance of this case.

AND FOR THIS ACT OF KINDNESS AND JUSTICE THE PETITIONERS SHALL AS IN DUTY BOUND EVER PRAY.

DATED: .03.2019

Drafted by:

Swarnendu Chatterjee

Advocate

Filed by:

PALLAVI PRATAP

ADVOCATE ON RECORD FOR THE PETITIONER

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

ARBITRATION PETITION NO. OF 2019

IN THE MATTER OF

Rotocast Industries Limited ..Petitioner

VERSUS

M/S Pometon India Private Limited and Anr .Respondents

AFFIDAVIT

I, Manish Mohta, son of Hari Krishna Mohta, aged about 41 years, r/o E -1, Anupam Nagar, Raipur, Chattisgarh-493221, do hereby solemnly affirm and state as under:

1. That I am the whole-time Director of the petitioner

Company and I have been authorised to represent the Company in the above mentioned matter Vide Board Resolution dated 18.02.2019 and as Such I am fully conversant with the facts and circumstances of the case.

2. That the contents of the accompanying Arbitration

Petition Pages 1 to and

Paras and Synopsis & list of dates and

I.As have been read over and explained to me in English language, which are true and correct to the best of my knowledge and belief, based on record of

the case and nothing material has been concealed therein.

3. That the Annexures filed along with the Arbitration Petition are true and correct copies of their respective originals and they form part of the courts below.

Deponent

Verification:

Verified at _____ on _____ day of March, 2019
that the contents of the Para 1 to 3 of this affidavit are true
and correct to my knowledge and belief and nothing
material has been concealed therefrom.

Deponent