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IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

TUESDAY, THE 28TH DAY OF SEPTEMBER 2021

THE HON'BLE MR. JUSTICE N. SATHISH KUMAR

O.P. No.84 of 2011

In the matter of the Arbitration and
Conciliation Act, 1996.

and

In the matter of Award dated
19.11.2010 in O.P.No.593 of 2008
passed by Justice S.Jagadeesan,
Judge (Retd.) in respect of the
dispute between M/s.K.S. Oils Ltd.,
and Mrs. Vestas RRB India Ltd.
(now known as M/s RRB Energy
Ltd)

M/s K.S.Oils Limited,
Represented by its Authorized
Officer Mr.P.Bhaskar
Jiwaji Ganj, Morena
Madhya Pradesh – 476 0001 and its
administrative office at
806, New Delhi House,
Barakhamba Road,
New Delhi – 110 001.

... Petitioner

-Vs-

1. M/s Vestas RRB India Ltd.,
(now known as M/s RRB Energy Ltd.,)
No.17 (Old No.2),
Vembuliamman Koil Street,
K.K.Nagar West, Chennai – 600 078.



*2. S.Jagadeesan (Retired) Learned Arbitrator,
No.53, Old No.23, 3rd Main Road,
Gandhi Nagar,
Adayar,
Chennai – 20.

... Respondents

Original Petition praying that this Hon'ble Court be pleased to

(1) Set aside the award dated 19.11.2010, passed by Justice S.Jagadeesan, Judge (Retd) in the Arbitration Proceedings in O.P.No.593 of 2008 in the matter of dispute between the petitioner and respondent and consequently allow the claim of the petitioner.

(2) Pay the costs of these proceedings.

This Original Petition having been heard on 17/09/2021 in the presence of Mr.Rajinish Pathiyil, advocate for the petitioner herein and Mr.Sathish Parasaran, Senior Counsel for M/s. Fox Mandal Associates, advocates for the 1st respondent herein and upon reading the petition and the award dated 19/11/2020 filed herein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of the said advocates for the parties hereto and this court having observed that the amount refunded admittedly payable by the first respondent, however, the Arbitrator has awarded 24% from 15/05/2008 till the date of payment and it is admitted by the parties that pursuant to the



was deposited in fixed deposit and fixed deposit was handed over to the Registrar General, therefore, this court is of the view that interest shall be payable as ordered at the rate of 24% till the deposit and thereafter, the accrued interest, as per the deposit shall be payable, though this court is of aware of the limitation to modify the award, since the amount has already been deposited, the interest rate shall be at the banking rate from the date of deposit and, **it is ordered:-**

That till the deposit, the interest ordered by the learned Arbitrator be and is hereby upheld and the original petition is partly modified.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE,
CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE
28TH DAY OF SEPTEMBER 2021.

Sd/-

ASSISTANT REGISTRAR (O.S-II)

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.



ED

25.10.2021

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O.P.No.84 of 2011

ORDER

DATED :28.09.2021

THE HON'BLE MR.JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 25/10/2021

APPROVED ON : 25/10/2021



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	17/9/2021
Pronounced on	28/9/2021

C O R A M

THE HONOURABLE Mr.JUSTICE N.SATHISH KUMAR

O.P.No.84 of 2011

K.S.Oils Limited
rep. By its Authorized Officer
Mr.P.Bhaskar
Jiwaji Ganj, Morena
Madhya Pradesh 476 001

Administrative Office at

806 New Delhi House
Barakhamba Road
New Delhi 110 001.

...

Petitioner

Vs

1. VESTAS RRB India Ltd
(now known as M/s. RRB Energy Ltd)
No.17 (Old No.2)
Vembuliamman Koil Street
K.K.Nagar West
Chennai 600 078.

2. S. Jagadeesan (Retired)
Learned Arbitrator
53 Old No.23, III Main Road
Gandhi Nagar, Adyar
Chennai 600 020.

...

Respondents



Original Petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the award dated 19/11/2010 passed by S.Jagadeesan, Judge (Retd) in the Arbitration Proceedings in O.P.No.593 of 2008 in the matter of dispute between the petitioner and respondent and consequently allow the claim of the petitioner.

