

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: March 16, 2020

+ O.M.P.(I) (COMM.) 429/2019

HERO WIND ENERGY PRIVATE LIMITED

..... Petitioner

Through: Mr.Rajiv Nayar, Sr. Adv. with
Mr.Sanjeev Sharma, Ms.Mumtaz
Bhalla, Mr.Anirudh Gandhi and
Mr.Sourabh Malhotra, Advs.

versus

INOX RENEWABLES LIMITED & ANR.

..... Respondents

Through: Mr.Sandeep Sethi, Sr. Adv. with
Mr.Sudhir Kumar, Mr.Pulkit
Srivastava and Ms.Ashna Abrol,
Advs. for respondents

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 ('Act', for short) has been filed with the following prayers:

“(a) Pass an order directing Respondents, jointly and/ Or severally, to fulfil their obligations under the Shared Services Agreement dated 24.07.2014, as well as the Wrap Agreement

dated 24.07.2014 by allowing the Petitioner to use all Shared Services without any encumbrance/hindrance;

(b) Pass an order directing Respondents, jointly and/ Or severally to re-start Feeder No. 14 immediately to enable the Petitioner to use the same and make its WTGs functional;

(c) Pass an ex-parte ad-interim order in terms of prayers (a) to (b) above; and/ or

(d) Pass any other or such other/further order/s as this Hon'ble Court may deem fit and proper in facts and circumstances of the present case and in the interest of justice."

2. The petitioner herein is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at 201, Third Floor, Okhla Industrial Estate, Phase-III, New Delhi, Pin-110020. The petitioner is involved in the business of generation of renewable energy *inter-alia* through development, implementation, operation and maintenance of non-conventional wind power projects.

3. Respondent No.1, Inox Renewables Limited ('IRL'), is a company, incorporated under the provisions of the Companies Act, 1956, having its registered office at Survey No.1837 & 1834 at Moje Jetalpur, ABS Towers, Second Floor, Old Padra Road, Vadodara, Gujarat, PIN-390007. Respondent No.1 is engaged in the business of land acquisition, regulatory management, project EPC, operation & maintenance etc.

4. Respondent No.2, Inox Wind Limited ('IWL'), is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at Plot No.1, Khasra Nos.264 to 267, Industrial Area Village Basal Una, Himachal

Pradesh, PIN-174303. Respondent No.2 is engaged in the business of manufacturing, assembling and delivering equipment, including, Wind Turbine Generators ('WTGs', for short) for setting up various wind farms in India. The address for service of respondent No.1 and respondent No.2 is Inox Towers, Plot No.17, Sector 16A, Noida-201 301.

5. Before delving into the controversy involved, it is necessary to state the facts in brief. The petitioner herein intended to set up a Wind Power Project with the rated installed capacity of 40 MW comprising of 20 WTGs, with each of the WTGs having a rated capacity of 2 MW to be located within a wind park at Dangri, Jaisalmer District, Rajasthan ('the Dangri Project', for short).

6. Since the petitioner intended to establish a fully integrated operational project, it entered into various agreements with respondent No.2 and several of its group entities, including respondent No.1 for supply, erection, commissioning, operation & maintenance of WTGs and shared services relating to them.

7. In pursuance of such agreements, respondent No.2 and its sister concerns including respondent No.1 assumed responsibility for setting up the Dangri Project, operating & managing it as well as carrying out all ancillary works / services pertaining to it. Respondents and its group entities were thus required to supply, install, set-up and maintain the WTGs in running condition after acquiring land and developing it in addition to providing shared services.

8. The petitioner, therefore, entered into an agreement with respondent No.1 on July 24, 2014 for shared services on the wind farm at the Dangri Project, ('the Shared Services Agreement', for short). As per the Shared Services Agreement, the petitioner was entitled to use shared services pertaining to the Dangri Project for the operational life of 20 years from the date of commissioning viz. January, 2015, upon payment of a fixed price of ₹35,00,000/- per WTG of 2 MW. The petitioner thus paid an amount of ₹7,00,00,000/- for 20 WTGs, towards the right to use shared services for the operational life of the WTGs, to respondent No.1.

9. The petitioner and respondents along with certain other group entities of respondent No.2 also entered into a Wrap Agreement dated July 24, 2014 ('Wrap Agreement', for short), in view of which, respondent No.2 assumed upon itself, the obligation to ensure performance of the obligations envisaged in the Share Services Agreement.

10. As per clause 3 of the Shared Services Agreement, shared services *inter-alia* mean internal approach roads, utility services, common office facilities, 33/220 kV pooling substation to Akal Grid Substation with necessary evacuation capacity, 33kV, any shared common feeder, shared transmission lines, any supporting transmission tower, electrical polls on which transmission lines are mounted, Supervision Control and Data Acquisition System ('SCADA', for short), pathways, any other equipment and components forming part of pooling substation and/or the power evacuation facility, necessary for smooth and effective

commissioning and operation of the wind farm. Clause 3 of the Shared Services Agreement reads as under:

“3. SHARED SERVICES

Shared Services means internal approach roads, utility services, common office facilities, 33/220 KV pooling substation and 220 KV DPDC line from pooling substation to Akal grid substation with the necessary evacuation capacity, the 33 KV, any shared common feeder, any shared transmission lines, any supporting transmission tower, the electric poles on which such transmission lines are mounted, the Supervision Control and Data Acquisition system ("SCADA"), pathways, any other equipment or components forming part of the pooling substation and/or the power evacuation facility necessary for smooth and effective Commissioning and operation of the Wind Farm.

Shared Services is to cover the above facilities from DP Yard (33KV transmission lines, site offices, central monitoring system, store, SCADA infrastructure etc built and maintained by Inox) till the Metering Point.

The detailed layout of pooling sub-station / power evacuation is mentioned in Schedule 1.”

