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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION NO. 196 OF 2016
WITH
NOTICE OF MOTION NO. 708 OF 2018**

Yogesh Mehra	...	Petitioner
vs.		
1. Enercon GmbH	...	Respondents
2. Wobben Properties GmbH		
3. Wind World India Limited		
4. Ajay Mehra		

**WITH
COMMERCIAL ARBITRATION PETITION NO. 205 OF 2016
WITH
NOTICE OF MOTION NO. 726 OF 2018**

Ajay Mehra	...	Petitioner
vs.		
1. Enercon GmbH .	...	Respondents
2. Wobben Properties GmbH		
3. Wind World India Limited		
4. Yogesh Mehra		

**WITH
COMMERCIAL ARBITRATION PETITION NO. 16 OF 2017
WITH
NOTICE OF MOTION (L) NO.1655 OF 2018**

Wind World (India) Limited	...	Petitioner
vs.		
1. Enercon GmbH	...	Respondents
2. Wobben Properties GmbH		
3. Mr. Yogesh Mehra		
4. Mr. Ajay Mehra		

Mr. Shyam Mehta, Senior Advocate i/b. Mr. Bimal Rajshekhar for the Petitioner in CARBP/205/2016.

Dr. Birendra Saraf a/w. Mr. Ranjit Carvalho, Ms. Sanaya Dadachanji, Mr. Rohit Lalwani i/b. Manilal Kher Ambalal & Co. for the Petitioner in CARBP/196/2016 and Respondent no. 4 in CARBP/205/2016 and Respondent no. 3 in CARBP/16/2017.

Mr. Zal Andhyarujina a/w. Mr. Kartikeya Desai, Mr. Karan Bhide and Mr. Asadali Mazgaonwala i/b. M/s. Kartikeya & Associate for Petitioner in CARBP/16/2017.

Mr. Aspi Chinoy, Senior Advocate a/w. Mr. Karl Tamboly, Mr. Jehangir Jejeebhoy, Mr. Vivek Vashi, Mrs. Kanika Sharma Goenka, Ms. Shaheda Madrasawala, Ms. Swati Khinvasara and Mr. Cyrus Jal i/b. Vashi and Vashi for Respondent no. 1 and 2 in CARBP/196/2016.

Mr. S. U. Kamdar, Senior Advocate a/w. Mr. Sarosh Bharucha, Mr. Jehangir Jejeebhoy, Mr. Vivek Vashi, Mrs. Kanika Sharma Goenka, Ms. Shaheda Madraswala, Ms. Swati Khinvasara and Mr. Cyrus Jal i/b. Vashi and Vashi for Respondent no. 1 and 2 in CARBP/205/2016.

Mr. Janak Dwarkadas. Senior Advocate a/w. Mr. Jehangir Jejeebhoy, Mr. Vivek Vashi, Mrs. Kanika Sharma Goenka, Ms. Shaheda Madraswala, Ms. Swati Khinvasara and Mr. Cyrus Jal i/b. Vashi and Vashi for Respondent no. 1 and 2 in CARBP/16/2016.

CORAM : A.K. MENON, J.

RESERVED DATE : 14th AUGUST, 2018

PROUNOUNCED ON : 14th DECEMBER, 2018

Judgment

1. These three petitions filed under section 34 of the Arbitration and Conciliation Act, 1996 challenge an award passed by a three member tribunal by majority of 2 : 1 and one dissenting member who passed the award on 26th August, 2016. The petitioners challenge the majority award to the extent it holds against

the petitioner. By consent all arguments of Counsel were advanced with reference to Arbitration Petition No. 205 of 2016.

Factual background

2. Before dealing with the substance of the challenge it is appropriate to briefly set out the factual background. The Petitioner in Arbitration Petition Nos. 196 of 2016 and 205 of 2016 are brothers Mr. Yogesh Mehra and Mr. Ajay Mehra (“the Mehras”) who set up a renewable energy business. They entered into a Joint Venture Agreement (JVA) known as Wind World India Limited (“WWIL”). Respondent no. 2 is Wobben Properties GmbH (“WPG”) incorporated under the laws of Germany. WPG is stated to be the exclusive licensing agent of Dr. Aloys Wobben (“Dr. Wobben”) and Enercon GmbH (“Enercon”). Dr. Wobben was initially the sole shareholder of WPG. Thereafter the shares were transferred to Aloys-Wobben Stiftung, a Trust organised under German law. Respondent no. 2 is WWIL. Respondent no. 4 is Mr. Yogesh Mehra, Managing Director of WWIL and petitioner in Arbitration Petition No. 196 of 2016. The Joint Venture Agreement (“JVA”) was executed in 1994. Respondent no. 1 is a company- Enercon incorporated under the laws of Germany and holds 56% of the shares of WWIL. The Mehras and family members hold the remaining 44%. It is believed to be set up by one Dr. Wobben, a German electrical engineer and entrepreneur. WWIL is an unlisted public company, a joint venture.

3. The Mehras are believed to have used their managerial, marketing and liaising skills in running the business of WWIL. Enercon also contributed its

technology to WWIL. The board of directors of WWIL was four strong and the right of appointment of directors vested in Mehras and Enercon equally. Thus two directors could be appointed by Enercon and two by the Mehras. Dr. Wobben was Chairman of the board, appointed by Enercon who held a casting vote in the event of deadlock. This was not to apply in case of investments and any matters of finance.

4. The genesis of the joint venture lies in Yogesh Mehra approaching Dr. Wobben who is believed to have conducted study of regulations in India pertaining to the business intended to be conducted by the proposed joint venture. The parties then had negotiations in respect of transfer of technical know how in India and later entered into a joint venture agreement nominating WWIL as the recipient of technical know how in India for commercial exploitation project. It is the petitioners contention that the business of land development rights was not the agreed business of WWIL and WWIL was incorporated only for manufacturing and sale of Wind Turbine Generators ("Turbines").

5. Yogesh Mehra is reported to have consulted professionals to understand the legislative and regulatory frame work for setting up manufacturing facilities for turbines in India. He was apparently advised to adopt the 'automatic route' for transfer of technology. The practice then followed required the Reserve Bank of India ("RBI") to grant approval for foreign technology agreements between foreign technology providers and Indian companies in respect of high priority industries, which included wind energy. Thus the joint venture was to comply with Indian laws. Pursuant to applications, RBI approved of the business in September, 1993.

Meetings were held between parties and on 9th December, 1993 Dr Wobben acting for Enercon is stated to have entered into a Memorandum of Understanding ("MOU") with Yogesh Mehra acting on behalf of the Mehra group whereby Enercon expressed willingness to transfer technical know how to WWIL (and also agreed to acquisition of 51% of share holding by Enercon to the technology) of the E-26 Turbine so as to enable manufacture of the same in India along with its parts. Enercon and Mehra also entered into the following agreements :

(i)	12 th January, 1994	Share holding Agreement subscribing to 51% of the paid up share capital ("SHA")
(ii)	12 th January, 1994	Technical Know How Agreement ("TKHA")
(iii)	19 th June, 1998	Supplementary Shareholding Agreement ("SSHA")
(iv)	19 th May, 2000	Secondary Supplementary Shareholding Agreement ("SSSHA")
(v)	19 th May, 2000	Supplementary Technical Know How Agreement ("STKHA")

Each of these agreements provided for subscription of shares transfer, supply and disclosure of technical know how, information and documents and related materials for manufacturing of products for the Indian market and to be used by WWIL. The two supplementary agreements SSHA and SSSHA recorded change in the respective share holding whereby Enercon's shareholding in WWIL increased to 56% and the Mehra decreased to 44%. Under the SSHA, WWIL was permitted to manufacture Electronic Control Components including power cabinets. It amended the definition of products to include E-26, E-30 and E-40 models of Turbines and at least two other models of Turbines to be manufactured or

developed by Enercon. Enercon also transferred technology of E-33, E-48 and E-53 turbines. By 17th November, 2002 an amount of DM 2.5 million had been paid over by WWIL to Enercon under the TKHA and according to the petitioners no further amounts were due, nor were they demanded by Enercon. It is not in dispute that the TKHA expired in January, 2004. By March, 2004 the annual turnover of WWIL was around INR 7.08 billion and it had 1004 employees. WWIL was entering into new areas of business including land development rights. Between 1998 and 2004 the Mehra family is believed to have provided personal guarantees in the aggregate of INR 6.9 billion as security for working capital loans. The contention of the petitioner is that the efforts of Mr. Yogesh Mehra have been acknowledged by Dr. Wobben. The Mehra family contended that technology for E-33 and E-48 were also to be transferred without any further royalty payments. When Enercon demanded further royalty this led to certain disagreements. Negotiations were held between Enercon and WWIL for the rate of royalty to be paid. Disputes arose between the parties thereafter.

6. Enercon filed Company Petition No. 82 of 2011 before the Company Law Board against the petitioner alleging oppression and mismanagement by the Mehra family members and all companies under their management including VWI were impleaded in that petition. Respondent no. 1 – Enercon sought removal of Yogesh Mehra and Ajay Mehra from the position of Managing director and Whole time director of Enercon (India) Ltd. (“Enercon India”) and transfer share holding of Enercon India to Enercon on a fair value. According to Enercon, Mehra family had avoided funding the company although the company was badly in need of funds.

No steps were taken to increase the equity and had made it clear that they were inclined to encash investments rather than bring in more funds. Enercon alleged that Mehras had concealed financial affairs of Enercon India by manipulating accounts to portray a rosy picture, the idea being to borrow monies from the banks and institutions. It was contended that the management Mr.Yogesh Mehra and Mr.Ajay Mehra, Associates and subsidiary company at Enercon India had undertaken huge borrowings to the tune of Rs.1030 Crores. It was alleged that such borrowing was excessive and had the banks been aware of the true state of affairs, they would never have agreed to lend monies. Mr. Yogesh Mehra had been misusing his power as the Managing Director of the Company for personal gain with ulterior motive and in breach of trust. It was further alleged that the Mehra group had conducted itself in an oppressive fashion while managing company in violation of established norms.

7. On or about 11th September, 2007 Mr. Yogesh Mehra and the respondent no. 4. filed a derivative suit in this Court being suit No. 2667 of 2007 inter alia seeking reliefs to ensure continuous and uninterrupted supply of parts and for specific performance of certain contracts. In the company proceedings the Mehras filed CA No. 484 of 2007 under section 8 of the Arbitration and Conciliation Act seeking reference to arbitration. It was contended that the subject matter of the dispute could not be heard by both the CLB and the arbitral tribunal.

