

NATIONAL COMPANY LAW APPELLATE TRIBUNAL**PRINCIPAL BENCH****NEW DELHI****COMPANY APPEAL (AT) No.87 of 2024**

(Arising out of judgement and order dated 1st February, 2024 passed by the National Company Law Tribunal, New Delhi in Company Petition No.35/PB/2022)

In the matter of:**GH Energy Pvt. Ltd.**

Having its registered office at:
108, Sachdeva Towers, Karkardooma
Community Centre, Karkardooma,
East Delhi - 110092

Appellant

Vs

1. Flovel Hydro Technologies Pvt Ltd

Company incorporated under the provisions of the Companies Act, 1956, having its registered office at Flat No. 618, 6th Floor, Hemkunt Chambers, 89,
Nehru Place, New Delhi 110019
No. 1

Respondent

2. Mecamidi S.A.

(Under Liquidation), through its Liquidator,
Maitre Antoine Barti-Magria,
R/o 15 Rue de l'hotel de Ville 92200
Neuilly Sur Seine, France

Respondent No. 2

For Appellant: Mr Kartik Kaushal, Mr. Mohd Faraz Anees, Advocates.

For Respondent: Mr Sudhir K Makkar, Sr Advocate, Ms Saumya Gupta, Mr. Kanishk Garg, Mr Anirudh Wadhwa, Mr Kartik Gupta, Mr Kartik Garg, Advocates.

WITH**COMPANY APPEAL (AT) No.89 of 2024**

(Arising out of judgement and order dated 1st February, 2024 passed by the National Company Law Tribunal, New Delhi in Company Petition No.35/PB/2022)

In the matter of:**Mecamidi HPP India Pvt Ltd**

Through its Authorized Representative
 Mr. Ramgopal Jalindra
 Property No. 116, First Floor, DLF Tower B, Jasola,
 New Delhi – 110025

Appellant

Vs

1. Flovel Hydro Technologies Pvt Ltd

Company incorporated under the provisions of the Companies Act,
 1956, having its registered office at Flat No. 618, 6th Floor, Hemkunt
 Chambers, 89,
 Nehru Place, New Delhi 110019
 No. 1

Respondent

2. Mecamidi S.A.

(Under Liquidation), through its Liquidator,
 Maitre Antoine Barti-Magria,
 R/o 15 Rue de l'Hotel de Ville 92200
 Neuilly Sur Seine, France

Respondent No. 2

For Appellant: Mr P Nagesh, Sr Advocate, Mr. Ankur Goel, Advocate.

For Respondent: Mr Sudhir K Makkar, Sr Advocate, Ms Saumya Gupta, Mr.
 Kanishk Garg, Mr Anirudh Wadhwa, Mr Kartik Gupta, Mr Kartik Garg,
 Advocates.

WITH**COMPANY APPEAL (AT) No.90 of 2024**

*(Arising out of judgement and order dated 1st February, 2024 passed by the
 National Company Law Tribunal, New Delhi in Company Petition
 No.35/PB/2022)*

In the matter of:**1. Sanjeev Kapoor & Anr.**

Director of Mecamidi HPP India Private Limited
 KL 101, 1st Floor, Eldeco Utopia,
 Sector- 93A, Noida, Uttar Pradesh – 201301

2. Amarjeet Singh

Managing Director of Mecamidi HPP India Private Limited
C-45, 1st Floor, Greater Kailash Part-1, New Delhi-110049

Appellants

Vs

1. Flovel Hydro Technologies Pvt Ltd

Company incorporated under the provisions of the Companies Act,
1956, having its registered office at Flat No. 618, 6th Floor, Hemkunt
Chambers, 89,

Nehru Place, New Delhi 110019

Respondent

No. 1

2. Mecamidi S.A.

(Under Liquidation), through its Liquidator,

Maitre Antoine Barti-Magria,

R/o 15 Rue de d'hotel de Ville 92200

Neuilly Sur Seine, France

Respondent No. 2

For Appellant: Mr P Nagesh, Sr Advocate, Mr. Ankur Goel, Advocate.

For Respondent: Mr Sudhir K Makkar, Sr Advocate, Ms Saumya Gupta, Mr.
Kanishk Garg, Mr Anirudh Wadhwa, Mr Kartik Gupta, Mr Kartik Garg,
Advocates.

WITH

COMPANY APPEAL (AT) No.91 of 2024

*(Arising out of judgement and order dated 1st February, 2024 passed by the
National Company Law Tribunal, New Delhi in Company Petition
No.188/PB/2021)*

In the matter of:

1. Sanjeev Kapoor & Anr.

Director of Mecamidi HPP India Private Limited

KL 101, 1st Floor, Eldeco Utopia,

Sector- 93A, Noida, Uttar Pradesh – 201301

2. Amarjeet Singh

Managing Director of Mecamidi HPP India Private Limited

C-45, 1st Floor, Greater Kailash Part-1, New Delhi-110049

Appellants

Vs

1. Flovel Hydro Technologies Pvt Ltd

Company incorporated under the provisions of the Companies Act, 1956, having its registered office at Flat No. 618, 6th Floor, Hemkunt Chambers, 89,
Nehru Place, New Delhi 110019 Respondent
No. 1

2. Mecamidi S.A.

(Under Liquidation), through its Liquidator,
Maitre Antoine Barti-Magria,
R/o 15 Rue de l'Hotel de Ville 92200
Neuilly Sur Seine, France Respondent No. 2

For Appellant: Mr P Nagesh, Sr Advocate, Mr. Ankur Goel, Advocate.