11. As per clause 4 of the Shared Services Agreement, the petitioner is entitled to an unhindered non-exclusive right to use the shared services for entire operational life of the wind farm from the commissioning date, irrespective of subsistence of any other agreement. Such a right has accrued in favour of the petitioner in terms of payments made as per Clause 6 of the Shared Services Agreement. Clause 4 and 6 of the Shared Services Agreement reads as under:

“4. RIGHT TO USE SHARED SERVICES

4.1 Inox hereby grants to Employer the unhindered right to non-exclusive use of the Shared Services for entire Operational Life of the Wind Farm from the Commissioning Date.

4.2 Inox hereby acknowledge and agrees that Inox is also acting as a coordinating agency (except for forecasting and scheduling) on behalf of all the owners of the Wind Park.

4.3 Employer agrees that the unhindered right to use the Shared Services Is a non-exclusive right and may also be used by other WTG owners operating/setting up operations/wind farms at the Wind Park.

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6. PRICES

The Employer shall pay to Inox, for the right to use Shared Services for the Operational Life, a one time, firm and fixed price of INR 35,00,000/- (Indian Thirty Five Lakhs only) per WTG of 2.0 MW each totaling to iNR 7,00,00,000/- (Indian Rupees Seven Crores only) for 20 (twenty) WTGs ("Price"). The Price is inclusive of all applicable taxes, cess, statutory payments paid or become payable and any or all other duties/fee etc. as per Schedule 2.

6.1 All payments shall be made by Employer on or before Due Date on completion of respective milestones as set out in Schedule 4. Any payment made after the Due Date shall be liable for penal Interest at SBI Base Rate + 4.0% for the period till such amount has been paid.

6.2 The Employer shall Intimate to Inox for any discrepancies in Invoices within 3 Working Days from the date of receipt of invoices.

6.3 In case total outstanding to Inox, for undisputed & accepted Invoices which are not paid for more than 30 days from Due Date, and exceeds 5% of Price, Employer agree that Inox shall have right to extend the Scheduled Commissioning Date. The revised timeline for completion of Commissioning ("Revised Commissioning Date") shall be mutually discussed and agreed at that time.

6.4 Subject to the other provisions of this Agreement, the above price shall remain fixed and firm for the entire term of this Agreement and is not subject to variation except.

6.4.1 In case of escalation in the rates of prevailing taxes and duties till the SCOD, this shall be borne by the Employer,

6.4.2 In case there is a delay from SCOD, due to reasons attributable to Inox, any impact on pricing on account of change in rates of prevailing taxes and duties, beyond SCOD, this shall be in to the account of Inox

6.4.3 In case there is a delay from SCOD, due to reasons attributable to Employer, any Impact on pricing on account of Change in rates of prevailing taxes and duties, beyond SCOD, this shall be in to the account of Employer

6.5 In the event that Inox fails to achieve Commissioning in respect of any WTG(s) on or before SCOD/RCOD, and there has been either a reduction in tariff post 31st March, 2015 or there is uncertainty in tariff FY 15-16, the Employer shall have the right to downsize or decline the uncommissioned WTG's:

For the WTGs not commissioned by SCOD/RCOD, as applicable, employer will have following rights

6.5.1 To accept the WTGs with delayed Commissioning In this case Inox will pay liquidated Damages as per Clause 17.1

6.5.2 To decline the WTGs

6.5.2.1 In such case Inox would be obligated to return all the money paid towards such uncommissioned WTG's with an interest rate of 17% till such amount has been paid. However, in this case the liquidated damages due to delay in commissioning shall not be applicable.

6.5.2.2 Employer shall renegotiate the price and completion timeline for the un-commissioned WTG's."

12. It is the case of the petitioner that on November 11, 2019, respondent No.1 malafidely and in blatant violation of its obligations under the Shared Services Agreement, stopped/switched off Feeder No.14 from the pooling substations situated at the wind farm, connected to 16 WTGs of the petitioner. A feeder is a power transmission line which transmits electricity into the power system. Petitioner claims that due to this wrongful and arbitrary act of respondent No.1, all the petitioner's WTGs connected to Feeder No.14 have stopped, resulting in huge loss to the petitioner.

13. It is averred by the petitioner that as per Article 5 (iii) of the Wrap Agreement, respondent No.2 had assumed the responsibility to ensure performance under the Shared Services Agreement and that it shall be jointly and severely liable for the

acts / omissions of respondent No.1. Article 5(iii) of the Wrap Agreement reads as under:

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Article 5
Contractors' Obligations

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(iii) Contractor 1 agrees and acknowledges that the split and award of the Contracts shall not in any way dilute the responsibilities of the Contractor 1 for ensuring by it the performance of the Contracts by the respective Contractors and successful Completion of the Project as per the Contracts and this Agreement. The obligation of Contractor 1 is to ensure the timely performance of the Contract by respective Contractors shall be paramount.”

14. It is stated by the petitioner that as per Clause 6 of the Shared Services Agreement, the petitioner has fulfilled its obligations by paying ₹7,00,00,000/- as a one-time firm and fixed price towards shared services of 20 WTGs in view of which it is entitled to use of shared common feeders including Feeder No.14. It is the case of the petitioner, even after repeated requests/enquiries into the reasons for switching off Feeder No.14 by respondent No.1, no justifiable reasons have been provided to the petitioner. Petitioner states that even respondent No.2 has shied away from its obligations under the Wrap Agreement.

15. It is the case of the petitioner that even after several rounds of meetings with the respondents, requesting them to start Feeder No.14 to avoid further losses as well as to undertake/fulfill their obligations under the Shared Services Agreement and Wrap Agreement, respondents have refused to

perform their obligations on an illegal, vexatious and unconnected premise that arbitration proceedings pertaining to Operations & Maintenance Agreement dated July 31, 2014, entered into between the petitioner and M/s. Inox Wind Infrastructure Services LTD. ('M/s. IWISL', for short), ('O & M Agreement', for short), is still pending and till such time the dispute is resolved, Feeder No.14 could not be restarted.

16. It is the petitioner's case that O & M Agreement and arbitration proceedings pending there have no bearing and nexus to the Shared Services Agreement and shared services that are mandated to be provided under it. It is further stated by the petitioner that respondents are merely coercing the petitioner to withdraw its claims which are pending under arbitration proceedings by switching off Feeder No.14.