8. On 29th October, 2007 the Company Law Board (CLB) directed parties to maintain status quo on all issues pending in the proceedings and dismissed the

application under section 8. Enercon sent notice invoking arbitration in respect of the IPLA. The disputes sought to be raised were six in number and are listed below;

- (a) WWIL claimed for damages for non supply of special components.
- (b) Validity of the IPLA including use of licensed intellectual property and the territorial scope of the licence.
- (c) Whether dispute pertaining to IPLA had been agreed to be referred to arbitration in London and its effect.
- (d) Royalty paid by WWIL pursuant to terms of the IPLA
- (e) Access to accounts pursuant to the terms of the IPLA
- (f) Liability, if any, of WWIL and the Mehra's to pay damages.

9. On 8th April, 2008 Mr. Yogesh Mehra and respondent no.3-WWIL and respondent no.4 -Ajay Mehra filed Regular Civil Suit No. 9 of 2008 before the Court of Civil Judge, Senior Division at Daman and sought a declaration that the IPLA was not a concluded contract and there was no valid arbitration agreement. A temporary injunction was sought restraining Enercon from initiating, continuing, with proceedings in the Courts in England. On the same day the Court in Daman directed Enercon to maintain status quo as regard to the proceeding initiated in the English Court. On 11th April, 2008 Yogesh Mehra responded to Enercon's letter invoking arbitration. He denied existence of the IPLA to the validity of the arbitration agreement under the IPLA and submitted that the seat of arbitration was India and not England. In July, 2008 respondent no. 3 filed suit no. 3090 of 2008 in this Court seeking to recover losses on account of Enercon's breach of the TKHA and the agreements related to supply of parts. Enercon filed a section 45

application under the Arbitration Act in the proceedings at Daman Court to refer parties to arbitration under clause 18 of the IPLA. Soon thereafter Yogesh Mehra, Ajay Mehra and the Mehra directors filed a Company Petition No. 74 of 2008 in the CLB against Enercon, Dr. Wobben and one Kettwig seeking reliefs on account of alleged oppression and mismanagement.

10. On 5th January, 2009 the Court in Daman dismissed Enercon's application under section 45 in Regular Civil Suit No. 9 of 2008 and granted an injunction restraining Enercon from pursuing proceedings in England. On 27th August, 2009 the Appeal Court in Daman vacated injunction and allowed Enercon's Application under section 45 of the Act. On 4th September, 2009 this Court in Writ Petition filed by Yogesh Mehra, WWIL and Ajay Mehra directed status quo in respect of order dated 8th April, 2008 and stayed the reference under section 45 of the Act. On 21st November, 2011 Enercon filed an Arbitration Claim Form before the English High Court seeking appointment of a third arbitrator and restraining WWIL from initiating or prosecuting proceedings in India. The English High Court also granted anti-suit injunction in relation to the suit filed by Yogesh Mehra in the Daman Court. Thereafter on 15th February, 2011 the English Court passed an ex-parte freezing injunction, restraining WWIL from disposing of its assets. On 23rd March, 2012 the English High Court discharged the injunction against WWIL while observing that Enercon's allegations regarding monies advanced by respondent no. 4 to various subsidiaries owned by the petitioner came within the purview of the CLB proceeding. On 5th October, 2012 the writ petition filed in this Court was dismissed and the parties in the Daman Court proceedings were referred to Arbitration.

11. On 26th February, 2013 Yogesh Mehra, WWIL and Ajay Mehra filed SLP in the Supreme Court challenging order dated 5th October, 2012 passed by the Bombay High Court dismissing the writ petition and referring parties to arbitration. On 14th February, 2014 the Supreme Court referred the disputes between the parties to arbitration while clarifying that the seat of arbitration could be India but the venue would be London.

Submissions of Mr. Mehta:

12. On behalf of the petitioners in Arbitration Petition no.205 of 2016 filed by Ajay Mehra, Mr. Mehta submitted that the petitioners had a good case on merits and sought stay of the arbitration award. PO-5 he submitted passed on 27th November, 2015 initially recorded that the hearing that were scheduled to commence on 30th November, 2015 was intended for hearing oral evidence and oral submissions and a party had liberty to apply to the tribunal for further hearing of oral closing submissions and whether or not such hearing was required to be determined in the discretion of the tribunal. He submitted that between 30th November, 2015 to 11th December, 2015 evidentiary hearings were held. Specific reliance was placed on the transcripts of day 9 and 10. According to Mr. Mehta on the 6th day of the hearing on evidence, his client had produced contracts and valuation reports and then dealt with the sale of land development rights from Vish Wind Infrastructure LLP (VWI). On 8th December, 2015 i.e. the 7th day of hearing on evidence, the Mehra brothers produced the final statement in respect of WWIL.

13. Mr. Mehta invited my attention to proceedings on day 9, extracts of which are produced in Volume III page 1864 which records the submission on behalf of the learned senior counsel appearing on behalf of Ajay Mehra that the petitioners had requested an opportunity to make oral closing submissions at a separate session or as decided by the tribunal. This aspect was clarified in PO-5 on 11th December, 2015. Mr. Mehta submitted that the tribunal fixed a schedule for Enercon to file an interim application and for the Mehras to respond to the request for production of further documents and for either party to apply for leave to adduce further evidence responsive to VWI documents. Mr. Mehta submitted that the tribunal then reserved 27th and 28th April, 2016 in London for oral evidence, if any, should an application be made for cross examination of the petitioners witnesses. It further directed that closing oral submissions would also be heard on those dates if such request was made and if it was felt necessary by the tribunal.

14. Mr. Mehta submitted that on 13th December, 2015, Enercon made an application to the tribunal under Section 17 seeking disclosure of the third party documents of VWI and Vaayu entities and restraining them from dealing with assets. On 15th and 16th December, 2015 the counsel and the solicitors for the Mehras informed the tribunal that they would not represent the Mehras thereafter. On 20th December, 2015 Yogesh Mehra, the petitioner in Arbitration petition no.196 of 2016 sought extension of time fixed in PO-5 by four weeks. PO-6 then came to be passed on 24th December, 2016 making of a few changes in the timetable but continuing the last two dates of 27th and 28th April, 2016 which according to Mr. Mehta were reserved for oral hearings. Mr. Mehta submitted that in view of the petitioners Advocates having discontinued representing the

petitioners, it became necessary to make alternate arrangements and on 7th January, 2016 the new Advocates representing the Mehras sought extension of time by 12 weeks to file a reply to Enercon's application under Section 17. As a result of the extension sought, time of schedules were sought to be re-adjusted and the tribunal passed PO-7 making further adjustments in the time schedule but retaining the date of 27th and 28th April, 2016 for the aforesaid purposes.

15. Since the tribunal had declined to extend time provided for cross examination of closing oral submissions if found necessary, Advocates for WWIL and the Mehras once again sought rescheduling of the time table and requested that 27th and 28th April, 2016 may be utilized only for oral evidence in respect of the application under Section 17. A further request was made that the parties be permitted to submit closing written submissions on 30th June, 2016 and that considering the nature of the matter closing oral submissions would be required.

16. Mr. Mehta submitted that in an effort to secure an oral hearing Advocates for WWIL and the Mehras contended that in view of the voluminous papers and the deadline of 22nd April, 2016, oral submissions need not wait till 2017 but an alternative solution can be worked out at a different venue but to no avail. He submitted that after the petitioners filed their response to the application under Section 17 on 27th February, 2016, PO-8 allowed Enercon's interim application holding that assets of WWIL had been wrongfully transferred to the Vaayu Companies. That order thereafter came to be set aside by this Court on 29th March, 2016 on the ground that the tribunal could not pass interim measures against persons who were not parties to the arbitration proceedings. The arbitration

proceedings however, continued on schedule and as Mr.Mehta would submit, the tribunal reminded the parties on or about 13th April, 2016 that the tribunal would decide whether or not it wished to hear oral closing submissions only after receiving the closing written submissions. Mr. Mehta submitted that on the very next date the Advocates for the petitioners applied for leave to adduce further evidence. Witness statements of one Khona and D. Vaidyanathan filed on 15 and 16th April, 2016. These witness statements were taken on record by the tribunal. Time to file closing written submissions was extended till 13th May, 2016 and hearings proposed to be held on 27th and 28th April, 2016 were cancelled. I may observe that this occasioned after the respondents informed the tribunal that they did not intend to cross examine the petitioner's witnesses. In view of the said communication, on 24th April, 2016 Advocates for the petitioners made a further request for oral hearing, however, the tribunal declined the application. On 25th May, 2016 the petitioners Advocates filed written closing submissions and repeated their request for oral closing submissions which according to them were required to be granted under Section 24(1) of the Arbitration Act. Accordingly, time was sought. Mr. Mehta submitted that the tribunal declined to oblige and vide an email on 4th February confirmed that dates fixed on 27th and 28th April 2016 could not be altered and that final written submissions must be given on or before 22nd April, 2016 in order to enable the tribunal to decide whether it wished to hear oral submissions at all.

17. Mr. Mehta submitted that evidential hearings in the arbitration were held from 30th November, 2015 to 11th December, 2015 and in this respect he relied

upon the relevant transcripts of day 9 and 10. He submitted that on day 6 of the evidential hearing, Mr. Mehra had produced records and valuation reports for sale of development rights from VWI to WWIL and on day 7, 8th December, Mr. Mehra produced financial statements of VWI. It was requested that parties be permitted to submit comprehensive closing written submissions on 30th June, 2016 and reiterated that closing oral submissions would be necessary. The tribunal then addressed an email dated 14th February, 2016 stating that the dates fixed on 27th and 28th April, 2016 could not be shifted and fixing 22nd April, 2016 as the outer date for filing closing written submissions to enable the tribunal to decide whether it wishes to hear oral submissions. However, the Mehra's request for oral submissions was rejected after the written submissions were filed since according to the tribunal, oral submissions could not be held till 2017 and the tribunal intended to issue an award in the summer of 2016. He submitted that the petitioners had immediately informed the tribunal that oral submissions could be made as earlier, at an alternative venue, such as Hong Kong where oral hearings had been held in the past. In the meanwhile, the Mehra's filed their response to the respondents reply to the application under Section 17 and PO-8 came to be passed whereby the interim application was allowed on the ground that assets of WWIL had been wrongly transferred to Vaayu Companies.

