



O.P.No.519 of 2016 and
Arb.O.P.(Comm.Div.)No.242 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on	04.11.2022
Judgment pronounced on	10.01.2023

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR
RAMAMOORTHY**

O.P.No.519 of 2016
and
Arb.O.P.(Comm.Div.)No.242 of 2021

Vaata Smart Limited
(Formerly Vaata Infra Limited)
Rep. by its Authorized Representative
Mr.V.R.Raghunathan
having its office at No.7,
11th Avenue, Ashok Nagar,
Chennai – 600 083.

... Petitioner
(in O.P.No.519 of 2016 & Respondent
in Arb.O.P.(Comm.Div.)No.242 of 2021)

vs.

Mysore Sales International Limited
Rep. by its Authorized Signatory
MAIL House,
No.36,Cunningham Road,
Bangalore – 560 052.

... Respondent
(in O.P.No.519 of 2016 & Petitioner
in Arb.O.P.(Comm.Div.)No.242 of 2021)



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WEB COURT

PRAYER IN O.P.NO.519 OF 2016: Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 27.04.2016 in Arbitration Case No.MSJ/2 of 2014 before the Sole Arbitrator Mr.Justice Malai Subramanian in part in so far as it relates to disallowance the claim No.1 to 8 made by the claimant and also in so far as it relates to allowing the counter claim of the respondent and consequently to direct the respondent to pay full claim of Rs.14,73,08,000/- (Rupees Fourteen crores Seventy Three lakhs Eight thousand only) and direct the respondent to pay future interest together with *pendente lite* interest charges @ 18% per annum for all the above amounts until full payments are made to and realized by the petitioner.

PRAYER IN ARB.O.P.(Com.Div)NO.242 OF 2021: Petition filed under Section 34(2) of the Arbitration and Conciliation Act, 1996, pleaded to call for the records relating to the impugned Award dated 27.04.2016 passed in Arbitration Case No.MSJ/2/2014 passed by the Sole Arbitrator Mr. Justice Malai Subramanian and set aside the same in part in so far as it relates to disallowance the Petitioner's claim and also in so far as it relates to allowing



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the claim of the Respondent.

For Petitioner : Mr.S.K.Srinivasan
Assisted by Mr.K.Harish
(Petitioner's counsel in O.P.No.519 of
2016 and Respondent's counsel in
Arb.O.P.(Comm.Div.).No.242 of
2021)

For Respondent : Mr.H.M.Muralidhar
for M/s.A.Narayanan
(Respondent's counsel in O.P.No.519
of
2016 and Petitioner's counsel in
Arb.O.P.(Comm.Div.).No.242 of
2021)

COMMON ORDER

The claimant before the Arbitral Tribunal assailed the arbitral award dated 27.04.2016(the Award) in O.P.No.519 of 2016. Likewise, the respondent before the Arbitral Tribunal assailed the Award in Arb.O.P.(Comm.Div.)No.242 of 2021. These cross petitions are considered and disposed of by this common order.

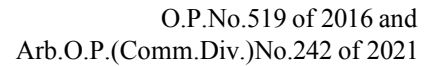
2. A Tripartite Operating Lease Agreement dated 23.03.2001(the



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Lease Agreement) was executed by and between Mysore Sales International Limited(MSIL), as the lessor, Sundram Fasteners Ltd. (SFL), as the lessee, and Wescare (India) Limited, as the operation and maintenance contractor. Wescare (India) Limited was later merged with a company called Vaata Infra Limited under a scheme of amalgamation sanctioned by this Court on 24.08.2012. The name of Vaata Infra Limited was subsequently changed to Vaata Smart Limited(VSL). VSL is the petitioner in O.P.No.519 of 2016 and MSIL is the petitioner in Arb.O.P.(Comm.Div.)No.242 of 2021. For ease of reference, the parties are referred to as VSL and MSIL throughout this order.

3. Under the Lease Agreement, the windmills were to be installed on lands owned by VSL. SFL agreed to take on operating lease six wind turbine generators (WTGs) or windmills owned by MSIL and operated and maintained by VSL for a term of eight years. The power generated through the windmills was to be wheeled into the TNEB grid and lease rentals were to be paid by SFL to MSIL by making payments into the designated escrow account on the basis of the TNEB tariff structure indicated in Schedule I and



4. In these circumstances, VSL dismantled the windmills, moved them to another site and informed MSIL by communication dated 15.07.2011.