17. It is also stated in the petition that the petitioner has balance of convenience in its favour as against the respondents, since the petitioner has paid for the use shared services for a period of 20 years under the Shared Services Agreement.

18. Reply to this petition was duly filed by respondent Nos.1 and 2. Respondents herein have raised a preliminary objection to the maintainability of the petition in terms of Section 9(3) of the Act, which mandates that once an Arbitral Tribunal has been duly constituted, the Court shall not entertain an application / petition under Section 9(1) of the Act, unless the Court finds that circumstances exist which may not render the remedy provided under Section 17 of the Act, efficacious. In this regard, it is stated

by the respondents that dispute arising out of the obligations set out under the Shared Services Agreement as well as the Wrap Agreement and other agreements executed between the parties are already pending adjudication before the learned Arbitral Tribunal comprising of Hon'ble Mr. Justice (Retd.) Dr. Arijit Pasayat (Presiding Arbitrator), Hon'ble Mr. Justice (Retd.) Vijender Jain and Hon'ble Ms. Justice (Retd.) Manju Goel. It is stated that the petitioner has deliberately, deceitfully and illegally averred in the petition that the subject matter of the said ongoing / pending arbitration proceedings are different from the present petition, whereas the facts remains that the alleged grievance of the petitioner raised in the petition based on the Shared Services Agreement as well as the Wrap Agreement pertains to, forms part and touches upon the four corners of the ongoing arbitration.

19. It is stated by the respondents that after the execution of entire set of agreements being Supply Agreement dated July 24, 2014, Development Agreement dated July 24, 2014, Erection and Commissioning Agreement dated July 24, 2014, and Shared Services Agreement, subsequently an O & M Agreement was also executed between the petitioner and the sister concern of the respondents i.e. M/s. IWISL, relating to operation and maintenance services to be provided by M/s. IWISL at the Dangri Project which also capitulates the subject matter of the Shared Services Agreement. It is stated by the respondents that the petitioner while issuing Default Notice dated January 17, 2018 to respondent No.2 as well as M/s. IWISL relating to generation losses issue, shared services / infrastructure issues, there was

categorical reference being made to the Wrap Agreement as well as the O & M Agreement. Similarly, it is stated that subsequent Notice for Amicable Settlement of Disputes dated February 09, 2018 issued by the petitioner also makes reference to the Wrap Agreement and defaults committed by M/s. IWISL relating to its various obligations pertaining to the shared services. It is further stated that in the Notice for Invocation of Arbitration dated February 28, 2018 addressed by the petitioner to respondent No.2 as well as M/s. IWISL, petitioner had contended willful default on part of respondent No.2 in providing operation and maintenance services which is in contravention of the provisions of O & M Agreement and other Agreements executed for the Project and invoked clause 7 of the Wrap Agreement which covers all disputes arising out of all the Agreements executed between the parties including the O & M Agreement. Further, the Notice of Invocation of Arbitration dated September 19, 2018 addressed to M/s IWISL, the petitioner while invoking Clause 20.2 of the O & M Agreement, has made allegations on failure of M/s IWISL to operate and manage all shared infrastructures. In pursuance of this invocation, the Arbitral Tribunal came to be formed. It is stated by the respondents that the present petition is not maintainable as an Arbitral Tribunal is already in place adjudicating upon the disputes between the parties arising out of the various Agreements. Article 7 of the Wrap Agreement and Article 20.2 of O & M Agreement are reproduced as under:

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WRAP AGREEMENT

Article 7

Governing Law & Dispute Resolution

This Agreement will be governed by Laws of India. Any and all matters arising out of or in relation to this Agreement shall be subject to the exclusive jurisdiction of competent Courts at New Delhi.

Any dispute, controversy, disagreement or disputed claim arising out of, in connection with or under this Agreement or the breach, termination, interpretation or invalidity thereof or in relation to any matters contained in or relating to this Agreement raised by any Party ('Dispute') shall be attempted to be resolved by the Parties by good faith negotiations in the best interest of the subject-matter of this Agreement within 30 (Thirty) days, failing which, such Dispute shall be referred to arbitration under the Arbitration and Conciliation Act, 1996. An arbitration tribunal will be formed in accordance with the Arbitration and Conciliation Act, 1996, which shall consist of 3 (three) arbitrators. Each party shall have the right to appoint 1 (one) arbitrator each. The appointed arbitrators shall appoint the 3rd (third) neutral arbitrator who will preside over the arbitration-tribunal.

The seat of arbitration shall be New Delhi and the language of the arbitration shall be English. This clause shall survive the termination of this Agreement.”

O & M Agreement

“20 Dispute Resolution

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20.2. Any dispute, controversy, disagreement or disputed claim arising out of, in connection with or under this Agreement or the breach, termination,

interpretation or invalidity thereof or in relation to any matters contained in or relating to this Agreement raised by any Party ('Dispute') shall be attempted to be resolved by the Parties by good faith negotiations in the best interest of the subject-matter of this Agreement within 5 (five) days from the Cure Period, failing which, such Dispute shall be referred to arbitration under the Arbitration and Conciliation Act, 1996. An arbitration tribunal will be formed in accordance with the Arbitration and Conciliation Act, 1996, which shall consist of 3 (three) arbitrators. Each party shall have the right to appoint 1 (one) arbitrator each. The appointed arbitrators shall appoint the 3rd (third) neutral arbitrator who will preside over the arbitration tribunal.”

