



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 20.03.2024

Pronounced on: 13.09.2024

C O R A M

THE HONOURABLE Ms. JUSTICE P.T.ASHA

C.S.No.225 of 2020

Omkar Clean Energy Services Pvt. Ltd.,
No.1 A, Saraswathi Street,
Mahalingapuram, Nungambakkam,
Chennai – 600 034.

....Plaintiff

-Vs-

1.Royal Sundaram General Insurance Co. Ltd.,
21, Patullos Road,
Chennai – 600 002.

2.JLT Independent Consultancy Service Pvt. Ltd.,
Capitale Towers,
Anna Salai, Teynampet,
Chennai – 600 018

(Amended as per order dated 30.04.2024 in A.No.1921 of 2021)

3.Proclaim Insurance Surveyors and Loss Assessors Pvt. Ltd.,
New No.21 D (Old No.14) ARK Colony,
Eldams Road, Alwarpet,



Chennai – 600 018.

4.Mr.Raja Mohamad

.. Defendants

PRAYER: Complaint filed under Order VII Rule 1 C.P.C. Read with Sections 2 (1) (c) (xx), 2(1) (i), 4 (1) and 12 (1) (a) of the Commercial Courts Act, 2015 for

(a)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.44,56,011/- towards Claim No. FT00000932 under Policy No.FT00000766000101, together with interest at 18% p.a. on Rs. 36,05,986.40 from 10.04.2019 till 31.07.2020, and further interest till realization;

(b)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.38,10,052.50/- towards Claim No. FT00000934 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs. 30,83,250/- from 10.04.2019 till 31.07..2020, and further interest till realization;

(c)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.24,98,084/- towards Claim No. FT00000988 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs.20,21,552/- from 10.04.2019 till 31.05.2020, and further interest till realization;



(d)For costs of the suit; and

(e)For such further or other relief as this Hon'ble Court may deem fit and proper in the circumstances of the case

For Plaintiff : Mr. Arun Karthik Mohan

For Defendant 1 : Mr. M.B.Raghavan
M.B.Gopalan Associates

For Defendant 2 : Mr. R.Palaniandavan

For Defendants : Mr. S.Dhakshnamoorthy
3 and 4

JUDGMENT

The above suit has been filed for the following reliefs:

“(a)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.44,56,011/- towards Claim No. FT00000932 under Policy No.FT00000766000101, together with interest at 18% p.a. on Rs. 36,05,986.40 from 10.04.2019 till 31.07.2020, and further interest till realization;



(b)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.38,10,052.50/- towards Claim No. FT00000934 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs. 30,83,250/- from 10.04.2019 till 31.07..2020, and further interest till realization;

(c)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.24,98,084/- towards Claim No. FT00000988 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs.20,21,552/- from 10.04.2019 till 31.05.2020, and further interest till realization;

(d)For costs of the suit; and

(e)For such further or other relief as this Hon'ble Court may deem fit and proper in the circumstances of the case''

2. The plaintiff would submit that they are engaged in the business of operating, managing and maintaining power plants and



Wind Turbine Generators (WEGs) in various parts of India. The 1st defendant is a general Insurance Company. The 2nd defendant is a consultancy company registered under the Companies Act. The 3rd and 4th defendants are carrying on business as insurers, surveyors and loss assessors.

3. The plaintiff had entered into Comprehensive Operations and Maintenance Agreement (herein after called the O & M agreement) with M/s.Clarion Wind Farm Private Limited. Under the agreement 14 WEGs were covered and this includes 3 WEGs which are the subject matter of the present suit. The 3 WEGs which are the subject matter of the above suit is described herein below.

(i)WEG bearing the code “CWFNEG13” hereinafter referred as WEG 1.

(ii)WEG bearing the code “CWFNEG14” hereinafter referred as WEG 2.



(iii)WEG bearing the code “CWFNEG03” hereinafter referred as WEG 3.

4. As per clause 5.3 of the O & M agreement the plaintiff was required to insure the WEGs covering major break downs and their O & M personnel. Further, in terms of Entry 4 to annexure I of O & M agreement, the plaintiff was liable to all costs incurred on account of unscheduled maintenance for the WEGs. Therefore, the plaintiff had through the 2nd defendant purchased the following industrial all risk policy from the 1st defendant for the 3 WEGs. The three policies are as follows:

(i)The policy dated 06.02.2018 for the period from 21.01.2018 to 20.01.2019 covering WEG 1.

(ii)The policy dated 29.01.2018 for the period from 27.12.2017 to 26.12.2018 covering WEGs 2 and 3.



5. The plaintiff has made a claim in respect of these 3 WEGs and in the pleadings has set out each of these claims separately.