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Thereafter, VSL moved A.Nos.161 and 162 of 2012 before this Court for appointment of an advocate commissioner to take an inventory of the dismantled windmills and to store them with a lien marked in favour of VSL. Pursuant to order dated 18.01.2012, the Advocate Commissioner took the inventory and filed a report on 28.01.2012 after executing the warrant. Subsequent thereto, the Arbitral Tribunal was constituted pursuant to order dated 12.09.2014 in O.P. No.243 of 2012. The arbitral proceedings were only between VSL and MSIL and SFL was not made a party thereto.

5. VSL submitted a statement of claim before the Arbitral Tribunal. In the statement of claim, VSL made an aggregate claim of Rs.658.37 lakhs and a net claim of Rs.518.36 lakhs. This claim was revised more than once. Eventually, a sum of Rs.13,65,35,309/- was claimed. The aggregate claim included a claim for refund of the deposit of Rs.270 lakhs, operation and maintenance (O & M) charges from 01.04.2009 to 30.06.2011, security charges from 01.04.2009 to 30.06.2011, rental charges for 21.97 acres of land, de-erection and dismantling charges, crane hiring charges, transport charges and demurrage charges. Interest was claimed on each of the above



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at the rate of 14.5% per annum. MSIL filed a statement of objections in response thereto along with a counter claim for an aggregate sum of Rs.1015.47 lakhs. The counter claim was later revised downward to Rs.398.36 lakhs. The counter claim covered a sum of Rs.131.20 lakhs as lease rentals as on 31.03.2009, interest on the lease rentals at 14.5% per annum up to 31.03.2009, interest on the consolidated sum of lease rentals and interest at 14.5% per annum from 1.04.2009 to 24.02.2015, a sum of Rs.66.17 lakhs towards revenue accrued and payable towards power generated from 01.09.2009 to 28.02.2011 and interest thereon at 14.5% per annum from 01.03.2011 to 24.01.2015. Further pleadings by way of reply were filed by the parties.

6. The Arbitral Tribunal framed seven issues on 20.06.2015. VSL examined one witness as C.W.1 and exhibited 93 documents as Exs. C-1 to C-93. MSIL examined two witnesses and exhibited 25 documents as Exs.R-1 to R-25. Each witness was cross examined by learned counsel for the counter party. Eventually, by the Award, the Arbitral Tribunal rejected claims 2 to 7 of VSL. As regards the 8th claim of VSL, the substantive claim



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of Rs.13,37,835/- was rejected but interest was awarded on the above sum at the rate of 14.5% per annum from 01.07.2001 to 31.03.2005. As regards the counter claims of MSIL, counter claims 3,4 and 5 were rejected. As regards claim 1 of VSL and counter claims 1 and 2 of MSIL, out of the lease deposit of Rs.270 lakhs, the Arbitral Tribunal concluded that MSIL is entitled to adjust a sum of Rs.159.59 lakhs towards lease rental dues. The balance of Rs.110.41 lakhs was directed to be paid to VSL with interest thereon at 14.5% per annum from 01.04.2009 till the date of payment. Claim 1 of VSL and counter claims 1 and 2 of MSIL were disposed of on the above terms. The Award is challenged by both parties by way of these cross petitions.

7. Oral arguments on behalf of VSL were advanced by Mr.S.K.Srinivasan, learned counsel, assisted by Mr.K.Harish, learned counsel; and on behalf of MSIL by Mr.H.M.Muralidhar, learned counsel, assisted by Mr.A.Narayanan, learned counsel.

8. Mr.S.K.Srinivasan submitted as follows on the facts. The Lease Agreement related to six WTGs or wind mills. The land on which the wind



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mills were erected belongs to VSL. MSIL was the owner of the windmills, which were leased to SFL but operated and maintained by VSL for and on behalf of SFL. MSIL was entitled to depreciation and other benefits under the Income Tax Act, 1961. As per the terms of the Lease Agreement, VSL was required to deposit a sum of Rs.270 lakhs with MSIL. This deposit represented 37.5% of the cost of the windmills. MSIL was entitled to retain this deposit during the tenure of the Lease Agreement and, upon expiry thereof, the deposit was to be refunded without interest. The Lease Agreement provided for the generation of power through the windmills and for the apportionment of revenues realized from such power generation. VSL was responsible for the erection, installation and maintenance of the windmills. The lease period was specified as eight years from 31.03.2001. The Lease Agreement provided for dispute resolution by arbitration. It also provided for the sale of the windmills to a third party or VSL subject to a right of first refusal by VSL at the residual value of Rs.270 lakhs. If the assets/windmills were sold for less than the residual value, VSL was liable to make good the difference between the residual value and the sale price.