20. It is stated by the respondents that the alleged grievance of the petitioner as raised in the present petition emanates from obligations set-forth in the O & M Agreement which capitulates the obligations of the shares services to be provided by the respondents. Moreover, it is stated by the respondents, in terms of Clause 1.20 of Annexure-1 of the Wrap Agreement as well as Clause 1(i)(j) and Clause 2(I)(f) of Schedule 1 of the O & M Agreement warrants that post termination of the O & M Agreement the petitioner was under an obligation to execute another O & M Agreement for the use of shared services infrastructure or make payment for the monthly O & M Services provided for use of shared services infrastructure at mutually agreed charges / cost. Clause 1.20 of Annexure-1 of the Wrap Agreement as well as Clause 1(i)(j) and Clause 2(I)(f) of Schedule 1 of the O & M Agreement are reproduced herein under:

“ **WRAP AGREEMENT**

Annexure-1 (Agreement)

**SCOPE OF WORK AND SPECIAL CONDITIONS
OF AGREEMENT**

1. SCOPE OF WORKS

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1.20 Contractor 3 shall ensure timely and appropriate development of shared internal infrastructure facility including internal roads, common evacuation system. Owner shall have right to use all such shared infrastructure including the common roads, paths leading up to the Project site, evacuation facility etc. for 25 years from Project Completion Date. However in the event of termination of O & M contract with Contractor 2 to any of its group companies, the cost for maintaining these shared infrastructures as mentioned herein, shall be mutually discussed and agreed.

XXX

XXX

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O & M Agreement

Schedule 1

SCOPE OF SERVICES

XXX

XXX

XX

1. OPERATIONS

(i) SCOPE OF WORK

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XXX

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(j) The Contractor shall operate and manage all shared infrastructure i.e. Pooling Substation, SCADA building, internal approach road, pathways, internal 33kV line

etc. In case of termination of this O & M Agreement Contractor shall continue to do all associated work for such shared infrastructure as per "Prudent Industry Practice" at mutually agreed charges, to be paid by Owner for such maintenance.

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2. MAINTENANCE

I. The Scope of Maintenance Will Broadly Include, But Not Limited To The Following:

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(f) Contractor shall Maintain all shared infrastructure i.e, Pooling Substation, SCADA building, internal approach road, pathways, internal 33kV line/220Kv line etc. In case of termination of this Agreement also Contractor shall continue to do all associated work as per "Prudent Industry Practice" at mutually agreed charges to be paid by Owner post such termination,"

XXX XXX XXXX

21. It is further stated by the respondents that the petition is also not maintainable for concealment of material facts by the petitioner. In this regard, it is stated that the petitioner has deliberately and deceitfully concealed that during the meeting of the parties held on November 19, 2019 and thereafter, the petitioner had acknowledged its obligations to pay the monthly O & M fees for the use of shared services infrastructure and the petitioner even offered to enter into subsequent O & M Agreement as well as agreed to pay monthly O & M fees in compliance of Clause 1.20 of Annexure-1 of the Wrap Agreement as well as Clause 1(i)(j) and Clause 2(I)(f) of Schedule 1 of the O & M Agreement. It is further stated that the

petitioner even concealed about the e-mail dated November 21, 2019 sent by the respondents sharing the draft of the requisite 'Agreement for O & M of Shared Services Infrastructure' and requesting the petitioner to execute the same on terms already agreed upon. The petitioner also concealed the reply e-mail sent on November 22, 2019, apprising the respondents that the matter is being discussed with the senior management and once again requested respondents to start Feeder No.14. It is averred by the respondents that all the e-mails have been sent / shared to the respondents were responded by the authorized representative of the petitioner, namely, Mr.Kailash Khanduji Donde, under whose signature, the present petition has also been filed. The authorized representative is liable to be prosecuted for committing fraud, perjury and contempt of Court, for having concealed material facts and misleading the Court by filing false and frivolous Statement of Truth dated November 22, 2019.

22. It is also stated by the respondents that that current petition is nothing but a desperate attempt by the petitioner to bypass the jurisdiction of the Arbitral Tribunal.

23. Rejoinder was also filed thereto by the petitioner, reiterating the contentions of the petition and stating that the scope of all the Agreements executed between respondents and its sister concerns, were different in nature and that the stand taken by the respondents in its reply that the Petitioner was not entitled to use of shared services in the event of termination of O & M

Agreement is malafide, as the Shared Services Agreement was de-hors the provisions of any other Agreement.

24. Mr.Rajiv Nayar, learned Senior Counsel appearing for the petitioner, submitted that in terms of Clause 4.1 read with Retical B of the Shared Services Agreement executed between petitioner and respondent No.1, respondent No.1 granted to the petitioner an unhindered right to non-exclusive use of the shared services for the entire operational life of the Dangri Project. He stated that a one-time payment of shared services ₹ 7 crores for 20 WTGs was made in terms of Clause 6 of the Shared Services Agreement in consideration for this grant of unhindered right to non-exclusive use. The existence of other agreements namely the Wrap Agreement, the O & M Agreement or non-payment of O & M charges or termination of O & M Agreement by the petitioner in any way does not restrict the petitioner's right to access / use the shared services.

25. He further submitted that Clause 3 of the Shared Services Agreement, which covers shared services facilities, includes within its scope the Shared Common Feeder, of which Feeder No.14 has been switched off illegally by the respondents disconnecting 16 WTGs of the petitioner. Feeder No.14 only has petitioner's 16 WTGs connected to it and the remaining 4 WTGs out of the 20 WTGs of the petitioner are still live having been connected to other common feeder(s) which has other WTGs of various other parties connected to it. In support of his contention, Mr.Nayar relies upon *Mafatlal Industries Ltd. and Ors. v.*

Mahanagar Telephone Nigam Ltd., 2002 (64) DRJ 94; Bhubaneswar Expressways Pvt. Ltd. v. National highways Authority of India, 265 (2019) DLT 631; wherein it was held that interim relief under Section 9 of the Act could be granted with respect to an admitted obligation of the parties.

26. It is contended by Mr.Nayar that Clause 1.20 of Annexure-1 of the Wrap Agreement as well as Clause 1(i)(j) and Clause 2(I)(f) of Schedule 1 of the O & M Agreement merely specify that upon termination, the cost of operating and maintaining the shared services, and not the use of shared infrastructure, would be mutually discussed and agreed between the parties. The said clauses do not in any manner dilute the right of the petitioner to make use of the shared services for the entire operational life of the WTGs. Also Clauses 3.2 and 3.3 of the O & M Agreement prescribe that upon the expiry of ten years, the parties would renegotiate the O & M price and in the event that any disagreement occurs between the parties in relation to such renegotiation, the petitioner shall not be obliged to continue the operation & management services provided by M/s. IWISL. Thus, it is his submission that the respondents, even after the termination of O & M Agreement, cannot restrain the petitioner from making use of the shared services.