18. Meanwhile, this Court set aside the P.O. 8 on the ground that was beyond the jurisdiction of the tribunal to pass an interim order against persons who were not parties to the arbitration proceedings which included the limited liability partnerships. Mr. Mehta further submitted that on 13th April, 2016 the tribunal

informed the parties that closing written submissions were due on 22nd April, 2016 and that a decision as to whether closing oral submissions were required at all would be decided only after receiving closing written submissions. On the next date, the petitioners Advocates sought to leave to adduce further evidence. This was permitted and on 15/16th April, 2016. Affidavits of evidence of witnesses Khona and Vaidyanathan were filed. On 20th April, 2016 (page 1899 vol.3) the tribunal took on record the witnesses statements extended the time for closing submissions till 13th May, 2016 but cancelled the dates fixed for oral hearing on the ground that there will be no further oral evidence. Mr. Mehta submitted that on 22nd April, 2016 although a further application was made for permitting oral hearing in the interest of justice and while reiterating the fact that they were agreeable to work out an arrangement for holding the closing oral submissions, the tribunal declined any further request for altering the time table. The petitioners contended that failure to grant oral hearings would be contrary to provisions of law including Section 24(1) of the Arbitration Act and against rules of natural justice. However, the tribunal declined to oblige.

19. On 26th May, 2016 the tribunal reminded the parties that PO-5 has clearly set out that oral submissions would be heard if requested and if determined necessary by the tribunal but the tribunal did not find it necessary to schedule a oral hearing and further that the Arbitration Act does not provide that the tribunal had hold as many hearings as one party requests and at such time that a party may desire. Mr. Mehta submitted that this approach of the tribunal was unwarranted and violative of principles of natural justice. Mr. Mehta contended that his clients

request of oral hearing was thus rejected and that the only reason for such rejection is that the tribunal did not have the time till 2017 and they had intended to issue a final award in the Summer of 2016. This he contends was denial of an opportunity to make and present their case and thus a good case for interference. Mr. Mehta submitted that one of the Arbitrators had dissented. He relied upon the dissenting award of the tribunal in support of his contentions. In support of his contention he relied upon the following judgments:-

(i)Abubakar Abdul Inamdar (Dead) by LRS. And others v/s. Harun Abdul Inamdar and Ors.¹;

(ii) Bachhaj Nahar v/s. Nilima Mandal and another²;

(iii)Vinay Bubna v/s. Yogesh Mehta & others³ and

(iv) Union of India, represented by Chief Commercial Manager, Western Railway, Churchgate, Mumbai v/s. K.P.Traders⁴.

Submissions of Dr. Saraf

20. In Arbitration petition no. 196 of 2015 the challenge was restricted to the petitioner's contention that disputes which were not contemplated were referred to arbitration. It was also contended that allegations of diversion of funds were not referred to arbitration and could not therefore be subject matter of the impugned award. Dr Saraf invited my attention to the facts as they played out and submitted that in April, 2008 Mr. Yogesh Mehra and respondent no.3-WWIL and respondent no.4 -Ajay Mehra had filed Regular Civil Suit No. 9 of 2008 before the Court of Civil Judge, Senior Division at Daman seeking a declaration that the IPLA was not a concluded contract and there was no valid arbitration agreement. Yogesh

¹ (1995) 5 SCC 612

² (2008) 17 SCC 491

³ 1998 SCC Online Bom 399

⁴ 2015 SCC Online Bom 1509

Mehra responded to Enercon's letter invoking arbitration, denying existence of the IPLA and therefore the validity of the arbitration agreement. In Suit no. 3090 of 2008 filed in this Court respondent no.3 sought recovery losses on account of Enercon's alleged breach of the TKHA. Enercon filed a section 45 application under the Arbitration Act in the proceedings at Daman Court to refer parties to arbitration under clause 18 of the IPLA. Soon thereafter Yogesh Mehra, Ajay Mehra and the Mehra directors filed a Company Petition No. 74 of 2008 in the CLB against Enercon, Dr. Wobben and one Kettwig seeking reliefs on account of alleged oppression and mismanagement.

21. Dr. Saraf narrated the events as set out in the factual background above that led to the Appeal Court in Daman allowing Enercon's Application under section 45 of the Act, the filing of a Writ Petition by Yogesh Mehra, WWIL and Ajay Mehra resulting in the reference under section 45 of the Act being stayed. Enercon meanwhile filed a Claim Form before the English High Court which granted anti-suit injunction in relation to the suit filed by Yogesh Mehra in the Daman Court. On 5th October, 2012 the writ petition filed in this Court was dismissed and the parties in the Daman Court proceedings were referred to Arbitration. It is then that Yogesh Mehra, WWIL and Ajay Mehra filed SLP in the Supreme Court challenging order dated 5th October, 2012 passed by the Bombay High Court dismissing the writ petition and referring parties to arbitration. On 14th February, 2014 the Supreme Court referred the disputes between the parties to arbitration while clarifying that the seat of arbitration could be India but the venue would be London. A reference was therefore made in accordance with the order of the Supreme Court. Parties thereafter signed on the terms and conditions of appointment of the Tribunal and

Enercon raised claims against Yogesh Mehra and Ajay Mehra under the SHA claiming damages caused to shareholders. Injunctions were sought requiring Yogesh Mehra to act in accordance with the SHA, claiming monies spent from Yogesh Mehra and Ajay Mehra to pay monies due to be paid to WWIL for breach of the SHA. Enercon also claimed damages caused to its shareholding in WWIL resulting from breach under the SHA and loss caused to Enercon for alleged wrongful use and dissemination of technology without payment of royalty. Yogesh Mehra, WWIL and Ajay Mehra have contended that the tribunal is not the appropriate forum and raised preliminary objection as to the jurisdiction of the tribunal to decide disputes under the SHA.

22. Apropos diversion of funds to third parties, it was submitted by Dr. Saraf that this issue could not be referred to arbitration. On 13th December, 2015 a section 17 application was filed by the Enercon for disclosure of documents. On 8th March, 2016 the tribunal vide PO-8 directed Yogesh Mehra and Ajay Mehra to disclose documents in relation to Vaayu Companies and granted an injunction restraining them from dealing with the assets of the partnership. This PO-8 was however, set aside as beyond the jurisdiction of the tribunal. Dr. Saraf therefor submitted that the impugned award was perverse inter alia due to the fact that matters that were not in issue were considered by the tribunal and ruled upon. In support of the challenge he relied upon the following judgments

(i) *Abdur Rahim and Others vs. Mahomed Barkat Ali and Others*¹

(ii) *State of West Bengal and Others vs. Shivananda Pathak and Ors.*²

(iii) *Locabail (U.K.) Ltd and Anr. vs. Bayfield Properties Ltd. and Another*³

¹ 1927 SCC Online PC 98

² 1988 5 SCC 513

³ 2000 Q. B 451

- (iv) *Axios Navigation Co. Ltd. vs. Indian Oil Corporation Ltd.*¹
- (v) *Oil & Natural Gas Corporation Ltd. vs. Schlumberger Asia Services Ltd.*⁵
- (vi) *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd.*⁶
- (vii) *Ecopack India Paper Cup. Pvt. Ltd. vs. Sphere International*⁷
- (viii) *Commissioner of Central Excise, Delhi vs. Allied Air-conditioning Corpn (Regd)*⁸
- (ix) *Inox Leisure Ltd. vs. Goa State Infrastructure Development Corporation Ltd.*⁹

Submissions of Mr. Andhyarujina:-

23. In Arbitration Petition no.16 of 2017, Mr. Andhyarujina on behalf of WWIL submitted that WWIL was essentially concerned with the TKHA and STKHA. He submitted that on 14th October, 1993 'in principle' approval was issued to Ajay Mehra in relation to the foreign collaboration between Enercon and the Mehta group. This would cover foreign investments by Enercon and technology transfer by them. In relation to WTGs, approval was granted with conditions including as to payments of royalty, a lump sum payment and the execution of the technology transfer agreement. Following on the approval on 9th December, 1993, Yogesh Mehra representing the Mehra Group and Enercon represented by Wobben entered into a Memorandum of Understanding for transfer of technology which inter alia, provided that a full-fledged technology transfer agreement and shareholders agreement legalizing the Memorandum of Understanding would be signed on 12th January, 1994. A shareholders agreement was subsequently

¹ 2012 SCC Online Bom 4

⁵ 2006 SCC Online 1072.

⁶ 2018) SCC Online SC 232

⁷ 2018 SCC Online Bom 540

⁸ 2006 7 SCC 735

⁹ 2014 SCC OnLine Bom 1535

executed when it was agreed that an agreement for transfer of technical know how would be executed. The same day the TKHA was executed which contemplated transfer of technology, indigenization providing for WWIL's right to manufacture products in India with technical know-how and information to be transferred to them.

24. On 19th May, 2000, the STKHA came to be executed which needed certain modifications to the TKHA. Additional products were agreed to be provided by Enercon pursuant to Enercon's shareholding increasing upto 56%. On 9th March, 2006, Enercon certified that technology in respect of WTG's Models, E-30, E-33, E-40 and E-48 had been transferred. In respect of the execution of the IPLA, Mr. Andhyarujina submitted that on 23rd March, 2006, Enercon and Yogesh Mehra executed a Heads of Agreement (HOA) which incorporated the basic understanding between the parties and in relation to the transaction and the intellectual property being transferred to WWIL. He submitted that on 2nd June, 2006, WWIL instructed its Auditors to provide work formula for computation of royalty payments lying with the understanding arrived at under the HOA. On 27th June, 2006, drafts of the proposed IPLA, Name Use License Agreement(NULA), the Successive Technology Transfer Agreement (STTA) and Shareholding Agreement was shared by Enercon with WWIL. On 7th August, 2006, Enercon internally discussed changes suggested by Yogesh Mehra to the IPLA. On 8th August, 2006 the HOA on the Shareholding Agreement was arrived at. According to Mr. Andhyarujina, the draft IPLA was never finalized and despite the comments exchanged between the parties, the final version sent to the petitioners/Mehra's by Enercon did not reflect the changes. A

meeting was thereafter held on 29th September, 2006 at Aurich in Germany to discuss the IPLA and execute what according to Mr. Andhyarujina were “Agreed Principles”. At that meeting, the parties executed the Agreed Principles mutually incorporated to the draft of the IPLA and the NULA, STTA and an Amendment to the existing Shareholder's Agreement.