For petitioner ... Mr.Rajinish Pathiyil

For respondents ... Mr.Sathish Parasaran
Senior Counsel
for M/s. Fox Mandal Associates
for R.1

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ORDER

This Original Petition has been filed to set aside the award, dated 19/11/2010, passed in the Arbitration Proceedings in O.P.No.593 of 2008, in the matter of dispute between the petitioner and first respondent.

2. The brief case of the claimant is as follows:-

The claimant wanted to set up an infrastructure for the manufacture of Green Energy using Wind Mills to generate Electricity. The first respondent, who is a Manufacturer, Contractor in Erection of Wind Energy Devices or Wind Energy Generators (hereinafter referred to as WEG in short), approached the claimant through its sales representatives, claiming that they were the leading manufacturers of WEG and have set up large



Wind Mill Farms in the South of India. The representatives of the first respondent Company informed the claimant that the sites in Palladam in Coimbatore District and Tenkasi in Tirunelveli District are potential for wind electrical generators and represented that WEG bearing Model No.P.S.600 KW with 47 m Rotor diameter mounted on a 50 m power was of a proven technology and found to be very effective in wind energy generation. The claimant agreed to purchase 10 numbers of WEGs, for a sum of Rs.3 crores, per wing, electric generator and accordingly, placed an order, on 16/2/2008. The first respondent has to pay for liquidity damage of Rs.6 lakhs per WEGs, which are not commissioned till 25th March 2008.

3. Pursuant to the Purchase Order, first respondent had supplied 10 numbers of WEGs belatedly, in violation of terms of Purchase Order, dated 16/2/2008 and the power generation is far below due to the sub standard machines. The claimant has issued a debit note, dated 17/5/2008, for a sum of Rs.60 lakhs. However, the same was not denied, till 20/10/2008 and thereafter, the first respondent raised the demand for payment.

4. The first respondent, as per the Power prognosis had guaranteed that generation of 14 lakhs unit per WEG at both Tenkasi and Palladam sites and in the event of lessor generation, then the guaranteed amount, i.e.,

if the variation is more than 10% from the expected performance, then the



claimant is entitled to compensate at the power purchase rate of the State Electricity Board at Rs.2.90 per unit. Therefore, the claimant has claimed damages for Rs.93,35,761/-, as damages on account of variation in power generation, as per clause v of the Purchase Order, dated 16/2/2008 and for a direction, restraining the first respondent and their representatives from any manner disrupting, disconnecting or failing to maintain, attend to the repairs, carry out check, maintain the generation data, sent daily generation report to the claimant in respect of the wind energy generators set out in the schedule and for a direction, directing the first respondent to furnish information as required for availing carbon credit and such other benefits in respect of the schedule mentioned WEG and to pay a sum of Rs.6 lakhs being the legal expenses and costs incurred by the claimant till date to defend and prosecute the litigations.

5. It is the case of the respondent that the claimant defaulted in adhering to the payment schedule, as agreed to in the Purchase Order. Only after much persuasions, as evidenced by emails and letters, claimant made belated payments. Delay in Commissioning was solely on the ground of delayed payments. In terms of the Purchase Order, the first respondent has only provided performance guarantee of the WEGs based on power curve and this guarantee was to commence only after one month from the date of commissioning of WEGs and will be valid till two years from the date of



commissioning. No guarantee for generation in absolute terms was anywhere provided by the first respondent and hence the claim for any short fall in generation is not tenable. WEGs have not completed two years period of operation, so far, in order to know the estimated generation vis-a-vis actual generation. The liquidated damages claimed by the claimant has to be proved by them. The 14 lakhs units in the Purchase Order is only an expected figure dependant on several conditions and by no stretch of imagination can the first respondent held ransom to it.

6. The first respondent filed a counter claim for recovery of a balance amount of Rs.50,86,099/-, together with interest at 24% p.a., from the date on which the last payment was made till the date of payment and also for a sum of Rs.1 crore towards damages for loss of business opportunity to the first respondent on account of the admitted willful withholding of the contractual debt together with costs of the arbitration.