27. It is further contended by Mr.Nayar that there is no absolute right in favour of the respondents to maintain the shared services and that the petitioner can, in its discretion, either after the termination of the O & M Agreement or after lapse of ten

year-term of the O & M Agreement, maintain the shared services either through third-party agency or by itself.

28. Mr. Nayar also drew a distinction between right to use shared services and operation and maintenance of shared services. It is his submission that the former emulates from Shared Services Agreement and the later forms part of O & M Agreement. Clause 3, 4 read with Schedule 1 of the Shared Services Agreement would demonstrate that Shared Services Agreement relates to the unhindered right to use the common feeder for entire operational life of the Wind Farm whereas the O & M Agreement pertains only to the operation and maintenance of the shared services and WTGs for a limited period of ten years. He further submits that O & M Agreement which has already been terminated by the petitioner does not contain any condition mandating the petitioner to avail operation & maintenance of shared services from M/s. IWISL, upon termination of the O & M Agreement.

29. He further submitted that there is no provision under the O & M Agreement which prevents the petitioner from using / accessing the shared services post the termination of O & M Agreement and the stand taken by the respondents that the petitioner has no discretion to engage any contractor other than M/s. IWISL for operation & maintenance of shared services is wrong and against the spirit of the O & M Agreement entered into between the parties.

30. With regard to the objection raised by the respondents as to the maintainability of the petition, it is submitted by Mr.Nayar that the present petition is filed for exercising the rights emanating out of the Shared Services Agreement and the pending arbitration proceedings has no nexus with the obligations arising out of the Shared Services Agreement and that the petitioner has not made any claim in relation to the use of the shared services in the pending arbitration. It is also his submission that respondent No.1 which had executed the Shared Services Agreement is not a party to the pending arbitration proceedings. In this regard, the present petition is not hit by Section 9(3) of the Act. He further stated that the whole object of executing different agreements for different scope with different parties was to have separate arbitration proceedings in respect of separate disputes arising out of these Agreements. To buttress his submission, he has relied upon the Supreme Court judgment in the case of ***Duro Felguera S.A. v. Gangavaram Port Limited (2017) 9 SCC 729***; wherein it was held that for multiple agreements containing provisions for arbitration, different Arbitral Tribunals should be set-up for adjudication of disputes arising out each agreement. He also categorically stated that reliance placed by the respondents on the Notice of Arbitration dated February 28, 2018 is ill-conceived and malafide as no arbitration proceedings were commenced on the basis of the said notice and the same shall not in any way affect the scope of pending arbitration.

31. Mr. Sandeep Sethi, learned Senior Counsel appearing on behalf of the respondents stated that as a preliminary objection,

the present petition is hit by Section 9(3) of the Act in light of the on-going Arbitration proceedings between the parties before the Ld. Arbitral Tribunal. He stated that the disputes arising out of the obligations set forth towards the Shared Services Agreement as well as Wrap Agreement and other Agreements are already pending adjudication before the Ld. Tribunal and the communications, pleadings and documents etc., as mentioned in the reply to the petition, exchanged between the parties are demonstrative of the fact that the subject matter of the present petition and the documents i.e. the Shared Services Agreement as well as Wrap Agreement and O&M Agreement are already covered in the on-going / pending arbitration. In this regard he drew the attention of the Court to the Default Notice dated January 17, 2018 issued by the petitioner to the respondent no.1 as well as M/s IWISL, Notice for Amicable Settlement dated February 09, 2018 issued by the petitioner to the respondent no.1 as well as M/s IWISL, Notice for Invocation of Arbitration dated February 28, 2018 issued by the petitioner to the respondent no.1 as well as M/s IWISL, OMP (I) COMM No. 258/2018 titled as *M/s Hero Wind Energy Pvt. Ltd. v. Inox Wind infrastructure services Ltd. and Anr.* filed by the petitioner against respondent no.2 as well as its sister concern M/s IWISL before this Court, Notice for Invocation of Arbitration dated September 19, 2018 issued by the petitioner to M/s IWISL, Statement of Claim dated January 21, 2019 by the petitioner against respondent no.2 as well as its sister concern M/s IWISL in the on-going arbitration proceedings between the parties before the Ld. Arbitral Tribunal

and an e-mail dated November 20, 2019 sent by the authorized representative of the Petitioner to the respondents. In support of this submission he has relied upon a Gujarat High Court judgment in the case of ***Manbhupinder Singh Atwal v. Neeraj Kumarpal Shah, R/Misc. Civil Application No. 90/2019*** as well as a judgment of the co-ordinate bench of this Court in ***Rajinder Nath v. Prem Nath Motors Ltd. & Ors., 190 (2012) DLT 454***; wherein the Courts held that when the dispute is already pending before the Arbitral Tribunal, the proper and expedient remedy for interim protective measure is, in all ordinary circumstances lie under Section 17 of the Act.

32. Mr. Sethi also submitted that the dispute between the parties does not arise out of the Shared Services Agreement and that switching off of Feeder No. 14 is owing to the failure of the petitioner to pay for maintenance of shared services after termination of the O&M Agreement. The O&M Agreement entered into between petitioner and M/s IWISL for operation and maintenance of shared services infrastructure as discussed in the Shared Services Agreement and the same has been incorporated in the O&M Agreement. Reference to the same can be found at Clauses 1(i)(j), 2(I)(f), 2(I)(j), 2(I)(q)(e), 2(II)(c) of Schedule 1 of the O & M Agreement. He further submits that as per Clause 8 of the O&M Agreement, M/s IWISL was under obligation to provide free of cost O&M services to the petitioner's 20 WTGs as well as shared services infrastructure for a period of 36 months. Thereafter, as per Clause 8.2 (i) and Annexure / Schedule 2 of the O & M Agreement mandates the petitioner to

