

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 26.08.2019

**CORAM :**

**THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR**

**O.P.Nos.680 & 750 of 2012**

**O.P.No.680 of 2012**

M/s.Raja Bahadur International Limited  
Represented by its authorized representative  
S.K.Jhunjhunwala,  
Hamam House, 3<sup>rd</sup> Floor, Ambalal Doshi Marg,  
Mumbai – 400 001. ... Petitioner

Vs.

1. M/s.Pioneer Wincon Private Limited,  
Division – Pioneer Asia Wind Turbines,  
30/1A, Harrington Chambers, 2<sup>nd</sup> Floor,  
'A & B' Block, Abdul Razak 1<sup>st</sup> Street,  
Saidapet, Chennai – 600 015.
2. Mr.Justice Raviraja Pandian  
(Former Judge, High Court of Madras),  
4/358, 9<sup>th</sup> Cross Street,  
Kapaleeswarar Nagar South,  
Neelankarai, Chennai – 600 041 ... Respondents

**O.P.No.750 of 2012**

M/s.Pioneer Wincon Private Limited,  
Division – Pioneer Asia Wind Turbines,  
30/1A, Harrington Chambers, 2<sup>nd</sup> Floor,  
'A & B' Block, Abdul Razak 1<sup>st</sup> Street,  
Saidapet, Chennai – 600 015. .. Petitioner

Vs.

1. M/s.Raja Bahadur International Limited  
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Neelankarai, Chennai – 600 041

... Respondents

**PRAYER in O.P.No.680 of 2012 :** Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to call for the records relating to the Award dated 27.06.2012 in Arbitration Case No.5 of 2010 before the Sole Arbitrator Mr.Justice K.Raviraja Pandian and set aside the same in part in so far as it relates to

a) Paragraph 18 (i.e. Para 18.1 to 18.09) that which relates to disallowance of shortfall in third year generation of a sum of Rs.38,64,764/- with interest and to further consequently direct the first respondent to pay the same with interest as claimed in terms of the original claim petition.

b) Paragraph 19 (i.e., Para 18.1 to 18.9) that which relates to allowing the O & M and other charges for the period from 20.04.2009 to 01.08.2009 in favour of the first respondent and to further consequently direct the first respondent to pay the claim sum of Rs.69,30,991/- (Rupees sixty nine lakhs thirty thousand nine hundred and ninety one only) being ascertained future loss of generation on account of unilateral stoppage and discontinuation of the operation and maintenance of the turbines together with interest in terms of the original claim petition.

c) Paragraph 20 (i.e. Para 20.1 to 20.2) that which relates to disallowance of interest claimed by the petition consequently direct the first respondent to pay a sum of Rs.37,63,097/- (Rupees thirty seven lakhs sixty three thousand and ninety seven only) and Rs.3,98,392/- (Rupees thirty lakhs ninety eight thousand three hundred and ninety two only) together with future interest till date of repayment in terms of the original claim petition.

d) direct the first respondent to pay future interest together with pendential interest charges @ 18% per annum for all the above amounts until full payments are made and realized by the petitioner.

e) Set aside Paragraph 19 (i.e. Para 19.1 to 19.5) wholly and thereby reject the counter claim made by the first respondent.

**PRAYER in O.P.No.750 of 2012 :** Petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 to set aside the Award of the learned Arbitrator dated 27.06.2012 in Arbitration Case No.5 of 2010 in so far as it relates to the Award of Rs.18,20,918/- with 12% interest from 01.06.2007 and Rs.18,20,918/- with 12% interest from 01.06.2007 and Rs.18,20,918/- with 12% interest from 01.06.2007 till realization and for costs of the appeal.

For Petitioner : Mr.S.K.Srinivasan for petitioner in O.P.No.680 of 2012 and for the first respondent in O.P.No.750 of 2012

For Respondents : Mr.Raveekumar for the first respondent in O.P.No.680 of 2012 and for the petitioner in O.P.No.750 of 2012

**COMMON ORDER**

सत्यमेव जयते

The petition in O.P.No.680 of 2012 has been filed challenging the Award rejecting the entire claim of the claimant and the petition in O.P.No.750 of 2012 has been filed challenging the Award passed the learned Arbitrator.

2. Since both the Original Petitions are arising out of the same Award, both the Original Petitions are disposed of by a common Order.

3. Brief facts leading to filing of these petitions are as follows :

The claimant is a company doing business of power generation and placed Order with the respondent for supply, erection and commission of Wind Turbine Generators for supply and commission of two numbers of "Gamesa Eolica G-58-850 KW". As the respondent has not paid compensation towards shortfall of generation of power and interest, the claim has been referred to arbitration.