7. The claimant filed a reply to counter claim filed by the first respondent and the first respondent filed rejoinder to the reply of the claimant to the counter claim.

8. On the basis of the pleadings, following issues were framed:-

- (i). Whether the claimant is entitled to liquidated damages in terms of contract when he has committed default in his obligations?



(ii). Whether the claimant was justified in adjusting the contractual dues of the respondent to the tune of Rs.50,86,099/-?

(iii). Whether the claimant failed to adhere the payment schedule as given in the contract which lead to the delay in the commissioning of the WEGs as claimed by the respondent?

(iv). Whether the claimant is justified in claiming the compensation of Rs.93,35,761/- towards shortfall in generation in terms of the contract especially when only performance guarantee of the WEGs based on the power curve is only given?

(v). Whether the respondent is liable to furnish to the claimant all the information for availing carbon credits?

(vi). Whether the respondent is entitled to recover the cost of maintenance of the project from the claimant?

(vii). Whether the respondent is entitled to the amount claimed in the counter claim?

(viii). To what reliefs the parties are entitled to including the cost of litigation and interest?

9. Award passed by the learned Arbitrator, in O.P.No.593 of 2008, is as follows:-



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liquidated damages and damages towards loss of production of energy is rejected.

2. The counter claim of the respondent is partly allowed. The respondent is entitled for an award in their favour for a sum of Rs.50,86,099/- together with interest @ 24% p.a., from 15/5/2008 till the date of payment.

3. The respondent is not entitled to recover the maintenance charges of 10 WEGs till 31/3/2010.

4. The respondents claim for the compensation for one Crore for loss of business is rejected.

5. The claimant is directed to pay a sum of Rs.4 lakhs towards the cost of arbitration to the respondent.

10. Being aggrieved, instant Original Petition has been filed, praying for the relief, as stated supra.

11. Heard Mr.Rajinish Pathiyil, learned counsel for the petitioner and Mr.Sathish Parasaran, learned Senior Counsel for M/s. Fox Mandal Associates for the first respondent.

12. Though various grounds have been raised in the Original



two submissions were focussed before this Court to challenge the award.

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13. The first submission is that the award is vitiated on the ground of violation of Section 12 of the Arbitration and Conciliation Act, 1996. The learned Arbitrator has not even disclosed in writing any circumstances likely to raise justifiable doubts as to his independence or impartiality. It is his further contention that the learned Arbitrator has ignored vital documents and passed an award in favour of the first respondent. In such a view of the matter, arbitral award passed has to be set aside.

14. It is his further contention that the contractual terms make it clear that in case, WEG is not commissioned, on or before 25th March 2008, first respondent has to pay the liquidated damage of Rs.6 lakhs per WEG, which are not commissioned till 25th March 2008.

15. It is his further contention that Clause 5 of the Purchase Order also clearly indicate that the expected power generation of Tenkasi and Palladam sites is 14 lakhs units, each, per WEG, per annum 100% grid availability and 100% machine availability as per power prognosis submitted by the first respondent. The first respondent given a guarantee for the purpose of WEG based on the power curve and performance of the machine for the purpose data of Wind Mast situated closest to the proposed site shall be taken as basis. If there is any variation (more than 10%) in



Electricity Board Purchase Ruling Rate. This has not been taken note of the learned Arbitrator. Hence, it is his contention that the award not only suffered by bias, as it violates the very procedure, under Section 12 of the Act, but also suffers from perversity as the important conditions of the contract as well the documents were not considered.

16. In support of his submissions, the learned counsel appearing for the petitioner has relied on the following judgments.