For Respondent: Mr Sudhir K Makkar, Sr Advocate, Ms Saumya Gupta, Mr. Kanishk Garg, Mr Anirudh Wadhwa, Mr Kartik Gupta, Mr Kartik Garg, Advocates.

JUDGEMENT**JUSTICE YOGESH KHANNA, MEMBER (JUDICIAL)**

1. The present four appeals have been filed against a common impugned order dated 01.02.2024 passed by Ld. NCLT, New Delhi in CP No.35/PB/2022 and CP No.188/PB/2021. Appeal Nos 89 of 2024, 90 of 2024 and 91 of 2024 have been filed by Mecamidi HPP India Pvt Ltd or its Directors. Appeal No.87 of 2024 is filed by GH Energy Pvt Ltd, the present majority shareholders of Mecamidi HPP India Pvt Ltd. The respondent No.1 in all 4 appeals is Flovel Hydro Technologies Pvt Ltd which has purchased shares of Mecamidi HPP India Pvt Ltd from the Liquidator of Respondent No.2, Mecamidi SA in auction conducted in France.

2. Mecamidi HPP India Pvt Ltd (hereinafter called the Appellant) is aggrieved by the order dated 01.02.2024 passed by the Ld. NCLT in CP No. 35 of 2022 whereby the Appellant Company has been directed to register 47% shares of

the Appellant Company in the name of the R-1 / Flovel. Further, the Hon'ble NCLT has also declared the EOGM held by the Appellant Company on 04.06.2024 as invalid.

3. The Appellant Company is admittedly engaged in the business of supply, installation, commissioning, etc. of electro mechanical equipment for setting-up of small and medium hydro power projects. Admittedly, Flovel is also engaged in the same business and is a bitter rival/ competitor of Appellant Company.

4. In the year 2010, the Appellant Company executed a Joint Venture and Share Purchase Agreement dated 15th September, 2010 ("JVSPA") with Mecamidi S.A. ("Mecamidi France") and Indian Promoter Shareholders. Additionally, a Memorandum of Understanding dated 15th September, 2010 ("MOU") was also executed between Mecamidi France and Indian Promoter Shareholders.

5. Pursuant to the execution of the JVSPA and MOU, Mecamidi France became a shareholder of Appellant Company holding 55% shares. Later this shareholding was reduced to 47%.

6. In the year 2019 Mecamidi (France) entered into insolvency and later in the year 2020 it entered into liquidation. Substantial amounts were owed by Mecamidi (France) to the Appellant Company for which claim was also filed by the Appellant Company. Resultantly, the 47% shares held by Mecamidi (France) in the Appellant Company were put to auction. Flovel placed its bid for acquiring these 47% shares and offered to pay Euro 4,42,000/-. A

company namely MM International (in which the Indian Shareholders had around 34% shares) had also submitted its bid offering to pay Euro 3,40,000/- to the Liquidator and Euro 3,00,386/- to appellant company in order to settle its claim against Mecamidi (France). However, the Liquidator treated Flovel's bid as *H1*.

7. It is argued during the auction process, Flovel was made fully aware about the *non-compete obligation* of Mecamidi (France) in terms of the JVSPA and even the entire auction was done on an *as is where is basis*. Despite knowing everything, Flovel gave an undertaking to the Liquidator that Flovel will make 100% payment in advance and will fully-indemnify the Liquidator against any litigation. Basis this undertaking, the Liquidator recommended the name of Flovel as *H1* bidder. Liquidator in recommendation document had prayed for *unconditional transfer of 47% shares to Flovel*. However, the Paris Commercial Court, passed a conditional order dated 13.09.2021 declaring Flovel as the *H1* bidder in which following conditions were imposed:

- a. *Mutual agreement to be executed between the Liquidator and Flovel for transfer of shares;*
- b. *Flovel to be personally responsible for any dispute relating to the transfer of shares;*
- c. *Flovel to be personally responsible for legal and material conditions for transfer of shares;*
- d. *Flovel to be solely liable for costs and expenses related to the transfer of shares; and*
- e. *The date to own and enforce the rights of the securities is set at the effective transfer of the shares.*

8. It is argued the above order dated 13.09.2021 was challenged before the French Appellate Court which *vide* its order dated 06.10.2022 confirmed all the above conditions and imposed an additional condition that transfer of 47% shares to Flovel has to take place *in compliance with the charter documents of*

Appellant Company and applicable laws of India. Pertinently, before the French Appeal Court, the Liquidator admitted the existence of approval clauses in relation to transfer of 47% shares. Even otherwise, *the Liquidator had asked for the approval of Appellant Company for transfer of 47% shares*

9. In the meantime, Flovel started writing letters to the Appellant Company asking for registration of its name as owner of 47% shares. However, it is argued neither the original share certificates nor the share transfer form SH-4 was ever submitted to the Board of the Appellant Company. These documents were submitted to the Appellant Company only after the passing of the impugned order dated 01.02.2024.

10. As the Appellant Company did not register Flovel as an owner of 47% shares on the basis of letters sent by Flovel, it filed CP No. 35 of 2022 under Section 241-242 and Section 59 of the Companies Act, 2013 wherein vide order dated 01.02.2024 the Appellant Company was directed to register 47% shares of the Appellant Company in the name of the R-1 / Flovel and the EOGM held by the Appellant Company on 04.06.2024 was declared as invalid.