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9. According to learned counsel for VSL, MSIL failed to cooperate in the sale of the windmills upon expiry of the lease term. Learned counsel submitted that about 21 letters were written by VSL to MSIL requesting that the windmills be sold and removed from VSL's land. Eventually, VSL was constrained to initiate arbitral proceedings because of the refusal or failure of MSIL to sell and remove the windmills. Therefore, learned counsel submitted that the Arbitral Tribunal correctly concluded that MSIL committed breach of the Lease Agreement. In those circumstances, the rejection of claims 4 to 7 warrants interference. According to learned counsel, on account of breach by MSIL in taking steps to sell the windmills, VSL was constrained to dismantle the windmills by incurring crane hiring charges, transport charges and demurrage charges. Once the Arbitral Tribunal concluded that MSIL committed breach by refusing to sell and remove the the windmills from VSL's land, these claims should have been allowed.

10. In response, learned counsel for MSIL submitted that VSL was liable to pay lease rent in accordance with Schedule III of the Lease

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Agreement. The admitted position is that the original term of lease was up to 31.03.2009. For this period, a sum of Rs.131.20 lakhs remained due and payable by VSL. This amount is payable with interest thereon at 14.5% per annum. Without paying this amount, VSL retained and continued to operate the windmills. By operating the windmills between 01.04.2009 and 28.02.2011, VSL generated power and earned revenue. Consequently, VSL was liable to pay to MSIL its share of such revenue. In addition, VSL is liable to pay interest on lease rentals from 01.04.2009 to 24.01.2015. Learned counsel for VSL submitted that interference is called for with the Award because the Arbitral Tribunal permitted VSL to retain the windmills while directing MSIL to adjust the deposit of Rs.270 lakhs against the lease rental arrears. According to learned counsel, this is directly contrary to Clause 8 of the Lease Agreement. Learned counsel pointed out that the windmills were seized by an Advocate Commissioner and are currently retained by VSL.

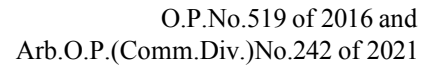
11. Learned counsel also submitted that the deposit of Rs.270 lakhs represents the residual value of the windmills. This is evident both from



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Clause 8 and Clause 33 of the Lease Agreement. The object and purpose of the deposit was to ensure that MSIL realizes not less than Rs.270 lakhs from the sale of the windmills either to VSL or a third party. According to learned counsel, the interpretation of Clause 33 by the Arbitral Tribunal is patently erroneous and calls for interference.

12. Learned counsel further contended that the deposit was on interest free basis, but the Arbitral Tribunal granted interest from 01.04.2009 by disregarding the terms of the Lease Agreement. As regards the contention that MSIL failed to cooperate in the repeated requests of VSL to sell the windmills, learned counsel submitted that VSL wanted MSIL to sell the windmills to it after adjusting the lease rental arrears of Rs.131.20 lakhs and interest on the deposit. Since this was not acceptable to MSIL, parties could not arrive at a consensus. He also contended that VSL failed to provide a commissioning certificate and, therefore, MSIL was unable to claim depreciation during the financial year 2000-2001. By referring to the submission of the certificate on 19.04.2001, learned counsel submitted that the award of interest on the sum of Rs.13,37,835/- from 01.07.2001 to



Discussion, analysis and conclusions

14. In order to answer issues 1 and 3, the Arbitral Tribunal examined Clause 33 of the Lease. Clause 33 is set out below:

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wind mills mentioned in Schedule II to this lease agreement. Upon expiry of the lease, the wind mills will be sold to a third party / Wescare, where Wescare have the right of first refusal at the said residual value. In case the assets are sold for a lower value, Wescare India Limited shall make good the loss by paying the differences between the residual value and the sale price either by demand draft or cash to the lessor. For this purpose, it is assumed that the sale will be concurrent with the termination of the lease."