25. The principal contention of the Mr. Andhyarujina is that the Agreed Principles contained the draft IPLA was incomplete and did not reflect the independent transfer of intellectual property and did not have the relevant annexures. As of 30th September, 2006, the parties were still not clear about the contents of the IPLA. The project portfolio and trade marks which were required to be annexed to the draft IPLA never formed part of the IPLA. It is submitted that the draft IPLA was void by virtue of Section 23 of the Contract Act by reason of its uncertainty. Furthermore, under Section 69 of the Patents Act, the IPLA would have to be registered if it was a concluded contract but it was not so registered. Mr. Andhyarujina submitted that the parties to the transactions were clearly of the view that the IPLA was not a concluded contract and as of 12th October, 2006, the parties were still to exchange final versions. Enercon did not state that the IPLA was a concluded contract, however, on 18th October, 2006 Enercon contended by letter of the same date that the IPLA had already been executed and the only three agreements viz. STTA, NULA and Amendment to the Shareholding Agreement had to be executed. He submitted that an email exchange followed whereby WWIL/Yogesh Mehra contended that the IPLA was not a concluded contract.

26. Mr. Andhyarujina submitted that Enercon then sought a personal meeting in response but did not deny the fact that the IPLA was not a concluded contract. He therefore submitted that in the absence of concluded contract, an IPLA could not have been relied upon by the arbitral tribunal and the findings of the arbitral tribunal on that basis could not be taken into consideration and the award based on such considerations and relying upon the IPLA would be bad and against the fundamental policy of Indian law. In support of his contentions, he relied upon the judgment in the case of *Bank of Credit and Commerce International SA v/s. Ali and others*¹⁰

Mr. Chinoy's Submissions

27. On behalf of Enercon and WPG respondent nos. 1 and 2 in these petitions Mr. Chinoy submitted that the challenge under section 34 had no merit. The petitioner was given full opportunity of presenting its case during the proceedings held between 30th November, 2015 and 11th December, 2015. Parties made oral submissions and presented their evidence. During the hearing held in December, 2015 the petitioners' evidence revealed certain transactions between the entities incorporated by the petitioners which included one VWI and WWIL. These had apparently resulted in diversion of huge amounts from WWIL to VWI and to the Mehras. The evidence indicated that the amounts were approximately 100 million euros.

28. The Advocates for the plaintiff were reportedly taken by surprise and later the said Advocates informed the Tribunal that they would not continue to represent

¹⁰ 2002 1 AC 252

the petitioners. In view of the fact that the Advocates concerned did not proceed in the matter since they had no instructions, the Advocates therefore sought time to determine whether or not to make oral submissions on other aspects or file detailed written submissions. My attention was invited to the transcripts of the hearing between 30th November, 2015 and 11th December, 2015. On the following day since the petitioners Advocate had not received any instructions a PO-5 came to be passed by the tribunal in accordance to which laid out a time table for further proceedings.

29. Mr. Chinoy further submitted that from the transcript of 11th December, 2015 after announcing a procedural time table which was arrived at by consent the Tribunal reportedly enquired whether the parties were committed to not make oral submissions in response to which the petitioners counsel has reportedly answered in the negative. The respondents counsel also sought to clarify that merely applying for a leave to make oral submissions did not entail the tribunal acceding to the request. The petitioners counsel reportedly answered in the negative.

30. The petitioners Advocate thereafter informed the tribunal that they would no longer be acting for the petitioners on or about 15th December, 2015. Vide letter dated 17th /20th December, 2015 the petitioners sought a four week extension of the schedule. This was duly opposed by the respondents Advocates. On 7th January, 2016 the new Advocates entered appearance and sought a 12 week extension of the period agreed in the time table. On 3rd February, 2016 the Tribunal passed a PO-7 altering some of the agreed dates.

31. Mr. Chinoy submitted that in paragraph 7 of the order the Tribunal observed that it had reserved 27th and 28th April, 2016 for oral hearing in London in the event there was any application to cross examine witnesses or if the tribunal wished to hear oral submissions on any aspect of the case. The Tribunal clarified that it would be extremely difficult to find alternative dates and revised time table would not alter its dates reserved for oral submission should it be required. It is submitted that on 15th and 18th April, 2016 the petitioners sought to file witness statement of the Chief Financial Officer of WWIL and an expert on Wind Development Rights, particular reference being had to VWI transactions. Respondents while clarifying that the claimants were not accepting his correctness of the depositions informed the tribunal that they had no objection if the witness statement were to be filed and they had no intention of cross examining the two witnesses.

32. On 20th April, 2016 the tribunal admitted the two witnesses statement, closed evidence and extended time for filing of written closing submissions till 13th May, 2016. It cancelled the dates fixed for oral hearing since it was of the view that no oral hearings would be required. On 11th May, 2016 the petitioner informed the tribunal that they would not be able to file the closing submissions till 25th May, 2016 which they eventually filed on that date. It was therefore submitted by Mr.Chinoy that the allegations of want of opportunity was not granted to urge their case is not at all relevant.

33. Mr. Chinoy further submitted that the other line of challenge that of absence of pleadings in relation to diversion of funds from WWIL to VWI by the petitioner and respondent no. 4 had no substance. He submitted that in the statement of claim filed before the tribunal the petitioner and respondent no. 4 had contended that in breach of SHA transferred value from WWIL to the Vaayu Companies and that they had constituted breach of the obligations of Mr. Yogesh Mehra and / or Mr. Ajay Mehra under the SHA and / or Indian Law including of good faith, obligations which the said gentlemen had towards the company and this had caused loss to the claimants entitling them to claim damages to be assessed on account of profit plus interest. Mr. Chinoy therefore submitted that the absence of pleading is not a ground that can be sustained.

34. Mr Chinoy submitted that on 27th February, 2016 the petitioners filed replies to the application under section 17 and 19 and this application came to be allowed on 8th March, 2016. Meanwhile on 15th March, 2016 this Court stayed the tribunals order in Arbitration Petition No. 621 of 2016 and on 29th March, 2016 this Court set aside the order passed by the Tribunal and directed continuance of the undertakings of the petitions. On 13th April, 2016 the Supreme Court issued notice on the Special Leave petition filed and on 14th April, 2016 the petitioner, WWIL and Ajay Mehra sought leave to file additional evidence in relation to the VWI transactions notwithstanding that time had expired on 16th March, 2016 and also sought time till 30th June, 2016 to file its closing submissions. It was only thereafter that the statements of the two witnesses were filed on 20th April, 2016, much beyond the scheduled date. Enercon had claimed damages payable by the

petitioner and respondent no. 4 to the claimant no. 1 including for the loss caused to Enercon shareholding in WWIL, as a consequence of the petitioners and respondent no. 4's breaches of the SHA and/or duties arising as a matter of Indian Law.

35. Mr. Chinoy submitted that the award holds that the Mehras director were accountable to WWIL for the Euro 97 million profit which VWI had made under development rights transactions. While moulding the relief and directing petitioner and respondent no. 4 to jointly and severally pay respondent no. 3 instead of respondent no. 1 a sum of Euro 97 million payable with interest. This amount was diverted from WWIL to VWI/ the Mehras through VWI – WWIL transactions. He therefore submitted that there is no substance in the challenge. In support of his contention Mr. Chinoy relied upon the following judgments :

(i) *Ram Sarup Gupta (Dead) by LRS. vs. Bishun Narain Inter College and Others*¹¹

(ii) *Bhagwati Prasad vs. Chandramaul*¹²

(iii) *Kali Prasad Agarwalla (Dead) by LRS & Ors. vs. M/s. Bharat Coking Coal Limited and Ors.*¹³

(iv) *Sree Swayam Prakash Ashramam and Anrs. vs. Anandavally Amma and Ors*¹⁴

Submissions of Mr. Kamdar:

36. In arbitration petition no.205 of 2016, Mr. Kamdar contended on behalf of the respondent nos.1 and 2 that the tribunal had failed to provide an opportunity to permit the respondents to make oral submissions. He invited my attention to Procedural Order no.2 (PO-2) dated 22nd June, 2015 and submitted that although the oral hearings on documents was requested, the tribunal did not consider that

¹¹ 1987 2 SCC 555

¹² 1966 2 SCR 286

¹³ 1989 Supp(1) SCC 628

¹⁴ 2010 2 SCC 689

there was anything at that stage of proceedings in the case which made necessary for disposal of the objections to requests for documents and the tribunal had declined a oral hearing citing the provisions of section 24(1) of the Arbitration and Conciliation Act. He submitted that the oral hearing was not necessary. He relied upon the request made by the plaintiff for production of documents which was refused by the tribunal. He submitted that the claimants had requested for numerous documents and he relied upon the contents of Annexure A to the PO-2. Annexure A sets out the Claimants' Requests for Document Production, the relevance and materiality, response to the requests which were either accepted or objected to with reasons and the reply and the tribunal's decision on such requests. In some cases, the tribunal held that refusing such requests and classifying them as too broad and insufficiently relevant. The Tribunal held that no ruling was required. In some cases they found the requests acceptable and granted the request since the tribunal considered the documents potentially relevant to the issues which fell within the terms of reference.

37. Mr. Kamdar, the learned Senior Counsel representing respondent nos.1 and 2, Enercon & Wobben Properties submitted that in PO-2 had made it very clear that oral hearings are unusual in international arbitrations. The Tribunal had made its order in relation to the requests for documents set out in Annexure A to the PO2. PO-2 was passed way back in June 2015 and no objection whatsoever was raised on the ground of the competence of the tribunal or the jurisdiction of the tribunal. The tribunal did not consider that there was anything in the case which makes the hearing necessary for the fair disposal of the objections to Request for documents.