4. The respondent made a counter claim stating that the generation of power of WTC based on wind and natural resources and there was a change in wind pattern which has resulted in below generation than agreed generation. It is also contended that the generation of 23 lakh units of power was subject to the availability of 95% grid and grid was not available for certain period. The respondent was protected by the 'force majeure'. The claim is also barred by limitation. Besides, they also claimed a sum of Rs.7,85,845/-.

5. The Arbitrator has framed the following issues :

1. Whether the claims made by the respective parties are barred by limitation?

2. Whether the Corporate Guarantee dated 12.04.2006 is binding upon the parties and is there novation of contract?

3. Whether the respondent can invoke force majeure condition as contained in the purchase order as well as the Corporate Guarantee?

4. Whether the Respondent has committed breach of Purchase order as claimed by the Claimant?

5. Whether the Arbitral Tribunal has jurisdiction to entertain the claim for loss of generation on account of discontinuation of operation and maintenance?

6. Whether the Claimant is entitled for the amounts claimed?

7. Whether the respondent is entitled to counter claim as made in the defence statement?

8. Whether the parties are entitled to interest as claimed?

9. To what other relief the parties are entitled?

6. The Arbitrator finally passed an Award in favour of the claimant for a sum of Rs.18,20,918/-with simple interest @ 12% per annum from 01.06.2007 till realization and Rs.40,98,25/- with simple interest @ 12% per annum from 01.06.2008 till realization and also allowed the counter claim directing the claimant to pay O & M Charges for the period from 20.04.2009 to 11.08.2009 at the rate of Rs.2.50 lakhs per WTG per year for the two WTGs with simple interest @ 12% per annum from 15<sup>th</sup> June 2009 till realization with applicable Service Tax and Rs.33,942/- and the amount covered by Ex.R.4 to R-7 with simple interest at the rate of 12% per annum from 01.01.2009 till realization.

Challenging the same, claimant filed the Original Petition in O.P.No.680 of 2012 and the respondent filed a petition in Original Petition No.750 of 2012.

7. The main contention of the petitioner is that the learned Arbitrator has not considered the fact that 95% of the grid availability was not there during the subsistence of the contract. Despite referring the documents of the claimant, the Arbitrator has held that there is no grid availability only for a certain period. However, it is his contention that the learned Arbitrator has not taken note of the various documents filed to show that the wind pattern has changed. Therefore, it is the contention of the learned counsel that the arbitrator has ignored the additional documents and the terms of the contract has become impossible for performance. Since, the generation is subject to 95% of grid availability and also the wind, when the entire wind pattern has changed in the relevant point of time, the entire Award is erroneous and is liable to be set aside.

8. The learned counsel for the respondent submitted that the issue of grid availability has not been raised by the respondent at any point of time before the Arbitrator. Similarly, no attested document has been filed by the TNEB as agreed in the contract. The learned Arbitrator has factually considered all these aspects and found that the respondent being expertise in the field has entered into the contract for guaranteed power generation. Further, to show that the wind pattern has changed, no evidence is available on record. Merely on the

basis of some articles and reports, it cannot be contended there is change in wind pattern. Hence, it is his contention that the Arbitrator has considered the entire aspects and this Court cannot re-appreciate the entire evidence. It is his further contention that as far as the counter claim is concerned, the Arbitrator ought not to have allowed the same, since the respondent has terminated the project. Further, it is his contention that the claim made by the claimant is not denied in entirety. Therefore, the Arbitrator ought to have allowed the entire claim. The Arbitrator has dismissed a part of the claim on the ground that there is no evidence on record. Hence, prayed for allowing of the entire claim and dismissal of the petition filed for counter claim.

9. It is now well settled that the award can be interfered only when the grounds set out under Section 34 of the Arbitration Act is made out. Scope of interference under Section 34 of the Arbitration and Conciliation Act 1996 is discussed in ***Oil and Natural Gas Corporation Ltd., v. Saw Pipes Ltd., [2003 (5) SCC 705]***, wherein the Honourable Apex Court has held that an Award can be set aside if it is contrary to:

- a) fundamental policy of Indian law; or
- b) the interest of India; or
- c) justice or morality; or
- d) if it is patently illegal

Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

10. In the judgment in ***Associate Builders Vs. Delhi Development Authority*** reported in **2015 (3) Supreme Court Cases 49** the Apex Court explained the term patent illegality and held that patent illegality must go to the root of the matter, Public Policy violation should be so unfair and unreasonable as to shock the conscience of the Court. The supervisory role of the Court under Section 34 is to be kept at a minimum level and interference is envisaged only in case of fraud or bias, violation of natural justice, etc., If the Arbitrator has gone contrary to or beyond the express of law of the contract or granted relief in the matter not in dispute that would come within the purview of Section 34 of the Arbitration and Conciliation Act 1996.