11. It is argued by the learned senior counsel for the appellant, the Flovel does not have any locus to file petition under Section 241-242 of the Companies Act, 2013 and that petition under Section 59 of the Act was rather pre-mature. It was argued a specific preliminary objection *qua* maintainability was raised by the appellant but the Ld. NCLT dismissed such objection. It was argued Flovel neither had the share certificates nor Form SH4 executed in its favour and it was never a member of the company and

thus had no indefeasible right over 47% shares and thus could not have asked for relief under Section 241-242 of the Act.

12. It was argued Flovel was only the successful bidder but a mutual agreement was to be executed for transfer of 47% shares and though Liquidator had executed a detailed agreement for sale of other assets, however, no such agreement was executed for 47% shares and hence the transfer was *incomplete* without execution of the mutual agreement, hence Flovel is wrongly portrayed as an owner of the shares.

13. Further it was argued EOGM held on 04.06.2021 by the appellant was valid and Ld. NCLT travelled beyond the pleadings to wrongfully hold the notice for EOGM dated 04.06.2021 was never served upon the liquidator as email was sent on official email of liquidator but not to secretary of the liquidator.

14. Lastly it was argued Flovel being a successor of Mecamidi (France) in any case is bound by the *rights, obligation and liabilities* of Mecamidi (France) under the *JVSPA, MOU* and the Articles of Association.

15. The Articles of Association of the appellant company provide as follows:

Article 21

21. The Board may decline to recognize any instrument of transfer unless- (b) the instrument of transfer is accompanied by the certificate of the shares to which it relates, and such other evidence as the Board may reasonably require to show the right of the transferor to make the transfer; and

Article 22

22. None of the shareholders shall sell, transfer, assign or pledge, encumber or otherwise in any manner dispose of its/ his share of the Company to an Affiliate or to a third party,

unless such Affiliate or third party agrees to be bound by all of the rights, obligations and liabilities of the transferring Party pertaining to the transferred Shares, including those defined in the Memorandum and Articles of Association.

Article 25

25. (ii) The Board shall, in either case, have the same right to decline or suspend registration as it would have had, if the deceased or insolvent member had transferred the share before his death or insolvency.

16. It was argued Article 25 provides a deeming fiction for *transfer* of shares in case of insolvency/ death of the shareholder and it has to be presumed as if insolvency/ death has not happened. Therefore, the Liquidation of Mecamidi (France) and the passing of order by French Court are of no significance as for the purposes of Article 25 everything has to be ignored and it has to be deemed/ assumed that Mecamidi (France) is *on its own transferring 47% shares to Flovel*. Accordingly, the correct test is whether it was possible for Mecamidi (France) to transfer 47% shares to Flovel without Flovel agreeing to be bound by the non-compete obligations and other obligations of Mecamidi (France) under the JVSPA or not. If shares cannot be directly transferred by Mecamidi (France) to Flovel, they cannot be indirectly transferred as part of liquidation process. If Mecamidi (France) cannot transfer the shares, then the corollary is that Flovel cannot purchase the shares i.e.if something cannot be sold, then it cannot be purchased.

17. The learned senior counsel for the Respondent rather argued despite the order dated 10.03.2022 which had restrained the then promoters of Mecamidi HPP India(P) Ltd (appellant), they have already sold their equity shares in the company and the appeal against the order dated 10.03.2022 was rather disposed of by this Tribunal without any relief to the appellant

herein. It was argued the promoters of the appellant had alienated 51.5% shares held by them in the company to M/s GH Energy Pvt Ltd and hence Contempt Petition No.5/22 was filed against the promoters and M/s GH Energy Pvt Ltd, since they violated the order dated 10.03.2022 passed in CP No.35/2022. It is pertinent to mention IA No.63/2022 was filed by the Respondent seeking restoration of the *status quo ante* in respect of the shareholding of the appellant and cancellation of the illegal share transfer in favour of M/s GH Energy Pvt Ltd. Hence as the acts *ex facie* are acts of contempt and if not purged, the appeals *viz* CA (AT) No.90 and 91 filed by the erstwhile promoters against the impugned order dated 01.02.2024 be not heard.

18. It is argued, even otherwise, the erstwhile promoters and M/s GH Energy Pvt Ltd have tried to strip the assets of the appellant by inducing mass exodus of employees from MHPP to M/s GH Energy Pvt Ltd; spacious office space owned by the appellant in Noida being taken over by M/s GH Energy Pvt Ltd and diversion of the appellant business to M/s GH Energy Pvt Ltd by Sanjeev Kapur, former MD of the appellant, now the MD of M/s GH Energy and thus both these appeals are liable to be dismissed.

19. We have heard the arguments advanced by both the counsel and have gone through the record. Firstly, on *maintainability* we are of the considered opinion that Flovel had made the payment of entire consideration amount being Euro 4,41,999 for the purchase of 47% shares; acquired an order of the Paris Commercial Court, which later stood confirmed by the Appellate Court as sale. The judicial Liquidator sent the following communication to the

Board of appellant: *a)* all legal rights and financial interest in the said shares vested with Flovel; *b)* duplicate share certificates in respect of the said shares be issued to in favour of Flovel.

20. The aforesaid communication issued by Judicial Liquidator leaves no matter of doubt about right of Flovel as a purchaser of shares of the appellant, consequently to the confirmation of sale of the said shares to Flovel under a court monitored liquidation process in respect of Mecamidi S A (France). Further by way of the letter dated 14.12.2022, the judicial liquidator recognised all rights and financial interest in the said shares, vests in Flovel with effect from 13.09.2021. Such letter dated 14.12.2022 was later confirmed by the liquidator in its email dated 11.12.2023 in pursuance to the directions made by the Ld. NCLT.