A. With regard to the **disclosure of interest**, he has relied on

(i). VOESTALPINE SCHIENEN GmbH Vs. DELHI METRO RAIL CORPORATION LTD (2017) 4 SCC – 665

(ii). ACE PIPELINE CONTRACTS PRIVATE LIMITED Vs. BHARAT PETROLEUM CORPORATION LIMITED (2007) 5 SCC 304

(iii). UNION OF INDIA Vs. TOLANI BULK CARRIERS LIMITED (2001 SCC BOM 1027)

(iv). IJM-GAYATRI JOINT VENTURE Vs. NATIONAL HIGHWAYS AUTHORITY OF INDIA (2012) ILR 3 DELHI 721

(v). LANCO-RANI (JV) Vs. NATIONAL HIGHWAYS AUTHORITY OF INDIA LIMITED (O.M.P.No.199/2008)

B. With regard to **Awarding of interest**, the learned counsel appearing for the petitioner has relied on

(i). McDERMOTT INTERNATIONAL INC. Vs. BURN STANDAD



CO. LTD & ORS (2006) 11 SCC 181

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(ii). UNION OF INDIA Vs. CONCRETE PRODUCTS AND
CONST.CO AND ORS (2014) 4 SCC 416

(iii). Mrs.PRASANNA Vs. MR.INDERCHAND JAIN & ANR
(O.P.No.385 of 2015 (Mad HC))

C. With regard to **Section 34 of the Arbitration and Conciliation Act, 1996**, the learned counsel appearing for the petitioner has relied on

(i). VESTAS WIND TECHNOLOGY INDIA PRIVATE LIMITED
AND ORS.Vs. INOX RENEWABLES LIMITED AND ORS (Arbitration
Petition Nos.1088 and 599 of 2015)

(ii). SSANGYONG ENGINEERING AND CONSTRUCTION CO.
LTD Vs. NATIONAL HIGHWAYS AUTHORITY (2019) 15 SCC 131

(iii). ASSOCIATE BUILDERS Vs. DELHI DEVELOPMENT
AUTHORITY (AIR 2015 SC 620)

(iv). OIL AND NATURAL GAS CORPORATION LTD Vs.
WESTERN GECO INTERNATIONAL LTD (AIR 2015 SC 363).

(v). K.M.SURESH BABU Vs. SUNDARAM FINANCE LIMITED
AND ORS (O.P.No.199 of 2014 dated 5/3/2020)

D. With regard to **Section 12 of the Arbitration Act and Legal bias**, the learned counsel appearing for the petitioner has relied on

(i). VINOD BHAIYALAL JAIN AND OTHERS Vs. WADHWANI



PARAMESHWARI COLD STORAGE PVT LTD AND ANOTHER (2019
SCC ONLINE SC 904)

(ii). MURLIDHAR ROONGTA AND OTHERS Vs.
S.JANAGANNATH TIBERWALA AND OTHERS (2005) SCC ONLINE
BOM 727)

(iii). ALCOVE INDUSTRIES LTD Vs. ORIENTAL
STRUCTURAL ENGINEERS LTD ILR (2008) I DELHI 1113

(iv). DIRECTOR GENERAL OF FAIR TRADING Vs. THE
PROPRIETARY ASSOCIATION OF GREAT BRITAIN, THE
PROPRIETARY ARTICLES TRADE ASSOCIATION (2000 WL
1841715)

E. With regard to **Applicability of Procedural Law**, the learned
counsel appearing for the petitioner has relied on

(i). ITI LTD Vs. SIEMENS PUBLIC COMMUNICATIONS
NETWORK LTD (2002) 5 SCC 510

(ii). THE STATE OF PUNJAB AND OTHERS Vs. SHAMLAL
MURARI AND OTHERS (Civil Appeal No.1415 of 1975)

(iii). SUSHIL KUMAR SEN Vs. STATE OF BIHAR (Civil Appeal
No.1252 of 1970)



INDIA AND OTHERS (Civil Appeal No.82 of 1971)

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17. Apart from the above, the learned counsel appearing for the petitioner has relied on the following judgments:-

(i). LEMMINKAINEN CONSTRUCTION (INDIA) VS. KIRBY BUILDING SYSTEMS INDIA LIMITED AND ORS (O.P.No.79 of 2014)

(ii). 3I INFOTECH LIMITED Vs. ROMILA BAJAJ AND ORS (O.P.No.416 of 2014 dated 30/4/2019)

(iii). P.HARIVARDHAN Vs. THE DIRECTOR, NITTANY CREATIVE SOLUTIONS (P) LTD AND ORS (O.P.No.52 of 2015 dated 17/3/2020)