11. With regard to the submission of the performance guarantee, the Arbitrator has infact considered the performance guarantee executed by the respondent wherein it has been agreed that the generation will be at the rate of 25 lakh units AWH power. However, the generation is subject to 95% grid availability and machine availability. The learned Arbitrator proceeded on the basis of the facts and factually found that only for a certain period grid was not available and held that as per the clause 4 of the contract, the respondent has agreed to supply guaranteed power. The respondent being responsible for

erection and commission and guaranteed for fixed generation of power and such contract has been executed consciously and now it cannot be contended that the such power generation is beyond the control of the respondent. The Arbitrator has taken decision on the basis of the evidence adduced by the parties and this Court cannot reappreciate the entire evidence.

12. Further, to contend that wind pattern has been changed, there is no evidence except the oral submission and certain articles and general statement. In order to avail benefit or prove particular factum, it is for the party who take such plea to gain a benefit to prove the same before the Court or Tribunal. On a perusal of entire materials, except some articles with regard to the change of wind, there is no evidence available on record to show that in the particular region, at particular locality, where the contract subsists, wind pattern has been changed. No steps whatsoever has been taken to prove the fact that the velocity of the wind has been reduced. No steps has been taken for measurement of the wind as per available technology, if really wind pattern is changed. It could have been established by measuring the wind. It has not been done so. Therefore, merely on the basis of the article issued generally, it cannot be pressed into service to hold that the wind pattern has been changed. Therefore, the respondent has come within the force majeure clause. The learned Arbitrator has rejected the contention of the claimant with regard to the contention that grid availability is below 95% and the Arbitrator has rightly found

that as per the documents of the claimant, only for few days, grid availability was not there. Having said so, the Arbitrator has further analysed the entire facts based on the contention of the parties and came to the conclusion that the respondent has not seriously disputed the grid availability at any point of time. Even in the counter, they have not seriously taken the issue. Only in the submissions, it was pressed in to service.

13. On a perusal of the counter, it is seen that except in one sentence, that the generation is subject to grid availability and machine availability, the entire counter proceeded towards the change of wind pattern. There are no details, whatsoever stated in the counter as to the nature of grid availability, what was the percentage, etc. Further, the learned Arbitrator has also taken note of the conditions in the contract to the fact that certification from Tamilnadu Electricity Board is necessary to find out the grid availability, which has not been done so. When the respondent wants to take benefit under the specific clauses of the contract, he has to prove that the grid availability was below 95% at the relevant point of time. Therefore, merely on the basis of some documents wherein grid availability was not there for certain period, without establishing the fact that the grid availability was below 95% as per the contract, now it cannot be contended that they are not liable to pay the amount as per the contract. The Arbitrator has rightly taken note of the defence taken by the respondent and rightly rejected their contention with regard to the pattern of the wind. On perusal

of the entire documents, it is also seen that the nature of percentage of the grid availability has been established and hence, the contention of the learned counsel cannot be countenanced in this regard.

14. As far as the contention of the learned counsel for the remaining claim, it is his contention that since the amount claimed in the petition has not been denied, the entire claim has to be Ordered. Such contention, in my view, has no force at all. When a person claim amount as compensation for a project of contract, the nature of loss sustained by them has to be proved by them. The Arbitrator has rightly held that they have not produced any document as to the nature of generation to calculate the amount. It is for the claimant to establish the nature of units generated at the relevant point of time. As no documents have been produced such contention of the claimant, the Arbitrator has factually rejected the claim of the claimant. Hence, this Court do not find any merits in these petitions.