21. As recorded in the impugned order, Flovel was prevented from submitting *SH4* form being registration of transfer of shares in its favour since appellant refused to issue duplicate shares and hence where the appellant had withheld the issuance of duplicate shares certificates, it cannot be permitted to allege Flovel cannot maintain the petition. Thus we see no reason to upset the impugned order of the Ld. NCLT on the issue of maintainability of the petition filed by Flovel only on the grounds *viz a)* Flovel was *allegedly* not a member of appellant company or *b)* it never held the share certificates or *SH4* form in its favour.

22. Our above view is in line of the impugned order as is noted in para 54 as under: -

54. *Now moving on to question of maintainability of the Company Petition bearing CP No.35/242-242/2022 filed by M/s Flovel, on perusal of the judgements Word Wide Agencies Pvt Ltd and Ors Vs Margarat T Desor and Ors (1990) 1 SCC 536 and Dayagen Pvt Ltd Vs Rajendra Dorian Punju & Anr., 2008 SCC OnLine Del 750) we are of the view that same is maintainable as it is a settled position of law that a person entitled to hold shares based on beneficial/financial interest can maintain a petition with respect to affairs and management of the Company under section 241-242.*

23. Further, the EOGM dated 04.06.2021 was held to be bad by the Ld. NCLT, in view of the fact no proper notice to the Liquidator was given for such EOGM and the notice was posted on the *email* which was being rarely used by the liquidator and was not posted on the mail, ordinarily being used by him *viz Liure.SANCHEZ-SEPVAI@btsg.eu*.

24. Let us first look at the purpose of EOGM dated 04.06.2021. It is the case of the appellant company that it had to receive certain amounts from the French Company and accordingly, as part of the routine process, appellant company filed its claim before the RP/Liquidator of the French Company. Mr. Jean Zekri, who was the Chairman (Ex-Management) Mecamidi (France) and also a Director on the Board of appellant company repeatedly asked the appellant company to withdraw its claim. When the appellant company did not withdraw its claim, Mr. Jean started opposing even fulfilment of routine compliances by appellant company like filing of ITR, PF Returns, ESI Returns, GST Returns, etc. Further, initiation of liquidation against the French Company was a major setback for the appellant company and it became difficult for the appellant company to get new contracts and deal with its bankers. Accordingly, the EOGM was conducted for amending Article 63 to dispense with the mandatory presence of the French Directors for routine

matters. Detailed reasons for conducting EOGM were duly provided by the appellant company in the Explanatory Statement.

25. Notice along with Explanatory Statement was served to all the Members of appellant Company, including the Liquidator of the French Company through E-mails. Liquidator was served on his *official email Id.* Further, the VC link of the EOGM was also served upon the Liquidator via Email. on his *official email Id.* Flovel also communicated with the Liquidator on the same email Id. on which EOGM Notice and VC Link was sent by Appellant Company (Email dt. 21.09.2021, 18.09.2021, 23.11.2021 were sent by lawyer(s) of Flovel to Liquidator). Further, till date the Liquidator had never stated he did not receive the EOGM notice or the VC Link. In the impugned order, service of notice has been held to be improper because the EOGM notice was not sent to the secretary of the Liquidator, which to our mind is not correct. Infact the notice was very much sent on an official email Id. of the Liquidator, also being used for sending e-mails by Flovel.

26. Despite service of EOGM Notice and VC Link, the Liquidator chose not to attend the EOGM dated 04.06.2021. Accordingly, the resolution proposed in the EOGM notice was passed unanimously by the member's present, amending Article 63 to dispense with the mandatory presence of French Directors for routine matters.

27. The company was required to send the notice to the Liquidator which was admittedly done on the official email Id of the Liquidator. There was no legal requirement to send the EOGM notice to the secretary of the Liquidator.

In any case, Amendment of Articles of Association was necessitated in the interest of Appellant Company to maintain its going concern status as Mr. Jean (ex-management of French Company) was allegedly not co-operating. Hence, we set aside this part of the order and hold the service of notice of EOGM dated 04.06.2021 was valid.

28. Now we come to the main issue involved in this appeal as to if Article 7 of JVSPA was required to be incorporated in the Articles of Association of the appellant company and *if* it was not so incorporated, what shall be its effect?

29. It has been argued any restriction on the transfer of shares, ought to have been mandatorily incorporated in the Articles of Association of the company and since Article 7 of the JVSPA was never incorporated in the Articles, the Respondent is not obliged to sign a *non-compete clause* and the share transfer in favour of the Flovel must be registered by the company in the absence of any restriction in the Articles of Association and the word “*including*” in Article 22 cannot be interpreted to have incorporated the *non-compete clause* into the Articles of Association of the appellant without specific incorporation. Article 7 of JVSPA is as under:-

*ARTICLE 7 – NON-COMPETITION FROM MECAMIDI GROUP
MECAMIDI hereby undertakes and shall cause its Affiliates to undertake, to stop and not to participate or to engage throughout the duration of the Joint Venture Company, directly or indirectly, any sales related to the same Business within India, Bhutan and Sri Lanka.*

30. It was argued by the Respondent, a fair reading of the Article 22 of the Article of Association shows it only casts an obligation on the transferring party and no remedy lies against Flovel. It was argued Article 3 of JVSPA made

it clear that all the terms and conditions of JVSPA *need to be incorporated in the Articles of Association* and for this reason, Article 4.3 of JVSPA was incorporated as Article 3 in the Articles of Association. Thus without amending the Articles of Association to include the *non-compete* clause, the same could not be enforced against Flovel as a precondition to register its name in the Register of Members of the company.