(iv). M.R.Hi-TECH ENGINEERS PVT LTD Vs. THE UNION OF INDIA AND ORS (O.P.No.45 of 2012 dated 7/7/2020)

18. In response to the submission of the learned counsel appearing for the petitioner, Mr.Sathish Parasaran, learned Senior Counsel for M/s. Fox Mandal & Associates appearing for the first respondent submitted that an allegation of judicial bias, is an afterthought. The same has been pressed into service, after ten years, after attaining some information about the arbitration conducted by the Arbitrator. If such contention is accepted, at this stage, there will not be any end for arbitral proceedings.

19. It is his further contention that Arbitrator himself was nominated by the claimant at the relevant point of time and no objection whatsoever



raised about the Arbitrator or his interest, etc. Therefore, it is his

contention that even assuming that from the year 2008 till date, the Arbitrator has conducted three Arbitral proceeding in respect of first respondent cannot be a ground to hold that the award is totally vitiated.

20. It is his further contention that Section 12 (5) of the Act is applicable only after amendment, whereas the applicant himself has chosen the Arbitrator and when there is no specific details given by the applicant as to the nature of the bias and the nature of arbitration conducted, at the relevant point of time, on behalf of the first respondent by the applicant, the arbitration award cannot be attacked on general assumption and presumption. Hence, such contention cannot be countenanced at any stage.

21. It is his further contention that on facts, the learned Arbitrator has in fact gone into all the documents and interpreted the terms of the contract and recorded the factual finding. When the factual finding recorded the same cannot be assailed on the ground that there is perversity. Absolutely, there is no perversity in the award. The entire materials have been considered by the Arbitrator. In fact, construction of the Contract and interpretations made by the arbitration is reasonable and the same cannot be interfered in Section 34 of the Act.

22. To substantiate his case, the learned Senior Counsel appearing for the respondent has relied on the following judgments.



(i). INTERNATIONAL AIRPORTS AUTHORITY OF INDIA Vs.

K.D.BALI AND ANOTHER {(1988) 2 SCC 360}.

(ii). J.G.ENGINEERS PRIVATE LIMITED Vs. UNION OF INDIA
AND ANOTHER {(2011) 5 SCC 758}

(iii). M/s. KAILASH NATH ASSOCIATES Vs. DELHI
DEVELOPMENT AUTHORITY AND ANOTHER (Civil Appeal No.193
of 2015)

(iv). S.P.SINGLA CONSTRUCTIONS PRIVATE LIMITED Vs.
STATE OF HIMACHAL PRADESH AND ANOTHER {(2019) 2 SCC –
488}

(v). PATEL ENGINEERING LTD Vs. NORTH EASTERN
ELECTRIC POWER CORPORATION LTD (2020 SCC ONLINE SC 466)

23. With regard to the first contention that the award is suffered by bias, It is to be noted that the very arbitrator is nominated by the applicant. The additional documents now filed though not received as an evidence, mere looking at the document makes it clear that from the year 2008 to 2020, arbitrator has conducted only three arbitration, on behalf of the respondent herein. Whereas this arbitration was referred in the year 2009 itself and further, no details were placed on record to contend that the



cannot be said that the Arbitrator is totally biased from the very beginning.

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24. It is to be noted that only on proper enquiry, the learned Arbitrator has been chosen by the applicant himself. The first respondent has not objected for that. Therefore, after the award went against the claimant, notice was issued to produce the document only on 27/5/2020 by the claimant requiring intimation as to the particulars of arbitration done by the learned Arbitrator from the year 2008. The very conduct of seeking such information belatedly indicate that the same has been used only in order to assail the award at a later point of time.

25. Be that as it may. The very arbitrator himself was nominated by the claimant. At the time of nomination, only after getting consent after satisfying his impartiality, the parties will normally nominate Arbitrator. Having chosen the Arbitrator and not raised any objection during the entire arbitral award, only after inviting adverse order and making such ground under Section 34 of the Act, itself clearly indicate that such ground has made only in order to assail the award. Such contention in view of this Court is nothing but without any substance.