The Arbitral Tribunal raised and answered the following question: whether MSIL was under an obligation to sell the windmills or whether VSL had to offer to purchase the windmills? By construing Clause 33, the Arbitral Tribunal recorded the following conclusions in internal page 20 of the Award, which, in relevant part, reads as under:

“ Clause 33 states that upon expiry of the lease,



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the wind mills will be sold to a third party/Wescare, where Wescare have the right of first refusal. So the emphasis is on the sale but not on the right of refusal. The term “where” assumes significance. Only at the time of offer for sale Wescare can exercise its right of first refusal. Wescare viz., the claimant no doubt is bound to make good the difference between the residual value of Rs.270 Lakhs and the actual sale price if the sale fetches a price lesser than the residual value as admitted by CW1. Even the plain reading of the terms of this clause categorically reveal that Respondent should have brought the wind mills for sale. The said clause further says that it is assumed that the sale will be concurrent with the termination of lease. The Respondent cannot have any excuse for not offering the turbines for sale immediately after the expiry of the lease period of 8



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*years on the ground that the assets were in the
custody of the claimant....”*

15. Under Clause 33, VSL was provided a right of first refusal. It stands to reason that a right of first refusal is triggered when the owner takes steps to sell the assets. In that context, the above interpretation of the Arbitral Tribunal is reasonable. Under Section 34 of the Arbitration and Conciliation Act, 1996 (the Arbitration Act), the interpretation of a contract by an arbitral tribunal may be interfered with only if it is outside the spectrum of credible interpretations, and, therefore, implausible. The above interpretation does not warrant interference.

16. The next aspect that the Arbitral Tribunal considered was whether the term of the lease was extended by act of parties. For such purpose, Clause 13 of the Lease Agreement was set out in the Award. The said Clause uses the expression “For this purpose”. By interpreting the said expression in the context of Clause 13, the Arbitral Tribunal concluded that extension was provided for only for the purpose of enabling parties to fulfil



their respective obligations. In this regard, the Arbitral Tribunal also noticed that SFL was not made a party since it had discharged its obligations. In addition, the Arbitral Tribunal took into account the evidence with regard to the expiry of the term of the lease. In relevant part, the following findings were recorded at internal pages 22 and 23 of the Award:

“....In Ex.C31 letter dated 13.05.2010, the Respondent states “This has reference to your letter dated 31.03.2010 enclosing the proposal for settlement of lease arrangement expired on 31.03.2009 for the installation of wind mills (6 nos. turbines) in Tamil Nadu”. In Ex.C42 dated 20.10.2010 the Respondent stated “Tripartite Lease Agreement dated 24.03.2001 expired on 23.03.2009”. In Ex.C60 dated 24.06.2011 also it is stated “Tripartite Lease Agreement dated 24th March 2001 expired on 24th March 2009”. Thus in all the above letters written to the claimant, the



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*Respondent categorically admitted that the Lease
expired by March 2009....”*

Apart from the above, the Arbitral Tribunal also noticed that the escrow account was closed and the balance in such account withdrawn. After reckoning all the above, the Arbitral Tribunal concluded that the term of the lease was not extended. Issues 1 and 3 were disposed of in this manner. These conclusions cannot be characterised as patently illegal.

17. The Arbitral Tribunal considered Issues 2 and 5 next. These issues related to the counter claim of MSIL for lease rentals beyond the term of 8 years and the claim of VSL for O&M and all charges incidental thereto. MSIL claimed lease rentals for the period beyond 31.03.2009, and this claim was examined by the Arbitral Tribunal by drawing reference to Section 116 of the Transfer of Property Act, 1882 (the TP Act) and the precedents cited by both parties. Eventually, the Arbitral Tribunal concluded that the loss occurred as a result of the failure of MSIL to bring the windmills for sale in accordance with Clause 33 of the Lease Agreement. The Arbitral Tribunal



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noticed that the revenue share from sale of power was to be shared by SFL and MSIL but not by VSL. Since SFL and not VSL received revenue, the Arbitral Tribunal concluded that SFL was a necessary party in relation to said claim and that no direction could be issued in the absence of SFL. The relevant findings from internal page 33 of the Award are set out below:

“...Though under clause 12 of Ex.C1 the right and obligation relating to lease rentals/residual value under Schedule III are between the Lessor and the claimant only and they are not enforceable against the Lessee, in so far as disputes that arose after the expiry of the lease, SFL appears to be a necessary party to that limited dispute. Since SFL is not a party to this proceeding, I am unable to give any direction for the collection of the revenue generated income after 01.04.2009. It is for the Respondent to take it up directly. Therefore, I hold that the claimant is not



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obligated to collect and pay any lease rentals to the respondent after the original period of contract.”