In the absence of challenge under Section 16 he submitted that the challenge under Section 16 ought to have been raised at the earliest possible opportunity and not after having participated fully in the arbitration proceedings that the plea of lack of jurisdiction could not be raised after submitting a statement in defence. He submitted that the law on the subject even under the 1940 Act had been settled in the case of *Renusagar Power Co. Ltd. (supra)* by the Supreme Court and the scope of the arbitration was well defined. All challenges under Section 12, 13 and 16 could not be made in a 34 challenge and these would have to be made before the arbitral tribunal itself. The tribunal was empowered to rule on its own jurisdiction and a challenge to the jurisdiction of the tribunal must be taken under Section 16(2) at the time of not later than filing the suit of defence. Deemed waiver would come into effect upon failure to challenge the jurisdiction of the arbitration. Mr. Kamdar submitted that in these circumstances, that there was no substance in the challenge. He therefore submitted that in the present case there was no reason to interfere with the award. In support of his contentions Mr. Kamdar relied upon the following judgments:–

(i) *Union of India v/s. Pam Development Private Limited* ¹⁶;

(ii) *MSP Infrastructure Limited v/s. Madhya Pradesh Road Development Corporation Limited* ¹⁷;

(iii) *Renusagar Power Co. Ltd. V/s. General Electric Company and another* ¹⁸;

(iv) *M/s. Visakha Petroleum Products Pvt. Ltd. V/s. B. L. Bansal & ors.* ¹⁹;

(v) *Narayan Prasad Lohia v/s. Nikunj Kumar Lohia and others* ²⁰ and

(vi) *M/s. Chowgule Brothers & Ors. V/s. M/s. Rashtriya Chemicals & Fertilizers Ltd. & Ors.* ²¹

¹⁶ (2014) 11 SCC 366

¹⁷ (2015) 13 SCC 713

¹⁸ (1984) 4 SCC 679

¹⁹ (2015) 7 Bom CR 141

²⁰ (2002) 3 SCC 572

²¹ (2006) 4 Bom CR 78

Submissions of Mr. Dwarkadas:

38. On behalf of respondent nos.1 and 2 in Arbitration Petition no.16 of 2017 filed by Wind World (India) Ltd., Mr. Dwarkadas, the learned senior counsel submitted that the controversy relating to the oral hearing or the lack of it is not sustainable and that allegations of improper procedure were baseless. He submitted that during the course of arbitration proceedings, hearings had taken place between November 30 and December 11, 2015 and during the course of these proceedings the respondents learnt that the Mehra had diverted large sums of money out of WWIL into VWI which was controlled by themselves. Such evidence having come to light, counsel for the Mehra did not have instructions to make oral closing submissions. As a result an agreed time table was arrived at as to how the matter would proceed. These were incorporated in a Procedural Order no.5 (PO5) which was passed by the consent of parties and in the presence of Mr. Yogesh Mehra-the petitioner in Arbitration Petition no.196 of 2016. PO5 provided for time lines in respect of the application under Section 17 filed by the respondents including time for filing reply. 18th January, 2016 was set down as the date by which either party seeking to adduce further evidence dealing with the VWI documents and apply to adduce further evidence. 16th March, 2016 was the agreed date for filing written closing submissions and 27th and 28th April, 2016 was fixed for oral evidence pursuant to an application to adduce further evidence contemplated at item 2. It was clarified that if any oral closing submissions were requested it may be permitted only if the Tribunal determined it necessary. But for the above, the evidential record was closed.

39. Mr. Dwarkadas further submitted that the Procedural Order no.6 (PO-6) granted an opportunity to the petitioners to file replies to the Section 17 application. This was subject to the Mehra's providing undertakings that they would not deal with the assets of certain limited liability partnerships owned by them. This order has been passed on 24th December, 2015. It was on 7th January, 2017 that the new Advocates for petitioners requested the tribunal for extension of time by twelve weeks, over and above, the extension granted vide Procedural Order no.6. Vide PO-7 dated 3rd December, 2016, the tribunal extended time for filing closing written submissions upto 22nd April, 2016. The date of oral hearings, if any deemed necessary by the tribunal, was retained as 27th/28th April 2016. He submitted that although the tribunal had extended time, the petitioners' Advocates once again sought extension of time to file their written submissions till end of June 2016 by indicating that they would apply for oral submissions at an appropriate time. In response, the tribunal expressed its inability to shift the dates any further and directed the petitioners to provide written submissions well in time before 27th /28th April, 2016 in order to enable the tribunal to consider whether the oral submissions were at all required. The tribunal had then indicated that it intended to make its award in the summer of 2016 itself of that postponement of the dates set was not possible since if closing of oral submissions were required it could then not take place till 2017. The petitioners persisted with the request for oral arguments to be fixed after June 30 and if necessary to be held in a different city. Mr. Dwarkadas submitted that on 13th April, 2016 the tribunal informed the parties that written submissions were due to be filed on 22nd April, 2016 and that after the receipt of written submissions the tribunal would decide

whether it wishes to hear any oral arguments. It only on 14th April, 2016 an application for additional evidence was made by the petitioners although this was to be done by March 2016. On 15th and 18th April, 2016 the petitioners provided witness statements of Mr. Khona and Mr. Vaidyanathan.

40. On 20th April, 2016, the tribunal while confirming the admission of the evidence, directed that time to file closing written submissions would be extended till 13th May, 2016. He submitted that despite knowing that tribunal had no other dates available and has reiterated in the Procedural Order no.7 the petitioners persisted in seeking further time to file written closing submissions till 30th June, 2016. This was rejected by the tribunal on 22nd April, 2016 itself. The respondents filed their written closing submissions on the scheduled date i.e. 13th May, 2016. The petitioners, however, filed their submissions only on 25th May, 2016 and once again requested for an oral hearing to be held. This request was declined by the tribunal which referred to PO no.5 on the basis of condition that oral hearing would be granted only if the tribunal felt it necessary. On 20th April, 2016 respondent nos.1 and 2 wrote to the tribunal agreeing to admission of the witness statements. However, they requested that the evidential record be closed on that footing respondent would not cross examine the witnesses who deal with the statements being closed submissions since the admission of a new evidence would not justify further delays in the time table. Mr. Dwarkadas submitted that the respondents were thus co-operative. On this basis, Mr. Dwarkadas submitted that there is no substance in the contention that the petitioners were deprived of an oral hearing.

Mr. Dwarkadas relied upon the following judgment :

- (i) *Municipal Corporation of Delhi vs. M/s. Jagan Nath Ashok Kumar and Anr.*²²
- (ii) *Board of Control for Cricket in India vs. Kochi Cricket Private Limited and Ors*²³.
- (iii) *State of Rajasthan vs. Puri Construction Co. Ltd. And Anr.*²⁴
- (iv) *M/s. Sudarshan Trading Co. vs. Government of Kerala and Anr.*²⁵

41. I have heard all learned counsel and considerable length over different dates and have perused the relevant record and the materials to which my attention was invited and I find no reason to interfere with the Award. I propose to deal with the judgments cited at the bar and then deal with the Procedural Orders and to the extent relevant and how the parties understood them and the other grounds canvassed.

CONSIDERATION OF JUDGEMENTS CITED

Judgements cited by Mr.Mehta

(i) In *Abubakar Abdul Inamdar (supra)* the Supreme Court dealt with an issue of Succession under Muslim law. The Court observed that the plea of adverse possession had been upheld by two courts below but not by the High Court and in such a situation one had to turn to the pleadings. In the written statements it was pleaded that for a period of time he had remained in exclusive possession of the house but he had not pleaded a single overt act on the basis of which it could be inferred or ascertained that his possession became hostile and notorious to the exclusion of others. The decision in my view is of no assistance to the petitioners.

(ii) In *Bachhaj Nahar (supra)*, the Supreme Court was considering Section 100 of

²² (1987) 4 SCC 497

²³ (2018) 6 SCC 287

²⁴ (1994) 6 SCC 485

²⁵ (1989) 2 SCC 38

the Code of Civil Procedure in a second appeal where a new case had been made out and was that Court was examining the propriety of such conduct. In the suit, the respondent-plaintiffs' suit for declaration and possession was dismissed by the first appellate court on the ground that there was no encroachment by the appellant-defendant. Although the High Court held that the respondent-plaintiff had no title over the suit it granted an injunction by holding that easementary right had been made out. The Supreme Court found that the High Court in its endeavour to reduce delay and hardship that may result from relegating the plaintiffs to one more round of litigation had rendered a judgment which violated several rules of Civil Procedure including one that no amount of evidence can be looked into upon a plea which was never put forth in pleadings and the question which arose from pleadings and which was not the subject matter of issue cannot be decided by the Court. Secondly, a Court cannot make out a case that is not pleaded but should confine itself to the question raised in the pleading. The Court should not grant relief which was not claimed and which does not flow from the facts and the cause of action alleged in the plaint. Thirdly, that factual issues cannot be raised or considered for the first time in a second appeal.

Mr. Mehta had submitted that the case against VWI and in relation to the Vaayu Companies were entirely extraneous to the dispute between the parties. He relied upon the observations of the Supreme Court that the Civil Procedure Code is an elaborate codification of the principles of natural justice to be applied in civil litigation and could not be flouted to reduce delays, that the Supreme Court had repeatedly held that pleadings are meant to give each side intimation of the case

that had to be met and that would enable the Courts to determine the real issue from between the parties and prevent a deviation from the course of the litigation. Mr. Mehta had highlighted the fact that Supreme Court had considered and held that the question is whether any relief can be granted when the defendant had no opportunity to show that the relief proposed could not be granted. In my view, this decision is of no assistance to the petitioners since the petitioners themselves were guilty of suppression of facts which came to the fore only in the course of oral hearings. Secondly, strict rules of civil procedure are obviously not binding upon the arbitral tribunal as evidenced from Section 19(1). Moreover section 19 it reads as follows:-

- 1. The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (I of 1872)*
- 2. Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.*
- 3. Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.*
- 4. The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.*

It is evident from the provisions of Section 19 that subject to provisions of this part the parties were free to agree on procedure and it is only failing such agreement the tribunal may once again revert to the provisions of Part-I, conduct the proceedings in a manner it considers appropriate. Section 19(2) read with Section 24(1) makes it clear that the parties could arrive at an agreement which includes the agreement

not to have oral hearings. This agreement, in my view finds place in PO-5 which is undoubtedly binding on the parties. It therefore cannot be contended by the petitioners that the award of the tribunal is bad in contravention of strict rules of civil procedure. This submission of Mr. Mehta therefore cannot be accepted.

(iii) In *Vinay Bubna (supra)*, a single Judge of this Court held that the award was in violation of principles of natural justice and fair play since the petitioner therein was denied documents and denied the right of oral hearing. It was contended that this would be against the public policy of India and amount to denial of a reasonable opportunity to present his case. The award therefore was liable to be quashed and set aside. I am of the view that the judgment in *Vinay Bubna (supra)* is of no assistance to the petitioners in this case since the petitioners themselves have disclosed facts in the course of oral hearings which led to the discovery of the transactions between the Mehras, WWIL and the Vaayu Companies. The petitioners themselves were guilty of suppression till then and the fact that disclosures were made by the petitioners at that stage does not entitle them to now contend that they were not given an appropriate opportunity of meeting the case. In fact, unfettered opportunities were given to file evidence and written submissions and availed by the petitioners including by introducing witness statements of Khona and Vaidyananthan. It is not possible therefore to accept the contention that the petitioners were denied an opportunity of presenting their case.