26. Section 12 of the Arbitration and Conciliation Act, 1996 reads as follows (prior to Amendment of Act 3 of 2016):-

“When a person is approached in connection with

his possible appointment as an arbitrator, he shall



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disclose in writing any circumstances likely to give rise to justifiable doubts as to his independence or impartiality.”

27. Section 12 (5) of the Arbitration and Conciliation Act 1996 has been amended with effect from 23/10/2015. The conduct of the applicant submitting the jurisdiction of the arbitration without raising any objection makes very clear that there were no circumstances likely to give rise to justifiable doubts as to his independence or impartiality. Even assuming that there was no disclosure made by the arbitrator at the relevant point of time, as per unamended Section 12 (1) of the Arbitration and Conciliation Act, 1996, petitioner was aware of the proceedings made at length and request for the Arbitrator to make disclosure which has not been done. However, knowing very well that the provision of Section 12 of the Act has been violated or not complied yet he proceeded with arbitration without stating objections to the non compliance and participated in the arbitral proceedings. Therefore, now in view of the waiver of his right, such plea cannot be permitted in Section 34 of the said Act. As the claimant himself aware of the provision Section 12 of the Act has not been complied yet proceeded in the arbitration. Therefore, the waiver Clause come into play and operate against the claimant from raising such plea in Section 34 of the Act.



28. In VOESTALPINE SCHIENEN GmbH VS. DELHI METRO RAIL CORPORATION LTD (2017) 4 SCC 665, the Hon'ble Apex Court has held that

“any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators, viz., their independence and impartiality is critical to the entire process.”

29. In ACE PIPELINE CONTRACTS PRIVATE LIMITED Vs BHARAT PETROLEUM CORPORATION LIMITED (Civil Appeal No.1783 of 2007) dated 4/4/2007), the Hon'ble Apex Court has held that

“Once a party has entered into an agreement with eyes wide open it cannot wriggle out of the situation that if any person of the respondent-BPCL is appointed as arbitrator, he will not be impartial or objective. However, if the appellant feels that the arbitrator has not acted independently or impartially, or he has suffered from any bias, it will



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application under Section 34 of the Act to set aside the award on the ground that arbitrator acted with bias or malice in law or fact.”

30. In UNION OF INDIA Vs. TOLANI BULK CARRIERS LIMITED {(2001) SCC BOM 1027}, in paragraph 9, the Bombay High Court has referred to the Hon'ble Supreme Court judgment in RANJIT THAKUR Vs. UNION OF INDIA (1988 Cri.L.J 158). In the said judgment, at paragraph 17, the Bombay High Court has held as follows:-

“As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however, honestly. Am I Biased?; but to look at the mind of the party before him.”

31. In IJM – GAYATRI JOINT VENTURE Vs. NATIONAL HIGHWAYS AUTHORITY OF INDIA (2012) ILR 3 DELHI 721, the Delhi High Court has set aside the award, on the ground that during the arbitral proceedings, a Contractor was engaged as a technical expert/advisor



mandatory requirement of disclosure as stipulated in Section 12 (2) of the

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32. In VINOD BHAIYALAL JAIN AND OTHERS VS. WADHWANI PARAMESHWARI COLD STORAGE (2019 SCC ONLINE SC 904), the Hon'ble Supreme Court has held that since the Arbitrator is the counsel for R.1 in another case, award has to be set aside on the ground of bias.

33. In MURLIDHAR ROONGTA AND OTHERS Vs. S.JAGANNATH TIBERWALA AND OTHERS {(2005) SCC Online Bom 727, the Hon'ble Supreme Court has held that once an Advocate representing the second respondent/Arbitrator in personal matters of the Arbitrator, has not been disclosed, there is bias.

34. The learned counsel appearing for the first respondent cited a judgment of the Hon'ble Supreme Court in S.P.SINGLA CONSTRUCTION PRIVATE LIMITED Vs. STATE OF HIMACHAL PRADESH AND ANOTHER {(2019) 2 SUPREME COURT CASES 488}, wherein, it has held that Section 12 (5) of the Act was amended with effect from 23/10/2005 cannot have retrospective operation in arbitral proceedings already commenced unless parties otherwise agree.