pay a consolidated O & M fees amounting to a sum of ₹16 lacs per WTG per annum which included consolidated O & M fees for providing O & M services to 20 WTGs as well as shared infrastructure. He further stated that since the 4th year onwards, the petitioner was required to pay O & M fees for the 20 WTGs as well as shared infrastructure, till the date of termination of the O & M Agreement on October 26, 2019 and an amount of ₹ 4.03 Cr remains to be paid by the petitioner for O & M expenses incurred by M/s IWISL, which also forms part of the dispute pending adjudication before the Ld. Arbitral tribunal, and the current dispute should also be adjudicated by the same Tribunal. To buttress this submission he has relied upon *Cholro Controls India Pvt. Ltd v. Seven Trent Water Purification Inc. & Ors., (2013) 1 SCC 641*; wherein the Apex Court held that in cases involving multiple agreements and all ancillary agreements are relatable to the mother agreement and performance of one of the agreements is so intrinsically interlinked with other agreements that they are incapable of being beneficially performed without performance of the other agreements, then the intention of the parties is to refer all the disputes between all the parties to the Arbitral Tribunal.

33. It is contended by Mr. Sethi that the reliefs as sought by the petitioner vide this present petition, it is apparent that the grant of these reliefs shall amount to giving final relief and finally adjudicating the issue in its entirety, which is beyond the scope of Section 9 of the Act. Further, there is no prima case made out and that the grant of these reliefs on the other hand shall cause

irreparable loss and injury to the respondents given the facts situation of the present case. Mr. Sethi also pointed out to the existence of Clause 17 of the Shared Services Agreement which provides for the alternate remedy of liquidated damages in the event of breach of the said agreement, thereby claiming the petition to be not-maintainable. In support of this contention, he has relied upon judgments of the co-ordinate bench of his Court in *Sartaj Singh Pannu v. Gurbani Media Pvt. Ltd & Ors.*, 2015 (4) Arb.LR 176 (Delhi); *Planet M. Retail v. Select Infrastructure Pvt. Ltd.*, 2014 (4) Arb.LR 348 (Delhi); wherein it was held that the petitioner has to show prima facie and balance of convenience for grant of interim relief as well as no interim-relief shall be granted if such grant would amount to the grant of final relief at interlocutory stage and if the petitioner is bestowed with the alternate relief of damages etc. He has also relied upon *Solitaire Ventures Pvt. Ltd. v. Vipul SEZ Developers Pvt. Ltd. & Ors.*, 2015 (150) DRJ 114; where in it was held that it would be wise to refer the dispute as to the specific performance of the MoU/agreement to the arbitral tribunal which is already seized of the matter as against deciding the same at an interim stage.

34. It is further contended by Mr. Sethi, it is the principle of law that the scope and ambit of Section 9 of Act is not to restore a contract/agreement which has already been terminated and no interim relief can be granted against termination and that the Court cannot give a direction to a party under Section 9 for not terminating or to continue with the contract. To substantiate this contention he has relied upon *Bharat Catering Corporation v.*

Indian Railway Catering & Tourism Corp. Ltd., 2009 (162) DLT 219; Bharat Catering Corporation v. Indian Railway Catering & Tourism Corp. Ltd., 2009 (164) DLT 2019 530; VF Services (UK) Ltd. v. Union of India & Anr., 2011 (10) AD2 69 (Delhi); Progressive Constructions Ltd. v. Chairman, National Highways Authority of India & Ors., 2009 (157) DLT 537; Indian Railways Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd. & Anr., FAO (OS) 433-35 of 2011.

35. Mr. Sethi submitted that the respondents cannot be forced to offer shared services from their own pocket to the petitioner without getting paid for the same and this is the reason for keeping Feeder No. 14 in abeyance as the petitioner remained totally non-committal in coming forward to execute the O & M Agreement for the shared services infrastructure and has till date neither reverted to the said e-mail dated November 21, 2019 sent by respondents containing a proposal including draft of the subsequent / requisite O & M Agreement for the shared services, which was in fact a reply to the e-mail dated November 12, 2019 by the petitioner categorically making a request to the respondents to discuss and mutually agree towards the cost of operation and maintenance of shared facilities in view of termination of O & M Agreement. In this regard he submitted that the petitioner seeking restart of Feeder No. 14 aptly signifies the ownership of the respondents / M/s IWISL over Feeder No. 14 which is part of the shared services and if it was otherwise they could have sought the relief against the respondents to

vacate or disposes M/s IWISL from the shared services / Feeder No. 14.

36. It is further contended by Mr.Sethi that the relief sought by the petitioner is mandatory in nature and therefore bared under Section 14 and Section 41(e) of the Specific Relief Act, 1963 ('Specific Relief Act', for short) as it is settled principle of law that no injunction shall be passed interim or final with respect to termination of a terminable contract in view of Section 14 of Specific Relief Act. To cement this contention he has relied upon the judgments of this Court in *Jindal Steel and power Ltd. v. SAP India Pvt. Ltd.*, 2015(4) ArbLR 24 (Delhi); *D.R. Sondhi & Ors. v. Hella KG Hueck & Co. & Ors.*, (2001) ILR (2) Delhi 679; *Rajasthan Breweries Ltd. v. The Stroh Brewery Company*, 2000 (55) DRJ (DB) and judgments of the Apex Court in *Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd.*, (2007) 7 SCC 125; *Rajasthan Breweries Ltd. v. The Stroh Brewery Company*, 2000 (55) DRJ (DB); *MIC Electronics Ltd. & Anr. v. Municipal Corporation of Delhi & Anr.*, 2011 (1) Arb LR 418; wherein it was held that protection under Section 9 of the Act cannot be granted in a contract determinable by its nature in terms of Section 14 (1) of the Specific Relief Act and Section 41(e) categorically provides that an injunction cannot be granted to prevent breach of contract, performance of which would not be specifically enforced.

37. It is further contested by Mr. Sethi that various e-mails and other communications which reveal that the petitioner was

under the obligation to pay monthly O & M fees or entered into a requisite O & M Agreement as per provisions of the other agreements, were concealed by the petitioner. Further, he states that the petition is bad in law for mis-joinder and non-joinder of necessary parties as operation & maintenance of Shared Services Infrastructure is to be provided by M/s. IWISL and, therefore, the relief sought in the present petition cannot be directed against respondent No.1 or 2.