(iv) In *K.P. Traders (supra)*, a single Judge of this Court in the course of hearing a challenge under Section 24 had occasion to consider various decisions of the Supreme Court and dealt with the question arising out of the fact as to when both

parties had agreed not to hold further hearings before the arbitrator, whether the arbitrator was bound to fix any dates for further hearing. Reference was made to Section 24 of the Act which made it clear that the tribunal had to decide whether to hold oral hearings for presentation of evidence or for oral arguments or whether proceedings were to be conducted on the basis of documents and materials unless otherwise agreed by the parties. In the facts of the case, the Court found that there was no agreement between the parties that the arbitrator would not hold oral evidence.

I am of the view that the decision in K.P. Traders (*supra*) also is of no avail as far as the petitioners are concerned and the petitioners case that they were prejudiced by want of a proper opportunity to defend the case against them and resulting in the award being perverse has not been made out. The award is not vitiated by any illegality especially in view of the fact that it cannot be set aside merely because there has been erroneous application of law or appreciation of evidence. There is nothing in the award which has been shown to me as being in contravention of policy of Indian Law or being in conflict with basic notions of morality and justice, far from being influenced by fraud or corruption none of which have been pressed as grounds of challenge.

Judgments cited by Dr.Saraf

- (i) In *Abdur Rahim (supra)* reliance was placed on aspect of breach of trust. The dispute in that case pertained to a suit for declaration of a certain property belonging to a wakf to be maintained by the Mahomedans in the interest of the

wakf without sanction of the Advocate-General. The High Court on appeal had set aside the judgment of the trial court which found that sanction of the Advocate General was not required since they doubted the maintainability of the suit without sanction of the Advocate General. Two questions were raised. Whether the suit was maintainable in view of the provisions of sub-section (2) of section 92 of the Civil Procedure Code and secondly whether suit is barred by the Rule of res judicata under explanation 6 of section 11 of the Code of Civil Procedure. It was urged on the respondents behalf that all suits founded upon any breach of trust for public purposes irrespective of the relief sought must be brought in accordance with provisions of section 92 of the CPC. Dr. Saraf submitted that the word “such further and other reliefs as the nature of the case may require” must be taken, not in connection with previous clauses (a) to (g) but in connection with nature of the suit viz. any relief other than those sought 9(a) to (g). Relying upon this Dr Saraf had submitted that no order could be passed under the residual clause of other reliefs. To my mind the question is whether the parties knew of what relief was being sought in the course of the proceeding. In this respect it is appropriate that one considers these observations of the Supreme Court in case of Ram Swarup (Supra) an Bhagwati Prasad (Supra) which hold in no uncertain terms that where parties knew the nature of relief that has been sought and absent specific and particularized pleadings in support of such pleadings the Court was not powerless to grant relief and in fact can grant such relief.

(ii). In *Shivananda Pathak (supra)* Dr. Saraf relied upon the concept of bias in support of his submission that tribunal was clearly biased against the Mehra. This

judgment seeks to deal with the concept of bias as a preconceived opinion or a predisposition or predetermination to decide a case or issue in a particular manner so much so that such predisposition does not leave the mind open to conviction and renders the judge unable to exercise impartiality in the particular case. Bias as we know has various forms, pecuniary bias, personal bias, bias as to subject matter in dispute, or policy bias etc. and apart from these common forms of bias, the Supreme Court considered bias of a different nature namely that of judicial obstinacy. The Supreme Court considered that essential requirement of judicial adjudication is a judge is impartial and neutral and is in a position to apply his mind to facts of the case before it and he is predisposed or suffers from prejudices or has a biased mind, he disqualifies himself from acting as a Judge. Dr. Saraf relied upon these observations in support of his contention that the tribunal was clearly biased.

(iii) In *Localbail (U.K) Ltd. (supra)* the Court of Appeals, United Kingdom was considering a concept of natural justice and bias and in the course of doing so had occasion to observe that in a particular case where existence of partiality or prejudice is actually shown, the litigant has a ground for objecting to the trial of the case by that Judge or applying to set aside any judgments proving that such objections are based on actual bias which are quite rare and partly for other reasons.

Judgments cited by Mr.Andhyarujina

(i) In *Bank of Credit and Commerce International SA v/s. Ali* which the House of Lords had occasion to consider the validity of certain agreements signed by

employees under which the employees accepted certain terms in full and final settlement of all claims then existing or those may exist against the bank. The bank's contention was upheld by the lower court but the Court of Appeals allowed the appeal filed by the employees. In the House of Lords, the bank's appeal came to be dismissed observing that although that there is no specific rule of interpretation applicable to a general release, the question of intention of the parties had to be ascertained objectively in the context of circumstances in which the release had been entered into. Mr. Andhyarujina had relied upon paragraph 37 in support of his contention that while considering the question of construction one would consider what reasonable person has understood by using the language in a document but the Judge disagreed observing that the background of the case was very important and that in the instant case, it was clear that the IPLA had not been executed.

Judgments cited by Mr.Chinoy

(i). In *Ram Sarup Gupta (Supra)* the Supreme Court had occasion to consider the provisions of Order 6 Rules 2, 4, 12 and Order 7 Rules 1 and 3 of the Civil Procedure Code, 1908 and held that pleading should be liberally construed and no pedantic approach should be adopted which would defeat justice on hair splitting technicalities. The Court held that sometimes pleadings make use of words which may expressly make out a case in accordance with strict interpretation of law, in such case it is duty of the Court to ascertain the substance of the pleading and to determine the question that it is not desirable to place undue emphasis on the form, instead the substance of the pleading should be considered. Once it is found that in spite of deficiency in pleadings parties knew of the case and proceeded to trial on

this issue by producing evidence it may not be open to such a party to raise the question of absence of pleading in an appeal.

(ii) In *Bhagwati Prasad (supra)* the Supreme Court was dealing with two cross appeals arising from a suit wherein plaintiff was owner of the house which was let out to the defendant as his tenant. The defendant admitted ownership of the plaintiff over the land, but the house was built by him and at his cost. The trial Court framed several issues and passed a decree for arrears of rent and directed the defendant to pay damages. In appeal, the High Court disbelieved the defendants' version of having constructed the house but set aside the order directing payments of past rent. The Court held that if a party asks for relief on a clear and specific ground and on the issues during trial no other ground is covered directly or by implication, it would not be open to the party to sustain the same claim on a new ground. The Supreme Court referred to principle laid down in *Sheodhar Rai vs. Suraj Prasad Singh*²⁶ in which it was held that where the defendant in his written statement set up title to the disputed lands, the Court could not, on his failure to prove the case, permit him to make out a new case which was not made out in the written statement, but was wholly inconsistent with the title set up by the defendant in the written statement. The new plea on which the defendant sought to rely that he was holding the suit property was not made in the written statement nor was it part of the issues and therefore no evidence could have been led about it. In such a case a party cannot be permitted to justify its claim on a ground that which is entirely new and which is inconsistent with the ground taken in the pleadings. The Supreme Court held that in considering application of this doctrine to the facts of

²⁶ AIR (1954) SC 758

the case in *Bhagwati Prasad (supra)* if a plea was not specifically made and yet it is covered by an issue by implication and the parties knew that the plea was involved in the trial then the mere fact that the plea was not expressly taken in the pleading would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule is that the plea should be founded on a pleading made by the parties but where substantial matters relating to title are involved directly or indirectly and the issues and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleading would be purely formal and technical and cannot succeed and the test is whether the parties knew that the matter in question was involved in the trial and whether they did lead evidence about it. If it appears that the parties did not know that the matter was in issue at the trial and one of them did not know that the matter was in issue at the trial and had no opportunity to lead evidence on it that would be a different matter and if one party is allowed to rely on matter in respect of which other party did not lead evidence or did not have opportunity of leading evidence it would introduce considerations of prejudice and in doing justice to one party, the Court cannot do injustice to another. Accordingly applying this principle to the facts in hand I find the findings of the tribunal can hardly be said to be perverse.

(iii) In *Kali Prasad Agarwalla (supra)*, the Court had occasion to observe that the appellant had contended that there was no proper pleading or issues for determination on a particular question and evidence was led in question which should not be looked into. The Court observed that it was too late to take up such contention when the parties went to trial being fully aware of all what they were

required to prove. They had adduced evidence of their choice in support of the claims and that evidence had been considered by both the Courts below. In that sense the Court came to hold that they cannot at that belated stage contend that the evidence ought not to be looked into. The Supreme Court therefore rejected the plea that the evidence led by the parties ought not to be looked into.

(iv) In the case of *Sree Swayam Prakash Ashramam and Another (supra)* the Supreme Court was considering a case of implied easement and in the process it was contended that there was no pleading in the plaint regarding implied grant of easmentary rights. The Supreme Court however considered these aspects in paragraph 30 and 32 and while dealing with submissions on behalf of the appellant that there were no pleadings in support of the claim for implied easmentary rights agreed. The trial Court found that when the evidence and pleading and grant of easement was established, although no implied ground was pleaded in the plaint. On this basis it is contended on behalf of respondent no. 1 and 2 that there is no substance in the objections sought to be raised on the basis that there were no pleading to support the case of the respondents. Accordingly applying this principle to the facts in hand I find the findings of the tribunal can hardly be said to be perverse.

Judgments cited by Mr.Kamdar

(i) In *Pam Development (supra)*, reliance is placed on the observations of paragraph 16 that the appellants in that case have not only filed the statement of defence but also made a counter claim against the respondents and since the appellant had not raised the objection with regard to competence or jurisdiction of

the tribunal before the Arbitrator. The Supreme Court made reference to its own decision in the case of BSNL v/s. Motorola India (P) Ltd. in which it had held that a party which knows that the requirement under the Arbitration Act had not been complied and yet proceeds with the arbitration without raising objection at the earliest, waives the right to object.

(ii) In *MSP Infrastructure Limited (supra)*, the Supreme Court while dealing with Section 16 of the Act observed that on a plain reading, a plea that the tribunal had no jurisdiction at all shall be raised not later than the submission of the statement of defence. The Court observed that the intention was to prohibit a party from raising a plea that the tribunal does not have jurisdiction after filing its statement of defences. The petitioner suffered the award and filed a petition under Section 34 and raised the question to jurisdiction after two years. The Supreme Court negated the plea and observed that the parties are bound by virtue of sub-section (2) of section 16 to raise any issue as to jurisdiction before or at the time of submitting of its statement of defence that it was expressly prohibited to do so at later stage.