35. The judgments relied upon by the learned counsel appearing for the claimant is not applicable to the case on hand. Knowing very well that



no disclosures made, he never sought for any information and yet proceeded with arbitration, without stating his objection of the non compliance. Therefore, this Court is of the view that such contention raised belatedly that too after the award has been passed, is without any substance.

36. On a perusal of the award, with regard to the merit, this Court is of the view that the main dispute is with regard to the Clauses in the Contract governing the parties. A perusal of the Purchase Order, makes it very clear that the payment terms agreed between the parties is follows:-

(1). 30% of the purchase order value will be paid as an advance along with the order.

(2). 70% of the purchase order value will be paid on pro-rata basis as under:-

(i). 20% will be paid within 3 days on providing proof of delivery of Tower materials at the site.

(ii). 20% will be paid within 3 days on providing proof of delivery of Blade materials at the site.

(iii). 25% will be paid within 3 days on providing proof of delivery of Nacelle at the site.

(iv). 5% of the purchase order value will be paid within 7 days on commissioning of WEG.

37. It is also specifically alleged that the payment schedule with



conditions is not maintained and any payment is delayed by more than 10 days, the commissioning of the WEG will be delayed and new commissioning schedule dates shall be intimated to the respondent. In this regard, the learned Arbitrator in paragraph 11.4, has observed that after considering the documents factually recorded that there were details in payment beyond the schedule dates which has been practically recorded by them. Therefore, based on the documents produced, the learned Arbitrator recorded that there were delay in each payment, this Court cannot re-appreciate the same. The delay in payment has been recorded by the learned Arbitrator factually. No contra materials brought to the notice of this Court to show that such finding is erroneous or against the documents. Therefore, when the payment terms itself violates, it will have an impact on the commissioning of WEG. The other important Clause is Clause 6 of the Purchase Order.

38. Clause of Liquidated damages, from the Purchase Order reads as follows:-

“WEG should be commissioned on or before 25th March 2008. In case the WEG is not commissioned on or before 25th March 2008, VRRB shall have to pay Liquidated Damage of Rs.6 lakhs per WEG for the WEGs which are not



commissioned till 25th March 2008.”

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39. Learned Arbitrator has in fact, taken note of the fact that there are fourteen days delay for 1 WEG and for remaining 5 WEG, there is a delay of six days. The dispute is with regard to the date of commissioning. The claimant has also not adhered to the payment terms and finally, the learned Arbitrator recorded and interpreted the contract and considering the various documents held that delay in payment had impact on commissioning and finally held that the liquidated damages is not pre estimated damages agreed between the parties. Besides, the learned Arbitrator has also concluded that there was no proof of loss established by the claimant to claim liquidated damages of Rs.60 lakhs that too after part payment, without any delay.

40. The learned Arbitrator also found that time was intended to be an essence of contract. The claimant ought to have raised the same immediately, after the expiry of the date for completion of the work, whereas the claimant has paid the amount in part payment. The learned Arbitrator in fact found that Commissioning of 10 WEGs were completed 27/3/2008 to 31/3/2008 though actual commissioning date was 25/3/2008. Claimant has also filed returns as on 31/3/2008 and certificate issued to the TNEB officials also prove the fact that WEG were commissioned and erected before 31/3/2018. Taking note of the fact that there was no loss



proved by the claimant for liquidated damages and interpreted the contract that amount specified in Clause 6 is only a penalty. Learned Arbitrator also recorded factual finding that claimant has not produced any evidence to prove and there is a loss of business and rejected the claim

41. As far as issue No.4 which pertaining to the power curve guarantee, it is the contention of the claimant that the respondent has violated the terms and conditions of the Purchase order.