38. Having heard the learned counsel for the parties and perused the record, the submissions made by Mr. Rajiv Nayar, learned Sr. Counsel appearing for the petitioner are the following:

1. The petitioner has invoked the arbitration clause under the Shared Services Agreement which grants un-hindered right to non-exclusive use of the shared services for the entire operational life of the project for which the petitioner has made one-time payment of ₹7 Crores for 20 WTGs.
2. The expenses of other agreements namely Wrap Agreement, O & M Agreement or non-payment of O & M Charges or termination of O & M Agreement by the petitioner in any way does not restrict the petitioner's right to access / use the shared services infrastructure.
3. Clause 3 of the Shared Services Agreement which covers the shared services facilities includes within

its scope, shared common feeder of which the Feeder No. 14 has been switched off illegally by the respondent no.1 disconnecting 16 out of 20 WTGs of the petitioner.

4. Clause 1.20 of the Annexure-1 of the Wrap Agreement as well as Clause 1(i)(j) and Clause 2(1)(f) of Schedule I of the O & M Agreement merely states that upon the termination, the cost of the operating and maintaining the shared services and not the use of shared infrastructure would be mutually discussed and agreed between the parties. The said clause does not in any manner dilute the right of the petitioner to make use of the shared services for the entire operational life of the WTGs.
5. He draws a distinction between the right to use the shared services and operation and maintenance of shared services. According to him, the former emulates from Shared Services Agreement and the latter formulates part of the O & M Agreement.

39. On the other hand, Mr. Sandeep Sethi, learned Sr. Counsel appearing for the respondent submitted the following:

1. O & M Agreement entered into between the petitioner and M/s. IWISL incorporates operation and maintenance of shared services infrastructure as envisaged in the Shared Services Agreement.

2. As per clause 8.1 of the O & M Agreement, M/s. IWISL was under obligation to provide free of cost operation and maintenance services to the petitioner's 20 WTGs as well as shared services infrastructure for a period of 36 months. Clause 8.2(i) and Annexure / Schedule 2 of the O & M Agreement mandates the petitioner to pay consolidated O & M Fees amounting to a sum of ₹16 Lac per WTG per annum which includes consolidated O & M fee for providing O & M services for 20 WTGs as well as shared infrastructure.
3. Petitioner was required to pay an amount of ₹4.03 Crores as O & M fee for the 20 WTGs as well as shared infrastructure from the expiry of 36 months till the date termination of O & M Agreement on February 26, 2019 to M/s. IWISL.
4. Disconnection of Feeder No. 14 is on the ground for non-payment of O & M expenses and non-execution of O & M Agreement.

40. At this stage, it may be necessary to state that Mr. Sethi has raised a preliminary issue on the maintainability of the petition in view of the fact that the parties are already before the Arbitral Tribunal wherein disputes regarding multifarious breaches as well as payments under the O & M Agreement are pending adjudication, appropriate for the petitioner is to file an

application under Section 17 of the Act with regard to the prayer as made in the present petition.

41. From a reading of Clause 3 and Clause 6 of the Shared Services Agreement, it is clear that the petitioner shall pay to the respondent no.1 for providing shared services as named therein an amount of ₹7 Crores. This amount is a one-time payment made to respondent no.1. The right to use referred to in Clause 4 is for using shared services as provided by the respondent no.1. There is no dispute that separately O & M Agreement was executed between the petitioner and the M/s. IWISL for the operation and maintenance of WTGs and the shared services by making certain payments which have been highlighted by Mr. Sethi during his submissions and as referred to above. There is also no dispute that the M/s. IWISL had granted free operation and maintenance of WTGs and the shared services for a period of 36 months which the petitioner has availed of without any demur and the petitioner was under obligation to pay for the O & M charges from the 4th year onwards. It is a conceded case of the parties that the O & M Agreement would have a life of 10 years unless the terms are re-negotiated on the expiry of 10 years for a further period of 5 years. The petitioner is also within its right to make an alternate arrangement on the expiry of the term of the contract i.e., 10 years or on failure to negotiate with M/s. IWISL. There is no dispute that the O & M Agreement has been terminated by the petitioner vide termination notice dated October 22, 2019 under Clause 19.1(i) of the O & M Agreement. After the termination, the petitioner did enter into negotiations

with M/s. IWISL and M/s. IWISL had even sent a draft of the requisite O & M Agreement to the petitioner for its approval. It appears that the petitioner did not proceed further. In any case, it is clear from the conjoint reading of the Shared Services Agreement and the O & M Agreement that the petitioner has made a one-time payment to respondent no.1 for setting up the shared services to be used by the petitioner, which along with WTGs need to be operationalised and maintained by M/s. IWISL for which a separate O & M agreement was entered into by the petitioner. As stated above, the operation and maintenance was at certain price, which according to Mr. Sethi, has not been paid by the petitioner and which is also a subject matter of the dispute before the Arbitral Tribunal. As noted from the above and argued by Mr. Sethi, it is for non-payment of these charges and non-execution of the subsequent / requisite O & M Agreement, the Feeder No. 14 has been disconnected for which a prayer has been made by the petitioner for its reconnection. Mr. Nayar has relied upon the provisions of the terms and conditions of the Shared Services Agreement to contend that it is the right of the petitioner to use the shared services. The said submission is appealing on a first blush, but on a deeper consideration, it is clear that, the Shared Services Agreement is for providing the shared infrastructure to all the owners of WTGs, in that sense they have right to use, but the O & M Agreement has a purpose, that is for operation and maintenance of the shared services on payment of certain charges. In fact, I note that the petitioner had

vide notice dated September 19, 2018 invoked arbitration clause in the O & M Agreement in the following manner:

9. In these circumstances, the disputes and differences have arisen between the parties which have remained unresolved despite repeated efforts. The claim of HWEPL is Rs.8, 76,33,176/- (Rupees Eight Crore Seventy Six Lakh Thirty Three Thousand One Hundred and Seventy Six only) as on date, which have arisen on account of multifarious breaches on the part of IWISL are inter alia as under:

A. Failure, neglect and refusal of IWL and IWISL to operate and manage the Project continuously on 24 hours every week by skilled manpower at the CMS as per clause 1 (i)(a) of Schedule 1, which are resulting into lower machine availability and revenue losses;

B. Revenue Loss caused due to failure of WISL to operate and manage all shared infrastructure i.e. Pooling Substation, SCAD A building, internal approach road, pathways, internal 33k V line etc. as per clause 1 (i)(j) of Schedule 1.;

C. Revenue Loss caused due to inaction and. failure of IWISL to take prompt action to address any

operational issue brought to the notice of the IWL and IWISL by CWPPL;

D. Loss caused towards due to non-supply of all spares including but not limited to consumables such as lubricants, cotton wastes, gloves, sensors, cables etc. as per clause 2(l)(a) of Schedule 1;

E. Loss caused on account of failure of IWISL to maintain all shared infrastructure i.e. Pooling Substation, SCADA building, internal approach road, pathways, internal 33kV line etc. as per clause 2(1)(f) of Schedule 1; and

F. Loss caused on account of failure of IWISL to take action for preventive maintenance as per clause 2(1)(q) of Schedule 1.

In view of the above, HWEPL hereby invokes arbitration in terms of Clause 20.2 of the O&M Agreement. It is relevant to mention that the arbitration clauses in all the aforementioned agreements are similar.”

The above invocation clearly depicts that the grievance of the petitioner is primarily with regard to failure on part of M/s IWISL to discharge its obligations in relation to operating and maintaining the shared services as envisaged in the O & M Agreement. Cleverly, the petitioner now in this petition, without making M/s IWISL a party seeks to invoke the Shared Services

Agreement for operation and maintenance of Shared Services which has to be carried out by M/s IWISL and not by the respondent herein. Further, the very action of disconnection of Feeder No.14 relates to operation and maintenance of shared services and therefore, the impugned action is related to O & M Agreement.

42. So, it follows that the subject matter of this dispute is relatable to the O & M Agreement, and a dispute connected therewith is also pending before the Arbitral Tribunal. Mr. Sethi is right in raising an issue on the maintainability of the petition under Section 9(3) of the Act which reads as under:

“Once the Arbitral Tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy provided under Section 17 efficacious.”

43. One of the submissions of Mr. Nayar that after the termination of O & M Agreement, petitioner has discretion to appoint any third party contractor for operation and maintenance of shared services and the respondent could not have disconnected the Feeder No.14 is concerned, the disconnection is by M/s IWISL which was operating and maintaining the shared services and is not a party in the present proceedings. Even otherwise, it is not the case of the petitioner that it has appointed a third party, as a contractor for operating and maintaining the shared services. In any case, this is a plea on merit to be urged before the Arbitral Tribunal.

44. That even otherwise, Mr. Sethi is justified in relying upon the Judgment of the Supreme Court in the case of ***Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors. (2013) 1 SCC 641***, wherein it was held that where various agreement constitutes a composite transaction, the court can refer the disputes to Arbitration existing between the signatory or non-signatory parties, if: (1) All ancillary agreements between them are relatable to principal agreement, and (2) performance of one agreement is so intrinsically interlinked with other agreements that they are incapable of being beneficially performed without performance of others or severed from the rest, i.e., it is possible to invoke principle of composite performance. This I say so because, the right to use the shared services under the Shared Services Agreement and payment for the operation and maintenance charges under the O & M Agreement being inter linked, this issue also needs to be adjudicated by the same Tribunal which is seized of the dispute under O & M Agreement. On this issue, Mr. Nayar had relied upon the Judgment of the Supreme Court in ***Duro Felguera S.A. v. Gangavaram Port Limited AIR 2017 SC 5070*** to contend that for multiple agreements containing provisions for arbitration, different Arbitral Tribunals should be set-up for adjudication of disputes arising out of each agreement. However, the reliance placed by Mr. Nayar on ***Duro Felguera S.A. (supra)*** is misplaced in the present factual matrix as the said judgment clearly distinguishes ***Chloro (supra)*** by holding that the latter refers to disputes arising out of relatable and inter-linked agreements

through composite reference / composite performance as the arbitration clause containing the words “*under and in connection with*” in the principal agreement had a wider purport to include non-signatories to the principal agreement but signatories to other relatable / ancillary agreements. Similar, is the stipulation for dispute resolution as envisaged in Shared Services Agreement as well as O & M Agreement. The relevant paragraph in ***Duro Felguera S.A. (supra)*** reads as under:-

“54. The learned Senior Counsel for GPL relied upon Chloro Controls India Private Ltd. (supra), to contend that where various agreements constitute a composite transaction, court can refer disputes to arbitration if all ancillary agreements are relatable to principal agreement and performance of one agreement is so intrinsically interlinked with other agreements. Even though Chloro Controls has considered the doctrine of "composite reference", "composite performance" etc., ratio of Chloro Controls may not be applicable to the case in hand. In Chloro Controls, the arbitration clause in the principal agreement i.e. clause (30) required that any dispute or difference arising under or in connection with the principal (mother) agreement, which could not be settled by friendly negotiation and agreement between the parties, would be finally settled by arbitration conducted in accordance with Rules of ICC. The words thereon "under and in connection with" in the principal

agreement was very wide to make it more comprehensive. In that background, the performance of all other agreements by respective parties including third parties/non-signatories had to fall in line with the principal agreement. In such factual background, it was held that all agreements pertaining to the entire disputes are to be settled by a "composite reference". The case in hand stands entirely on different footing. As discussed earlier, all five different Packages as well as the Corporate Guarantee have separate arbitration clauses and they do not depend on the terms and conditions of the Original Package No.4 TD nor on the MoU, which is intended to have clarity in execution of the work."

45. In view of my above discussion, without going into merits, the present petition for the prayers made is not maintainable. Liberty is with the petitioner to file appropriate application before the Arbitral Tribunal already in place for the reliefs prayed for in this petition. The petition is dismissed. No costs.

V. KAMESWAR RAO, J

MARCH 16, 2020/aky/jg