The above conclusion that the revenue accrued to SFL and that, therefore, SFL should have been joined as a necessary party to make and sustain such claim cannot be faulted.

18. As regards the claim for O&M and other charges, the Arbitral Tribunal recognised that the O&M activities after the original lease term were unauthorised and that MSIL did not derive any benefit therefrom. The relevant findings from internal page 35 of the Award are set out below:

“....But here, by the act of the claimant no benefit was received by the respondent. A third party has obtained the benefit. Moreover as submitted by the learned counsel for the respondent the running of the turbines after the lease period was not authorized and therefore the claimant is not entitled to receive any compensation for the act of



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generating power after the lease period. The claimant was deemed to have done it at its risk and cost.”

The above conclusions are eminently reasonable. Once the Arbitral Tribunal rejected the claim of MSIL for lease rental charges for the period beyond the original lease term, it would have been manifestly unjust to grant O&M and other charges to VSL especially because MSIL did not derive any revenue or other benefit from such operations.

19. The Arbitral Tribunal also dealt with the claim for refund of the deposit of Rs.270 lakhs and the counter claim for lease rental arrears and interest thereon. Clause 8 of the Lease Agreement deals with the lease deposit of Rs.270 lakhs, which represents 37.5% of the cost of the windmills. Clause 8 is set out below:

*“8. That Wescare shall pay the Lessor upfront, a Lease deposit equivalent to 37.5% of the cost of the wind mills which shall be retained by the Lessor during currency of the Lease tenure. **The same shall be refunded by the Lessor to Wescare without any***



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interest upon expiry of the lease and all the rights and obligations of parties to this Lease Agreement are fully discharged. This lease deposit shall not be utilized during the lease tenure for any purpose and that Wescare hereby irrevocably agrees that the Lessor shall be permitted to utilize the lease deposit at the time of closure of the lease agreement for the following purposes only:

- a) Towards any shortfall in the residual value*
- b) Towards any shortfall in the rentals payable in terms of Schedule III to this Lease Agreement.”*

(emphasis added).

Clause 8 expressly permits the utilization of the lease deposit, at the time of closure of the Lease Agreement, for two purposes only. The said purposes are shortfall in the residual value and shortfall in the rentals payable in terms of Schedule III of the Lease Agreement. Since Clause 8 permits utilisation



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of the deposit only upon expiry of the term of the lease, the Arbitral Tribunal allowed the claims for rental arrears of Rs.131.20 lakhs and the claim of Rs.28.39 lakhs as interest thereon up to 31.03.2009. As regards the period subsequent thereto, it was concluded that any shortfall in lease rental could and should have been adjusted by MSIL from and out of the deposit of Rs.270 lakhs. The finding of the Arbitral Tribunal, on this issue, from internal page 40 of the Award is set out below:

"The third counter claim relates to interest of Rs.135.14 lakhs at 14.5% per annum on the lease rental dues and interest from 01.04.2009 to 24.02.2015. This claim does not stand scrutiny because when a right has been endowed upon the respondent to adjust the shortfalls in Lease rentals out of the lease deposit kept by it, non-exercise of that right does not entitle it to demand interest. Hence, I hold that the respondent is not entitled to interest on lease rental dues. Secondly, there shall



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be no interest on interest unless the contract otherwise provides for it. Ex.C1 nowhere provides for interest on interest. The Supreme Court in State of Haryana and others vs. S.L.Arora & Company reported in (2010) 3 SCC 690 held that in the absence of any provision for interest upon interest in the contract, the Arbitral Tribunals do not have the power to award interest upon interest, or compound interest, either for the pre-award period or for the post-award period. Therefore, I hold that this counter claim deserves to be dismissed."