(iii) In *Renusagar Power Co. Ltd.(supra)*, while considering the competency of arbitrator or umpire to provisionally decide its own jurisdiction, the Supreme Court in paragraph 25 culled out the following four propositions after discussing a host of the authorities viz. (1) whether a given dispute inclusive of the arbitrator's jurisdiction comes within the scope or purview of an arbitration clause or not depends upon the terms of the clause and it depends on what the parties intend to

provide; (2) expressions such as “arising out of”, “in respect of”, “in connection with”, “in relation to”, “in consequence of”, “concerning” or “relating to” the contract are all of the widest amplitude and include even the questions as to the existence, validity and scope of the arbitration agreement; (3) the arbitrator cannot clothe himself with power to decide questions of his own jurisdiction and it will be for the Court to decide those questions but nothing prevents the parties from investing the arbitrator with power to decide those questions by collateral or separate agreement and (4) if the arbitration clause is widely worded so as to include existence, validity and effect that is scope of the agreement and as far as the existence of validity of the agreement is concerned, it would not be decided by the arbitrator the sheer logic. The arbitration clause must fall along with the underlying commercial contract which is either non-existent or illegal while in the case of the effect and scope, the arbitration would decide the issue of arbitrability of the claims.

(iv) Reliance was placed by Mr. Kamdar on the decision of *M/s. Visakha Petroleum Products Pvt. Ltd. (supra)* in which the Supreme Court considered a submission based on the decision of the Supreme Court in *Narayan Prasad Lohia v/s. Nikunj Kumar Lohia* reported in 2002 (3) SCC 572 and the submission that since the issue of appointment of the arbitration and bias was not alleged under section 12, 13 and 16 of the Act the petitioner could not be allowed to raise such plea for the first time under section 34. The Court further held that if the challenge under Section 12, 13 and 16 was not raised before the Tribunal it would constitute a waiver under Section 4 and such a plea cannot be raised for the first time under Section 34.

(v) In *Chowgule Brothers (supra)*, a Division Bench of this Court observed that it is not permissible to look at a minority award while considering a petition to set aside the majority award and for various reasons because such an approach predicated that the majority arbitrators took into consideration only those facts and documents relied upon in any minority award and that the majority arbitrator did not consider the question from any other angle and the law relied upon in the minority award. That such a presumption would be incorrect and unfair to the majority arbitrators and would lead to confusion in adjudication of petitions seeking setting aside of the award but the majority award can be set aside only on the basis of what is stated therein.

Judgments cited by Mr. Dwarkadas

(i) In *Municipal Corporation of Delhi (supra)* the Supreme Court observed that the Arbitrator was the sole Judge of the quality as well as quantity of evidence and it was not to the Court to take upon the task once cogent reasons are given based on material on record. If the arbitrator has acted within the terms of the reference, the Court should be slow to interfere.

(ii) In *BCCI (supra)* Mr. Dwarkadas laid stress on the observation of the Supreme Court which inter alia make it clear that the section 34 petition is filed after the Amendment Act the amended provisions would bar any enquiry into the merits of the case.

(iii) In *Puri Construction (supra)* he relied upon observation that award cannot be set aside merely because an alternate view is possible.

(iv) In *Sudarshan Trading Co. (supra)* the allegation of misconduct and excess of jurisdiction the Supreme Court found that while an award is excess of jurisdiction is open to judicial review but in cases of awards within jurisdiction then is not open to judicial review and in such case the Court cannot interpret the contract even if a different view is possible.

42. Having dealt with the decisions relied upon by counsel I propose to consider the challenge in terms of the case canvassed by counsel. In this respect the procedural orders assume significance inasmuch as they reveal the process adopted by the tribunal during the progress of the case. It will be appropriate to start with PO-5. Reference to PO-5 clearly records presence of the parties and the fact that evidential hearing had been concluded. Since all counsel before me have repeatedly relied / laid stress upon the timetable in PO-5 it is reproduced for ease of reference ;

"I. The following timetable is agreed between the parties.

<i>Sr.No.</i>	<i>Particulars</i>	<i>Date</i>
<i>1</i>	<i>Claimants to file an Application under Section 17 of the Arbitration & Conciliation, Act, 1996</i>	<i>13 December, 2015</i>
<i>2</i>	<i>Respondents to file their Reply to the Claimants Application under Section 17 of the Arbitration & Conciliation Act, 1996</i>	<i>19 December 2015</i>
<i>3</i>	<i>Respondents to respond to the Claimants' request for production of the documents set out at Annex A</i>	<i>15 December 2015</i>
<i>4</i>	<i>Tribunal to make a ruling on the Claimants' Application 9i) under Section 17 of the Arbitration & Conciliation Act, 1996 and (ii) in relation to any disputed item in Annex A.</i>	<i>23 December 2015</i>
<i>5</i>	<i>Respondents to provide any documents / information in accordance with (3) and/or (4)</i>	<i>4 January 2016</i>
<i>6</i>	<i>An Application to the Tribunal, if either party seeks to</i>	<i>18 January 2016</i>

	<i>adduce further evidence, responsive to the Vish Wind Infrastructure LLP documents or the new documents produced at (5) above.</i>	
7	<i>An Application to cross examine or respond to the evidence adduced pursuant to (5) above</i>	25 January 2016
8	<i>Exchange of closing written submissions</i>	16 March 2016
9	<i>Any oral evidence in accordance with (7) above and Closing Oral submissions, if any are requested <u>and if determined necessary</u> by the Tribunal (<u>Emphasis supplied</u>)</i>	27 and 28 April, 2016 in London

II. *Save as aforesaid, the evidential hearing is concluded."*

PO-6 sets out the procedural history from the commencement of the evidential hearing. Discussions were then held during which the tribunal considered the difficulties caused to the petitioners herein on account of change of Advocates and observed that prima facie the evidence indicated breach of the shareholders agreement and of fiduciary duty of the Mehra's acting on behalf of the WWIL and a prima facie risk of the dissipation of assets which have been paid or transferred from WWIL. The tribunal then ordered undertakings to be filed as required in paragraph 12 of the PO-6 and extended the time for compliance of stages 2 and 3 of Procedural Order no.1 while clarifying that the order did not preclude either of the claimants from applying for interim measures to any Court. The petitioners' Advocates then wrote to the tribunal on 7th January, 2016 seeking further time of 12 weeks especially since the claimants had contended that the petitioners herein had concealed activities of certain companies described as "Vaayu Companies". This communication makes it clear that time was sought by the Advocates in order to *"enable them to appropriately and completely respond to such allegations"* in discharge of the Advocates professional duties.

43. PO-7 amended the time table permitting the petitioners to file their reply to the application under section 17 by 26th February, petitioners to respond to the requests for production of the documents by 26th February 2016, time for the tribunal to make a ruling under the Section 17 application, time to provide documents and time to apply to the tribunal to seek to adduce further evidence in response to the VWI documents till 4th March 2016. Time was extended upto 11th March, 2016 for the petitioners to provide documents requested and lastly time for either party to to apply for adducing further evidence responsive to the Vish Wind documents or further documents contemplated above was extended on 16th March, 2016. Time to apply for cross examination or respond to evidence if any adduced as above was also extended to 16th March, 2016. The date for exchanging closing submissions was extended upto 22nd April, 2016. Lastly PO-7 records that a meeting for oral evidence if any (for cross examination) and closing oral submissions, if any were requested and if determined necessary by the tribunal would be held in London on 28th April 2016.

44. Further correspondence from the Advocates for the petitioners sought revision of the 16th March, 2016 date to 31st March, 2016. The petitioners Advocates persisted that they wished to make closing oral submissions and would apply for extension. However, this assertion fails to consider PO-5 which clearly mentioned that oral hearings would only be scheduled if determined necessary by the tribunal. Correspondence continued to be exchanged on the change in schedules being sought by the petitioners. The tribunal vide an email dated 13th April, 2016 reminded the co-arbitrators and Advocates for parties that closing submissions were due to be filed on 22nd April, 2016 that the respondents have not

applied for cross examination in accordance with PO-5 amended vide PO-7 and that the tribunal would notify the parties as soon as possible after receiving closing submissions whether the tribunal wished to hear any oral submissions. If not, the provisional arrangements for oral hearings on 27th/28th April, 2016 would be cancelled and the application of the respondents in the arbitration for return of documents would be dealt with in the final award. They also sought remittance of funds to cover up expenses.

45. In response to this important email, the petitioners Advocates vide their email on 14th April, 2016 reserved their rights to apply to the tribunal for permission to make closing *oral* arguments subsequent to the filing of closing *written submissions* (emphasis supplied) and that they are willing to work out an arrangement for closing oral arguments after 30th June, 2016 similar to that one that was held in 2014 referring to the fact that the tribunal had apparently held a hearing in Hong Kong at an earlier point in time. Thus, the petitioners were aware of the fact that they could not claim to be heard orally as of right. It is for this reason that the claimants Advocates consciously used the following language in its email dated 14th April, 2016.

"The respondents reserve their rights to apply to the Tribunal for permission to make closing oral arguments subsequent of the filing of the closing written submissions." (Emphasis supplied)

Thus, it is became obvious that absent permission of the tribunal, there was no question of any oral submissions. Given the fact that in PO-5, the parties had already agreed that closing oral submissions, if any, requested would be subject to the determination of the tribunal. The respondents had agreed to admission of

evidence, statements of Mr. Kaushik Khona dated 15th April, 2016 and Mr. D. Vaidyanathan dated 16th April, 2016 and they also decided against cross examining these persons and dealt with their witness statements in the closing submissions. The respondents Advocates vide their letter dated 20th April, 2016 dealt with the contents of petitioners letter dated 18th April, 2016 providing the final version of witness statements and contending that further evidence is out of time and without prejudice to their contention that dilatory tactics were being adopted by the petitioners.

46. Denying that there was procedural unfairness and to avoid any allegations, the respondents sought to admit the additional evidence provided the evidential record was closed especially since under Section 19(4) of the Act, the tribunal has the power to determine relevance and materiality of the witness statements. The Respondent decided that they would not cross examine the Petitioners' witnesses and that closure has to be achieved in accordance with the agreed schedule. It is under these circumstances that the petitioners vide their Advocates letter dated 22nd April, 2016 repeated their requests for making oral submissions. The tribunal had then clarified that it did not wish to receive further submissions on the time table and that its ruling of 20th April, 2016 vide PO-7 would hold.