31. It was also argued Flovel was never a party to the JVSPA and it was signed only by the erstwhile promoters of company and their French counterpart. It was held by the impugned order Flovel was not bound by the *non-compete clause* as Article 22 of the Articles of Association did not say JVSP is to be adhered to prior to transfer of the shares. Article 3 and 5 of JVSPA read as follows: -

“3. The purpose of this Joint Venture and Shares Purchase Agreement is to set forth the terms and conditions under which MHPP will function in accordance with the Memorandum and Articles of Association to be amended so as to reflect the terms and conditions of this Joint Venture and Shares Purchase Agreement, the Applicable Laws and the manner in which the Parties shall organise and manage the affairs of MHPP and matters arising there from and incidental thereto.

5. The Parties shall agree upon the Memorandum and Articles of Association of MHPP which shall be amended after the Closing Date so as to reflect the terms and conditions herein;

32. The Ld. NCLT held since the *non-compete clause* was never incorporated in the Articles of Association, hence Flovel cannot be asked to comply with it *prior* to transfer of the shares and thus accepted the line of the argument of the respondent herein and gave the following reasoning *viz*

75. The sale of shares was approved by the French Commercial Court and upheld by the French Court of Appeal held that the transfer of shares must take place in compliance with the

statutory clauses of the Company Mecamidi M/S HPP India and more generally the law applicable to these transfers. The statutory clauses are of the MOA and AOA of the Company i.e. M/s Mecamidi HPP India. **That compliance happens only after the transfer of shares.** There can be no condition preceding the transfer of shares. It will be violative of Indian laws.

76. Further, M/s Mecamidi S.A. has moved to an advanced stage in the liquidation process. Therefore, the position has changed since the opinion dated 09.07.2021. The respondents i.e. Indian partners of M/s Mecamidi HPP India have not submitted any fresh opinion based on the current facts i.e. after the order of the French Commercial Court and French Court of Appeal.

77. Further to determine whether JVSPA would bind M/s Flovel, the object, and intent of JVSPA first has to be looked into. We find it pertinent here to take our view to how "Mecamidi" i.e., M/s Mecamidi S.A. France itself has been defined in the JVSPA, which reads as follows:

- MECAMIDI SA, a company duly organised and existing under the laws of France, having its registered office at 29, Chemin de Saint-Amand 31100 Toulouse, registered with the commercial and company registry of Toulouse under the number RCS 580 800 217, whose legal representative is Mr. Jean ZEKRI, Chairman and CEO,
- Hereinafter referred to as "MECAMIDI",
The description makes it very clear that "Mecamidi" was never intended to include any other entity / successor / acquirer post any transfer or transmission. Now the terms "Parties" is defined in the following terms:
- The PARTNERS and MECAMIDI are hereinafter referred to as individually "Party" and collectively "Parties".
This is to convey that parties to the JVSPA are none other than those signatory to it and any other entity including acquirer post liquidation, could not be called a privy to this JVSPA. The interpretation clause under Article 2 does not provide any clarification in this regard, clearly excluding every third party be it future acquirers away from the JVSPA. It further provides that:
- Whereas the Parties, adhering to the principle of equality and mutual benefit and through friendly consultations, have agreed to enter into this Agreement, in order to set forth the terms and conditions that shall govern the sale and purchase of 145 750 shares, i.e. 55% of the paid up share capital of HPP India, by MECAMIDI.

The object of execution of this JVSPA was only to set forth terms and conditions for sale purchase of shares. Further, Article 3 viz. "PURPOSE" states as follows:

- *The purpose of this Joint Venture and Shares Purchase Agreement is to set forth the **terms and conditions under which MHPP will function in accordance with the Memorandum and Articles of Association to be** amended so as to reflect the terms and conditions of this Joint Venture and Shares Purchase Agreement, the Applicable Laws and the manner in which the **Parties shall organise and manage the affairs of MHPP and matters arising there from and incidental thereto.***

Article 5 viz. "conditions precedent to the benefit of both parties" reads as follows:

(ii) The Parties shall agree upon the Memorandum and Articles of Association of MHPP, which shall be amended after the Closing Date so as to reflect the terms and conditions herein;

- *Article 12 viz. MEMORANDUM AND ARTICLES OF ASSOCIATION, reads as follows:*

The PARTNERS undertake and warrant that the provisions of memorandum of association and the articles of association of HPP India shall be amended so as to be the same as those set forth in the Memorandum and Articles of Association of MHPP attached in Appendix 1 below.

In the event of any discrepancy between the Joint Venture and Share Purchase Agreement and Memorandum and Article of Association, the latter shall and must prevail.

Further Article 13 viz. Effectiveness of the JVSPA, inter alia provides that

Except as otherwise expressly provided herein, this Joint Venture and Shares Purchase Agreement shall remain in full force and effect for the duration of the Joint Venture Company in accordance with the Articles of Association, subject to earlier termination

Now, these clauses of JVSPA substantially dispel confusion and make it clear that post execution of JVSPA, it was mandatory to amend Articles to incorporate terms of JVSPA and this joint venture i.e., M/s Mecamidi HPP was to function only in accordance with the Articles so amended. In view thereof, we are of the considered opinion that such clauses of JVSPA as were not incorporated into the Articles were only binding on "parties" thereto i.e., M/s Mecamidi S.A., M/s HPP India and partners i.e., Indian directors while M/s Flovel being not privy to it cannot be bound by the same.