20. The lease rental claim of Rs.131.20 lakhs pertains to the period up to 31.03.2009 and was, consequently, payable periodically for the period prior to and ending on 31.03.2009. In the event of default in making payments on or before the prescribed date, interest was payable by VSL. The third counter claim of Rs.135.14 lakhs was for interest on the consolidated sum of Rs.159.59 lakhs (comprising an interest component of



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Rs.28.39 lakhs and a principal sum of Rs.131.20 lakhs) for the period running from 01.04.2009 to 24.02.2015. As regards the principal sum of Rs.131.20 lakhs(rental dues), MSIL was certainly entitled to interest up to 31.03.2009. This was recognized in the Award. As regards the period commencing from 01.04.2009, as is evident from the above extract from the Award, the Arbitral Tribunal rejected the claim because MSIL could have realized this amount by making an adjustment against the deposit of Rs.270 lakhs. This conclusion is based on a credible interpretation of Clause 8 of the Lease Agreement and does not call for interference.

21. As regards the claim for refund by VSL, after setting off the lease rental dues and interest thereon up to 31.03.2009, refund was granted of the net outstanding. Such refund was ordered with interest thereon at 14.5% per annum. With regard to the grant of interest, learned counsel for MSIL contended that Clause 8 specifies that the lease deposit would be refunded without interest and that the Arbitral Tribunal's decision is contrary to and in disregard of the contract. After examining Clause 8, the Arbitral Tribunal recorded a finding that “the interest free nature of the deposit does not



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extend beyond the currency of the lease tenure.” Therefore, interest was awarded at 14.5% per annum on the net refund value. If interpreted as contended by MSIL, a deposit may be retained for even ten or twenty years after expiry of the relevant contract without paying interest thereon. Therefore, the interpretation placed on the expression in Clause 8 (placed within quotation marks above) by the Arbitral Tribunal is undoubtedly credible and reasonable and, therefore, does not merit interference.

22. As regards dismantling and related charges, the Arbitral Tribunal concluded that VSL was justified in dismantling the windmills but that VSL carried out these activities unilaterally and that MSIL received no benefit from the continued operation of the windmills. The Arbitral Tribunal also concluded that the arbitration clause does not empower the Arbitral Tribunal to consider claims relating to the period after 31.03.2009. By taking all the above factors into account, it was held that VSL is not entitled to these charges. Although the reasoning of the Arbitral Tribunal is not entirely convincing, in the factual context, the conclusion cannot be construed as a patent illegality justifying interference under Section 34 of the Arbitration



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23. VSL also made a claim for refund of the sum of Rs.13,37,835/-, which was paid by VSL to MSIL as security towards interest on advance tax. In order to enable MSIL to claim depreciation on the windmills for the financial year 2000-2001, VSL was required to provide a commissioning certificate on or before 31.03.2001. Since MSIL would be required to pay a higher sum as advance tax if it did not produce the commissioning certificate to the Income Tax Department, the security was provided. Therefore, upon production of the commissioning certificate, this amount was liable to be refunded. VSL provided the commissioning certificate belatedly on 19.04.2001. Therefore, MSIL was unable to claim depreciation for the financial year 2000-2001. In this situation, MSIL should have adjusted the security deposit towards interest on advance tax paid belatedly, but this amount was adjusted against lease rental dues on 31.03.2005. After noticing that the amount was adjusted on 31.03.2005 towards lease rental dues, the Arbitral Tribunal rejected the claim for refund of the principal sum but granted interest on the said sum for the period running from 01.07.2001 to



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31.03.2005 at 14.5% per annum. Interest was awarded because MSIL retained the money and derived benefit therefrom until 31.03.2005. This conclusion also does not warrant interference under Section 34 of the Arbitration Act.

24. One last issue merits consideration. Learned counsel for MSIL pointed out that the windmills were dismantled and are in the custody of an Advocate Commissioner. He also pointed out that MSIL is entitled to these windmills as the owner thereof. As the owner of the windmills, although the value thereof would have reduced considerably by now, MSIL is entitled to take custody of the windmills and either retain and use the windmills or bring the same for sale so as to appropriate the sale proceeds. By leaving it open to MSIL to file an appropriate application for such purpose, both these petitions are dismissed without any order as to costs.

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Speaking Order

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