47. On 13th May and 15th May, 2016 the respondents and the petitioners through Advocates are seen to have addressed an email to the tribunal attaching copies of their respective closing submissions. The petitioners email reiterates their earlier requests for closing oral submissions and contended that the request for oral

submissions are required to be statutorily granted by the tribunal under the proviso to Section 24(1) of the Act and it was the appropriate stage when an oral hearing should be held and contended that the parties had not agreed that no oral hearing should be held. The petitioners contended that if oral hearings was to be denied, it would be contrary to provisions of law.

48. On 26th May, 2016 the tribunal acknowledged the receipt of the closing written submissions and making reference to PO-5 reiterating the consensual nature of PO-5. It observed that paragraph 9 of the time table agreed vide PO-5 had provided that closing oral submissions would be heard on 27th and 28th April, 2016 *“if any are requested and if determined necessary by the tribunal”*. (*Emphasis supplied*) The tribunal however did not consider further oral hearing necessary. Referring to the specific contention under Section 24(1) of the Act, the tribunal found that it was required to hold hearings at an appropriate stage of the proceedings on a request by a party unless parties agreed that no oral hearing shall be held. The tribunal recorded that it had held hearings in December 2014 and November/December 2015 and that it was not required to hold as many hearings as any party may request and at such time they may propose. However, the tribunal permitted parties to make written submissions on costs and comments on each other submissions before 24th June, 2016. The proceedings were then treated as closed.

49. On day 10 in the course of the hearing the Chairman of the tribunal while dealing with the request of oral hearing sought the petitioner's counsels confirmation that the tribunal was proceeding on the assumption that they were not

necessarily committed to an oral hearing at all, which counsel for the petitioners confirmed. Thus, there was no schedule fixed for oral hearing and it was the tribunal which was to decide in its discretion whether or not oral closing submissions were required. In my view 27th and 28th April 2016 were dates fixed for cross examination, if any and as evident from the PO itself for the purposes of closing oral submissions if any requested and if determined necessary by the tribunal, in the instant case, the tribunal felt it unnecessary.

50. The extracts from the proceedings on day 9 and 10 of the arbitration also support the view of the tribunal which had categorically sought to ensure that the counsel for the petitioners was at the material times made aware that the tribunal was not committed to a oral hearing. This was reiterated by the fact that on day 10, extract of the proceedings read as follows:-

"The Chairman : I assume we are not necessarily committed to an oral hearing at all?"

Mr. Khambata : No, I understand.

The Chairman : It may be that no one wants to cross-examine and then we just do it.

Mr. Joseph : I think, Lord Hoffmann, you are absolutely right. We are not committing ourselves, and I think may be we said closing submissions, if any are requested or something along those lines.

The Chairman : Yes

Mr. Khambata : Yes, that would give us the opportunity to go back and make an appropriate application for oral submissions.

Mr. Joseph : If any is required, and that again would not commit the tribunal to acceding to the request if the request were made.

Mr. Khambata : Of course not, of course not."

Thereafter on 3rd February, 2016 Advocates representing Enercon sought a clarification

from the tribunal upon receiving PO-7 in the following words:

“ We note that at paragraph 7 of the Procedural Order, it is stated that the tribunal “has reserved 27 and 28 April, 2016 for an oral hearing in London in case there should be an application to cross-examine arising out of the section 17 application or the tribunal should wish to hear oral submissions on any aspect of the case.” However, at point (9) in the revised Procedural Timetable, we note that the date reads “28 April 2016 in London”.

*For complete clarity, please can you confirm our outstanding is correct that, should an application to cross-examine **or an application for closing oral submissions be made and accepted by the tribunal**, both 27 and 28 April 2016 remain reserved for such purposes?” (Emphasis supplied)*

In response, on the same date the tribunal responded for the same date as follows: *“Yes, 27 and 28 April remain reserved”*.

In my view, the tribunal had given a full opportunity to the petitioners of presenting their case including by permitting leading of evidence and filing closing written submissions. The tribunal had already indicated that closing oral submissions may be scheduled only if it was deemed necessary. The approach of the tribunal has by far been transparent and I am unable to accept the contention that absence of an opportunity to make closing oral submissions had caused any prejudice.

51. Apropos the contention that the tribunal considered and granted relief to the respondents in the absence of specific pleadings it must be noted that in December, 2015 Mr. Yogesh Mehra was cross examined on the aspect of WWIL and the VWI transactions. It was through this cross examination that the contracts were disclosed on 7th December 2015 revealing that WWIL had lent VWI Euro 650,000 free of interest by the year ended 31st March, 2010. VWI had apparently used that

amount to acquire land. The documents shows that from 2010 to 2013 VWI sold rights that it had allegedly developed back to WWIL for a sum of Euro 121.8 million. Thus it is contended that Euro 119.9 million was diverted from WWIL to VWI and it was used by the Mehras. The statement of claim also sets out that the loss caused to Enercon by the Mehras by breach of their duties under the SHA and/or under Indian Law includes the damages caused to the value of Enercon's shares in WWIL and that Enercon was entitled to damages and interest. In addition, Enercon came to be entitled to accounts of profits. In the written submissions filed by Enercon in the opening it had contended in paragraph 114 that the Mehras had breached their obligation under the SHA including those under clause 2.7 and 4.1. and that they were liable to pay damages and/or account for profit in respect of transactions undertaken by WWIL with these related companies. Furthermore during cross examination on 8th and 9th December, 2015 both sides had filed statements of experts in relation to these transactions and then on the last date of the hearing the tribunal issued a procedural order no. 5. I find that procedural order no. 5 was issued post disclosure and in that sense the petitioner and respondent no. 4 were alerted to the fact that VWI transactions would be urged by the claimants as one of the breaches of the bargain between the parties. It is only on 13th December, 2015 that the claimants filed application under section 17 and 19 of the Act in relation to its disclosures. The petitioner thus sought extension of time on the ground on account of change of advocates. The tribunal thereafter passed the procedural order no. 7 on 3rd February, 2016 altering dates earlier fixed as set out in table. The cross examination was not resisted on the basis of absence of pleadings but in any case this was an aspect for the tribunal to consider which it

did. I find no substance in the contention that the claims were allowed in the absence of pleadings. In my assessment the petitioners were well aware of the claims in relation to the Vaayu companies. Thus the case that was to be met was known to the petitioners. Absence if at all of specific pleadings was not found fatal to the defence.

52. Dr. Saraf had also canvassed the aspect of bias. As correctly observed in Shivanand Pathak (Supra) and Localbail (Supra) proof of actual bias is difficult because the law does not countenance the questioning of a Judge of extraneous influences affecting his mind and that the policy of common law is to protect litigants who can discharge a lesser burden of showing a danger of real bias exists without requiring to show that bias actually exists. Although it was sought to be contended that the tribunal was biased, in the instant case I am unable to find justification for the allegation of bias in the facts of the case. Nothing in the award suggests that the tribunal was biased in substantive or procedural terms, besides the petitioners did not resist proceeding with the reference.

53. The other ground on which the award was assailed is that the IPLA was not a concluded contract. Mr. Andhyarujina had submitted that no reasonable man would agree, if he was to be asked, whether the IPLA was a concluded document. It is however a matter of record and an admitted fact that WWIL had made royalty payments in accordance with the IPLA. On a query Mr. Andhyarujina admitted that on 8th August, 2007, WWIL remitted payments towards royalty for the last quarter of 2006 but the petitioner paid such sum in good faith in the hope that respondent no. 1 would thereafter transfer the updates and new technology envisaged under

the IPLA but this was not done. He contended that the remittance although there was no legal binding obligation to pay royalty. Yet again the record indicates a contention that the royalty was paid by mistake. This contention appears preposterous to say the least. I am unable to accept this contention. If the IPLA was not an agreed document in terms of its contents there would have been no obligation to pay. It was also signed by the parties at one stage. There may have been differences on form rather than substance of the IPLA. However these aspects have been considered by the tribunal and the findings cannot be faulted on available grounds.

54. In a challenge under Section 34 when one considers Explanation 2 to Section 34(2)(b)(ii), we find that post amendment it is clarified for avoidance of doubt that in order to ascertain whether an award is in contravention of the fundamental policy of Indian law, it will not entail a review on merits of the dispute. The award in my view does not demonstrate perversity and the amended provisions of the Act would apply in view of the decision of the Supreme Court in BCCI (*supra*) since the Court in its jurisdiction under Section 34 is not sitting in appeal. On the other hand a judicious approach is apparent. A view different from that of the tribunal cannot be taken even assuming different views were possible. On this count as well the challenge fails. Although intermittently references were made on the merits of the dispute and on the dealing of those merits by the tribunal *inter alia* included as highlighted in the majority and dissenting awards. In my view, it is not appropriate that to delve into the merits of the case. The challenge before me was on the limited grounds urged by the counsel. The other grounds of challenge incorporated in the

petition allude to merits of the matter and findings, specific observations of the tribunal alleging errors of jurisdiction and failure to take into account unrebutted evidence of Mr. Yogesh Mehra and the like. None of these have been, however, pressed into service and the challenge was restricted largely to failure of the tribunal to permit oral hearings resulting in the award as being contrary to fundamental policy of Indian law being in violation of principles of natural justice. The three member tribunal was divided and the majority for award is sought to be challenged on the basis of the dissenting view of one of the arbitrators. I am unable therefore to accept the petitioners contention that the award is against the fundamental policy of India and in violation of the basic notions of justice and in the result the challenges fail. No interference is called for.

55. Accordingly, I pass the following order :

- (i) Commercial Arbitration Petitions no. 196 of 2016, 205 of 2016 and 16 of 2017 are dismissed.
- (ii) In view of the dismissal of the the petitions Notices of Motion No. 708 of 2018, 726 of 2018 and (L) No. 1655 of 2018 in those Petitions also stands dismissed.
- (iii) No orders as to costs.

After the judgment was pronounced, Mr.Mehta makes a mention and seeks continuation of ad-interim protection granted earlier. Vide order dated 24th April, 2018 the Court had directed that no steps in Execution shall be taken upto 7th June, 2018. This order was corrected on 27th April, 2018 by 'Speaking to the Minutes'

which also records an undertaking on behalf of the petitioners. At the request of Mr. Mehta, ad-interim protection granted in terms of the order dated 24th April, 2018 as corrected by the order dated 27th April, 2018, shall stand extended by four weeks from today.

(A. K. MENON, J.)