78. Even otherwise, we are of the firm view that the present is the case where M/s Flovel is acquiring shares in question pursuant to "Liquidation", which as per Articles as amended in 2017 shall follow the same process as that of "Transfer".

79. We find that even if the non-compete clause finds its place in JVSPA, the same is missing from the Articles as amended in 2017, and thus same cannot be imposed upon / disqualify M/s Flovel from acquiring shares held by M/s Mecamidi S.A. in M/s Mecamidi HPP India.

80. We see that the order dated 13.09.2021 passed by Paris Commercial Court had authorized the Liquidator only to sell shares by "Mutual Agreement" to M/s Flovel. Pursuant to such authorization received, the Liquidator issued a letter dated 14.12.2021 to M/s Flovel, vesting financial interest in M/s Flovel. Further, the French Liquidator issued official proceedings apostilled on 14.10.2021 authorizing Mr. Satvir Singh Sorot, an Indian National holding Indian passport number U8969000 to represent the French liquidator and to carry out further acts to transfer the shares in the name of M/s Flovel.

81. Mr. Satvir Singh Sorot was authorized to execute the transfer agreement based on a purported authorization received from the Liquidator via a resolution passed in official proceedings of the judicial liquidator dated 14.10.2021. However, the authority of Mr. Sorot was challenged by Indian directors of M/s Mecamidi HPP India on the ground that purported official proceedings were not signed by the Liquidator. Since the issue had emerged before us, we vide order dated 09.11.2023 had directed Ld. Sr. Counsel Mr. Sudhir Makkar, to file a letter from the French Liquidator to the effect that he has signed and issued the letter dated 14.12.2021 addressed to Mecamidi HPP India and also confirming the authorization granted in favor of Mr. S. S. Sarot to represent the French Liquidator.

82. Pursuant to an Order dated 09.11.2023, an affidavit dated 13.12.2023 has been filed on 14.12.2023 by Mr. Gautam Kar, authorized representative of M/s Flovel. From a perusal of the affidavit it is seen that the Judicial Liquidator of Mecamidi S.A., Mr. Antoine Barti has issued an email dated 11.12.2023 to Mr. Amarjeet Singh, Mr. Sanjeev Kapoor, Mr. Gautam Kar among others, duly confirming that the Liquidator had signed and issued following documents:

a. Official Proceedings of the judicial liquidator of M/s Mecamidi S.A. as apostilled on 14.10.2021 Authorising and appointing Mr. Satvir Singh Sorot and failing him Mr. Hires Choudhary as the authorised representative of Mecamidi S.A. in respect of the 47% of the shareholding of Mecamidi S.A. in the M/s Mecamidi HPP India;

b. Letter dated 14.12.2021 issued by the Judicial Liquidator to the Board of Directors, M/s MHPP in respect of written consent regarding transfer/transmission of the said Shares;
c. Letter dated 14.12.2021 issued by the Judicial Liquidator to the Board of Directors, MHPP requesting issue of duplicate share certificates in the name of Mecamidi S.A.; and
d. Letter dated 14.12.2021 issued by the Judicial Liquidator to Flovel in respect of the liquidation proceedings of Mecamidi S.A. by way of which the Judicial Liquidator confirmed that all rights and financial interest in respect of the said Shares shall vest with Flovel with effect from 13.09.2021

83. On perusal of these documents issued and confirmed by the Liquidator, we are satisfied that Mr. Satvir Singh Sorot is an authorised person to take steps in respect of the transfer and registration of shares held by M/s Mecamidi S.A. in M/s Mecamidi HPP India to M/s Flovel. Accordingly, we issue direction in his favor that he be allowed to perform all remaining formalities to effect the transfer of 47% shares to M/s Flovel Hydro Technologies Private Limited.

84. With this we issue directions for the release of original share certificates deposited with the Registrar, NCLT vide order dated 10.10.2022 in favor of Mr. Satvir Singh Sorot to enable him, to execute a proper instrument of transfer in Form SH.4 with M/s Flovel and jointly approach the Board of Directors of M/s Mecamidi HPP India for registration of transfer by having due regards to the provisions of the Companies Act 2013, Articles of Association and Memorandum of Association.

85. In the same series of discussions, we find it pertinent to address whether to effect the transfer of 47% shares as aforesaid, prior approval from the Board of Directors or Shareholders of M/s Mecamidi HPP India is required.

33. A bare perusal of the impugned order would show the Ld. NCLT was of the view since non-compete clause of JVSPA was never incorporated in the Articles of Association of the Joint Venture Company, hence Flovel shall not be bound by such terms and conditions of the JVSPA, when it had no privity of contract and more so only Mecamidi (France) would be bound by JVSPA but not its successor.. To appreciate the issue between the parties one need to look into the *mode of transfer* under the Articles.

34. Article 21 of the Articles of Association gives a right to the Board to *decline to recognise any instrument of transfer* unless the instrument of transfer is accompanied by a certificate of shares to which it relates and such other documents as the Board may reasonably require to show the *right of the transferor to make transfer*. Then *per* Article 25, the Board has similar right to decline registration of shares if any member had gone insolvent. Further Article 22 of the Articles of Association says, *none of the shareholder had any right* to transfer, assign etc. his shares in the company to an affiliate or third party *unless* such affiliate or third party agree to be bound by the rights, liabilities and obligations of the transferring party pertaining to the transferred shares, *including* those defined in the Memorandum and Article of Association. Though the learned senior counsel for the Respondent argued the rights and liabilities pertaining to the transferred shares are *only limited* to the unpaid dividends, unpaid capital, etc. but one cannot lose sight of the fact that Article 22 in the same stretch notes rights and obligations of the transferring party pertaining to the transferred shares can be *even beyond* Articles, as is depicted by the word ***including*** in Article 22 (Supra).