15. Accordingly, these Original Petitions are dismissed. No cost.

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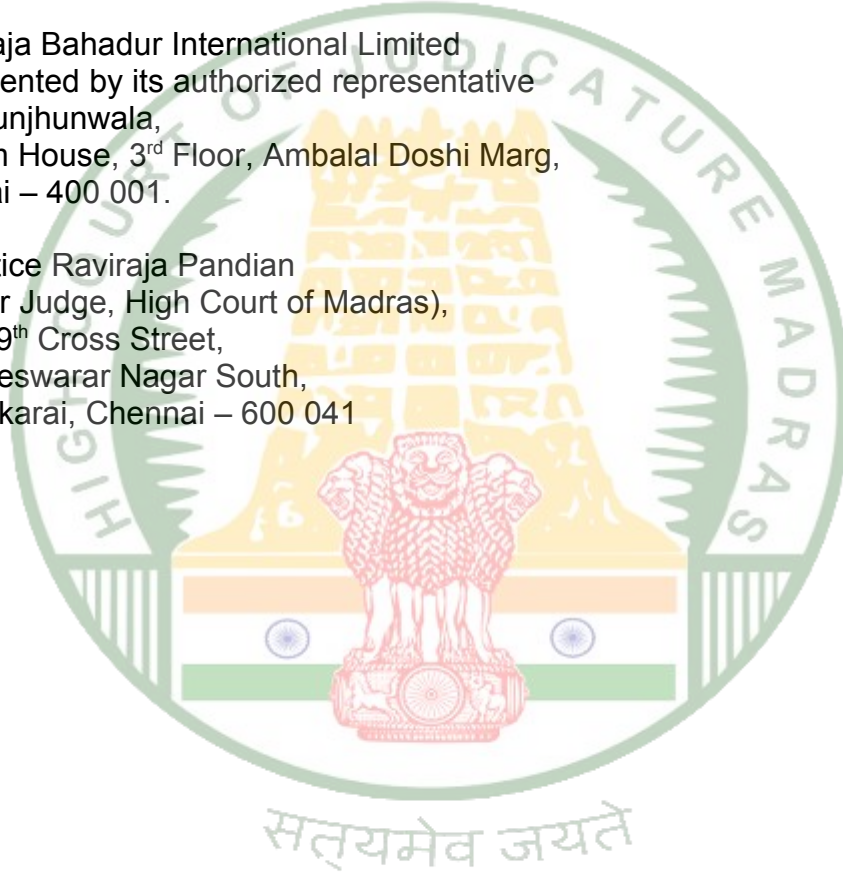
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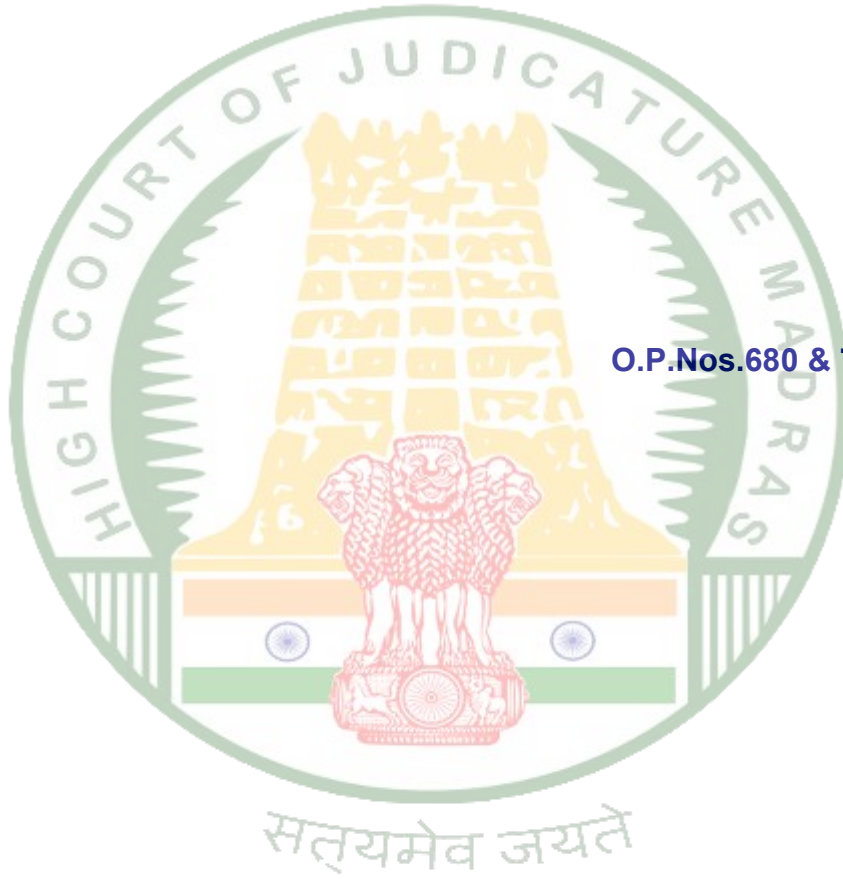
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**N.SATHISH KUMAR, J.**

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