42. It is relevant to extract Clause 5 in the agreement and the same reads as follows:-

“The expected power generation of the Tenkasi site (location of WEG) is 14,00,000 (Fourteen lacs only) units per WEG per annum (LCS Reading) and Palladam site (location of WEG) is 14,00,000 (Fourteen lacs only) units power WEG per annum (LCS Reading) at 100% grid availability and 100% machine availability as per power prognosis submitted by you. However, VRRB stand guarantee for the performance of the WEG based on the power curve and performance of the machine, for the purpose data of Wind Mast situated closest to the proposed site shall be taken



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as basis. If there is any variation (more than 10%) in performance of the WEG, i.e., Power Curve of the WEG, VRRB will compensate us @ SEB purchase ruling rate during the warranty period. This guarantee will commence from one month after the date of commissioning of the WEG and will be valid till 2 years from the date of commissioning. Moreover, if generation is less than expected generation and there is more than 15% downward Variation with respect to power curve, the VRRB shall relocate the WEG to nearest suitable location free of cost, i.e., without any shifting charges payable by us and at par conditions of this P.O.”

43. A careful perusal of the above makes it very clear that expected power generation is Rs.14 lakhs in each sites p.a., at 10% the credit available and machinery available as per power prognosis submitted by the respondent. The above Clause makes it also clear that the first respondent stand a guarantee for the performance of WEG, based on the power curve and performance of the machine, for the purpose data of Wind Mast situated closest to the proposed site shall be taken as basis. If there is any



variation (more than 10%) in performance of the WEG, i.e., Power Curve of the WEG, the guarantee will commence from one month after the date of commission. But, the learned Arbitrator has infact, interpreted the Clause as follows:-

“The question arises is whether it is an absolute guarantee for the generation of 14 lakhs units per WEG per annum? It is specifically mentioned that the guarantee is for the performance of the WEG based on power curve and if there is any variation of more than 10% in performance of the WEG i.e., power curve of the WEG, the respondent will compensate. So, the guarantee is only for the purpose of Machine i.e., the power curve of the WEG. It is known that wind energy, the generation of power is totally depend on the velocity of wind which is a nature factor. No one can give guarantee for the velocity of the wind, which depends upon nature. When the performance of the WEG in producing the energy depend upon the wind velocity, the given guarantee can be construed only as a guarantee for the



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performance of the Machine and in fact that makes clear from the sentence, “However, VRRB stand guarantee for the performance of the WEG based on power curve and performance of the Machine.”

44. Besides in para 12.1 the learned Arbitrator has relied upon the answers given by the witness on the claimant side and finally held that claimant has in fact on the wrong interpretation of the Clause made a claim. The arbitral Tribunal has reasonably interpreted and took a plausible view and hence, the same cannot be interfered by this Court. When the very Clause itself clearly indicate that the guarantee based on Power Curve and for the performance of machine availability, the claim of the compensation on the basis of expected generation has rightly held by the learned Arbitrator is not maintainable.

45. Relying on the judgment of the Bombay High Court in VESTAS WIND TECHNOLOGY INDIA PRIVATE LIMITED AND ORS Vs. INOX RENEWABLES LIMITED AND ORS (Arb.Petition Nos.1088 and 599 of 2015), the main allegation of the learned counsel appearing for the applicant is that the respondent has suppressed the material information and data and fraud was committed by the respondent upon the claimant, and had deliberately not furnished the crucial material data and information,



enter into the agreement with the respondent or not. Therefore, the above judgment cannot be applicable to the facts of this Case. The amount refunded admittedly payable by the first respondent. However, the Arbitrator has awarded 24% from 15/5/2008 till the date of payment.

46. It is admitted by the parties that pursuant to the order passed by this Court in O.A.No.441 of 2009, a sum of Rs.50,86,009/- was deposited in a fixed deposit and fixed deposit was handed over to the Registrar General. Therefore, this Court is of the view that interest shall be payable as ordered at the rate of 24% till the deposit. Thereafter, the accrued interest, as per the deposit shall be payable. Though this Court is aware of the limitation to modify the award, since the amount has already been deposited, the interest rate shall be at the banking rate from the date of deposit. Till the deposit, the interest ordered by the learned Arbitrator is upheld.

47. In view of the above, this Original Petition is partly modified.

Sd./-N.S.K.J.

28/09/2021

//Certified to be true copy//

Dated at Madras this the day of 2021.

COURT OFFICER(O.S.)