35. The word *including* is of most importance and it says if the third party does not adhere to the rights, obligations and liabilities of the transferring party, *including* these under Memorandum and Articles of Association, the Board shall have a right to reject such transfer. The word *including* shows the Board may even look beyond such Articles and may refuse to register the transfer *unless* transferee adheres to obligations noted elsewhere, than only under the Articles.

36. Moreso, Article 25 provides a deeming fiction for transfer of shares in case of insolvency/ death of the shareholder and it has to be presumed as if insolvency/ death has not happened. Therefore, despite the Liquidation of Mecamidi (France) and the passing of order by French Court(s) for the purpose of Article 25, it has to be deemed/ assumed that Mecamidi (France) has on its own transferred 47% shares to Flovel. Accordingly, the correct test is *whether it was possible for Mecamidi (France) to transfer 47% shares to Flovel without Flovel agreeing to be bound by the non-compete obligations and other obligations of Mecamidi (France) under the JVSPA or not*. If shares cannot be directly transferred by Mecamidi (France) to Flovel, they cannot be indirectly transferred as part of liquidation process. If Mecamidi (France) cannot transfer the share, then the corollary is Flovel cannot purchase the shares unless Article 22 is satisfied. If something cannot be sold, then it cannot be purchased.

37. Further, a narrow interpretation cannot be given to the expression '*pertaining to*' as is used in Article 22. The expression '*pertaining to*' is synonymous with '*in relation to*' and '*concerning with*' which are *expressions of expansion* and not *contraction*. French company may have had completely unrelated and unconnected rights/ obligations having no relation to the Appellant company. Therefore, '*pertaining to*' signifies that rights/ obligations of the French company concerning the Indian company need to be seen. Accordingly, the expression '*pertaining to*' is used only for establishing a relationship between the French company and its shareholding in the Indian

company and not otherwise. This expression has not been used to narrow or restrict the scope of restrictions under Article 22 of the Articles of Association.

38. The words used in Article 22 are '*None of the shareholder shall sell..... 'unless such Affiliate or third party agrees to be bound'*'. The conjoint usage of the words '*none*' and '*unless*' in Article 22 makes it abundantly clear the restriction contained in Article 22 is a condition precedent/ pre-requisite and not a condition subsequent.

39. Further we also need to examine if such *non-compete clause* in any way is *repugnant* to Articles of Association or *if* it can *co-exist* with the Articles. Admittedly, JVSPA is not a private document between the shareholders alone but the appellant company is also a party to such JVSPA. It is a settled position of law that shareholder agreements are binding even if are not incorporated in the articles, so long as are not contrary to the Articles. Can we say the *non-compete clause* is contrary to the Articles of Association? Further if such *non-compete clause* is not incorporated in the Articles, can one allow the major shareholders holding as much as *34 or 47%*, to compete with its own company. Now JVSPA reserves such rights for both the Indian promoter's shareholders as well as Mecamidi (France) now Flovel. Thus we do not agree to the Flovel's stand it is not bound by any of the obligations of Mecamidi (France) under the JVSPA, since had purchased shares in a court auction. It is a settled position of law *an auction purchaser enjoys no special right*. Moreso Article 22 and 25 of its charter clarifies the position as above.

40. Further, the Ld. NCLT on privity of contract held since the JVSPA was entered into between the parties as of alone and was never intended to include its successors, acquirers, post any transfer/transmission and thus Flovel shall not be bound by terms of the JVSPA, but then we cannot ignore that Mecamidi (France) held 47% shares in a Joint Venture company and Flovel had acquired those 47% shares and would certainly step into the shoes of Mecamidi (France). Admittedly Mecamidi (France) was a party to the JVSPA, which JVSPA could have been terminated only upon happening of some events, as noted in its Article 14 of JSVPA and not otherwise.

41. Article 14 of the JVSPA rather makes it clear the termination of the JVSPA for any cause whatsoever *shall not release either of the party from any liabilities at the time of termination and nor such termination shall affect in any way the survivor of any right, duty or obligation of either party which is expressly stated elsewhere in this JVSPA agreement to survive termination.* Admittedly Mecamidi (France) was a party to this JVSPA and its obligations therein could have continued even beyond its termination. Thus if the shares held by Mecamidi (France) in the company were acquired by Flovel, then Flovel cannot take a stand contrary to the obligations of its predecessor, an erstwhile party to JVSPA.

42. Lastly, we all know the interest of the company is paramount. Flovel admittedly is a biggest competitor of the appellant company and has a history of disputes with Mecamidi (France), as alleged. Initially Mecamidi (France) had entered into a joint venture with Flovel but it did not last long and resulted in disputes. Thereafter, Mecamidi (France) partnered with Mecamidi

HPP India Pvt Ltd *viz*, the appellant herein. Later Mecamidi (France) went into insolvency and Flovel purchased all its shares in the appellant company. Now admittedly the appellant company and Flovel are competitors and shall be competing for the same contracts throughout India and abroad. If Flovel is allowed to compete with its own company *viz* the appellant herein, the appellant then shall go out of business, as in every tender there are restrictions that two companies of the same group cannot bid for the same tender. The secrecy of price will also be lost. In *Amritsar Swadeshi Woollen Mills Pvt Ltd Vs Vinod Krishan Khanna and others (2019) SCC Online NCLAT 166* the Court held as under: -

45. xxxxxxxx... It is settled law when a matter is before the National Company Law Tribunal or before this Appellate Tribunal, arising under sections 241 and 242 of the new Act, read with rule 11, irrespective of what the parties plead, say or do, the paramount consideration of the Tribunal is to keep in view as to what is in the interest of the company. The interest of parties is subservient to interest of company. It is necessary for the Tribunal to first consider interest of the company. The health of the company reflects on the health of economy and that is what matters...xxxxxxx

43. Now it was an argument of the Respondent one M/s Far East holding 8% shares, purchased from the Liquidator, was registered as a Member in MHPP and it submitted a deed of undertaking dated 02.11.2021 but the said 8% shareholding held by M/s Far East were thereafter acquired by Indian promoters and subsequently sold by them to M/s GHEPL without signing *non-compete undertaking* and now M/s GHEPL and the erstwhile Indian promoters though registered as Members of MHPP, but are opponents competing with the appellant for projects in India and Sri Lanka, in violation of Article 7 of JVSPA. We do not agree to this submission. One must understand the *non-*

complete obligation of the promoters was only for a period of 5 years, which got over in 2017 itself. This non-compete tenure of five years was duly agreed upon by the French Company i.e. Mecamidi (France) per Clause 8 of the JVSPA and thus the Respondent Flovel company cannot seek extension of this time period of five years, which already stood expired in the year 2017. Clause 8(f) of JVSPA read as under:-

"8(f) The Provision set forth in Article 8 above shall remain in effect:

-throughout the duration of Joint Venture Company and Survive the date on which any party leaves MHPP for a period of three (3) years if the PARTNERS initiate the termination process of MJHPP; or

-for a period of five (5) years from the Execution Date.

In any event, the period of non-compete shall not exceed five (5) years from the ddate hereof."

44. More so Article 22 apply to an *affiliate* or to a *third party* too and hence when M/s Far East, purchased the shares, it was asked to sign the *deed of undertaking*. Now the term '*Affiliate*' has been defined under Article 2(1)(c) of the Articles as well as *Article 1(1)* of the JVSPA. The definition given in Article 2(i)(c) of the Articles is as follows:

"2(i) (c) Affiliate(s) when used with reference to any of the shareholder, unless otherwise provided herein, means any person controlled by, controlling or under common control with that shareholder, where "control" means the ownership, either directly or indirectly, of or more than fifty percent (50%) of the voting rights or comparable interests in such shareholder or such person"

Admittedly, Article 22 above applies in case of transfer '*to an Affiliate or to a third party*'. When Liquidator transferred 8% shares to M/s Far East, a '*third party*', hence Article 22 was applicable. However, Mr. Amarjeet Singh who was

an existing shareholder was neither an '*affiliate*' of M/s Far East nor a '*third party*', hence, Article 22 did not apply when one shareholder transfers shares to another existing shareholder. Therefore, Article 22 was not applicable when M/s Far East subsequently transferred 8% shares to Mr. Amarjeet Singh (existing shareholder and not a third party). In any case, the *non-compete obligation* of Indian shareholders was already over in 2017. As regards other obligations of Indian Shareholders, M/s GH Energy Pvt Ltd i.e. GHEPL had given an undertaking dated 24.03.2022 as under:-

NOW THIS DEED OF UNDERTAKING WITNESSETH AS FOLLOWS:

1. *The New Shareholder acknowledges and undertakes that it has received a copy of the Joint Venture and Share Purchase Agreement dated 15th September, 2010 and the Memorandum of Undertaking dated 15th September, 2010 and has clearly understood the contents therein.*
2. *The New Shareholder hereby undertakes that the New Shareholder shall at all points in time remain fully bound by and shall fully comply with all the obligations and liabilities of Partners (the Existing Shareholders) as contained in Article 18 of the Memorandum of Understanding dated 15th September, 2010 related Shareholders Bank Security.*
3. *The Existing Shareholders hereby undertake that the existing securities provided by them to the bank of the Company in relation to various financial facilities being availed by the Company will not be revoked/withdrawn by them till the time the same are suitably replaced/submitted by the New Shareholder as per the agreement between the Existing Shareholders and New Shareholder.*

45. Lastly it was an argument of the Respondent a remedy for violation of *non-compete clause* is duly prescribed in JVSPA itself and is only a pecuniary compensation and such disputes may be resolved through arbitration. We do not adhere to this argument. The arbitration will come into play if despite the

non-compete clause, the Flovel commits its breach but not otherwise. Further, we cannot leave a situation for further litigation between the parties. The disputes *interse* need to end here in the interest of the company. Thus we set aside the impugned order of the Ld. NCLT so far it says Flovel/Respondent is not bound to *sign non-compete clause*. Hence while directing Flovel to be admitted as a member/shareholder of the appellant company, we also direct M/s Flovel/Respondent to sign *non-compete clause* per JSVPA and till it signs, it shall be bound by such *non-compete clause* by this order. With these directions, appeal no's. 87, 89, 90 and 91 of 2024 are all disposed of.

46. Pending applications *viz* I.A. No. 1999, 2000, 2014, 7565, 2016 and 2017 of 2024 are also disposed of.

(Justice Yogesh Khanna)
Member (Judicial)

(Mr Ajai Das Mehrotra)
Member (Technical)

Dated:08-04-2026

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