(i) Claim No.FT00000932 under Policy No.1:

a) It is the case of the plaintiff that on 05.02.2018 they had carried the regular maintenance of WEG 1 and in the course of the maintenance and checking gear box they found damage to the intermediate gear wheel. Therefore WEG was stopped and there was no operations from 05.02.2018 to 30.03.2018. On 07.02.2018, the plaintiff informed the 2nd defendant about the same and requested the 2nd defendant to arrange for surveyor to assess the damage. Accordingly, the 3rd defendant was deputed to assess the loss. On 12.02.2018, the 3rd defendant had visited the site and inspected the gear box of WEG 1. The plaintiff had provided the 3rd defendant with the history card book and log details of WEG 1.

b) Thereafter, on 16.02.2018, the plaintiff had sent the damaged



parts to M/s.Kay Arr Engineering Services (*herein after referred to as Kay Arr*) for repairs. The 3rd defendant had sent an e-mail dated 19.02.2018 asking the plaintiff to inform them about the date of dismantling and the date when the damaged parts would reach the repairer. Apart from that, the 3rd defendant had requested for certain details and documents.

c) The plaintiff had received a quotation dated 21.02.2018 and inspection report dated 20.02.2018 from Kay Arr. This report was forwarded by the plaintiff to the 3rd defendant on 23.02.2018. On 26.02.2018, the 3rd defendant visited Kay Arr Engineering Services and inspected the gear box spares.

d) Thereafter, by an e-mail dated 27.02.2018 the 3rd defendant informed the plaintiff about the inspection and directed them to proceed with the repairs on a "without prejudice" basis and with loss assessment subject to the terms and conditions of the policy. The 3rd defendant had called for further details and documents.



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e) As a sequel to the above e-mail the plaintiff proceeded with the repairs and a sum of Rs.36,05,986/- was incurred towards repairs and recommissioning of WEG 1. Kay Arr had also issued inspection report dated 27.03.2018 with the root cause analysis stating that the damage to WEG 1 was on account of the following, *“due to frequent braking at high torque might have been axially act on NJ2320 bearing and damaged it. Machine might have run some more times with bearing failure and misalignment, damaged the intermediate gear engaging side profile and other bearings too.”*

Through email dated 29.06.2018 and 18.07.2018 all the documents were provided to the 3rd defendant including the invoice for Rs.36,05,986/-. There was no response to the same and thereafter the plaintiff had sent follow up e-mails for early settlement of the claim on 31.07.2018, 09.08.2018 and 17.08.2018.



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f) By letter dated 24.12.2018, the 3rd defendant informed the plaintiff that the claim would not fall within the purview of Policy No.1. They would state that the WEG was stopped for regular maintenance and there was no breakdown or sudden stoppage of the WEG. That apart, the 3rd defendant had informed the plaintiff that the assessment had not been done by the Original Equipment Manufacturer (*herein after referred to as OEM*). The 3rd defendant would also submit that the WEG has been in operation for over 16 years from 29.03.2002 when it was commissioned. It is further stated that wind speed variation / turbulence is an “*inherent phenomenon associated with wind mill operation recurring on hourly basis*”. Therefore the damage was only on account of regular wear and tear of the equipment.

g) Once again by e-mail dated 02.01.2019 and 09.01.2019 the plaintiff had requested the 2nd defendant to take up the matter with the 1st defendant. Accordingly, the 2nd defendant had also forwarded the e-



mail dated 09.01.2019 received by them from the plaintiff to the 1st defendant. Ultimately, the 1st defendant had rejected the claim on the ground that the damage was a result of gradual deterioration and wear and tear. Therefore, the plaintiff approached Kay Arr for further clarification on 10.04.2019. Kay Arr submitted a report where they opined that the damage could be due to external non uniform load on the high speed bearings (generator side) and not due to wear and tear.

h) The plaintiff therefore sent a letter dated 18.09.2019 contesting the 1st defendant's rejection of the claim and requesting the 1st defendant to re-consider their stand. By letter dated 18.11.2019, the 1st defendant refused to re-consider the claim and reiterated that the damage is on account of regular wear and tear.

ii) Claim No.FT00000934 under Policy No.2:

(a) In respect of this WEG also regular maintenance was carried on 16.02.2018 and when checking the gear box it was found that there



has been planetary gear bearing failure. This WEG was also stopped and could not be operated from 16.02.2018 to 22.03.2018. For the sake of brevity, even with reference to this WEG, the very same procedure had been followed by the plaintiff in submitting the claim and the defendants have followed the procedure of inspecting the WEGs, contacting the repair etc.

(b) As in the case of WEG 1, the 3rd defendant was deputed to survey the damage. The WEG was thereafter given to Kay Arr for repairs and repairs were carried to the tune of Rs.30,83,250/-. On 28.03.2018 Kay Arr had given their inspection report and once again their claim was rejected by the first defendant's letter stating that the damage was on account of wear and tear. The request for re-consideration was also turned down.

iii) Claim No.FT0000988 under Policy No.3:

a) On 01.05.2018 in the course of the regular operation WEG 3



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had suffered breakdown on account of “24 V missing fault”, as a result the main bearing had suffered damage and the slip ring cable had melted. Therefore WEG 3 could not be operated from 02.05.2018 to 15.05.2018 and it was ultimately re-commissioned on 16.05.2018. Once again the WEG was sent for repairs to Kay Arr. The 2nd defendant had deputed the 4th defendant to carry out survey in respect of WEG. Ultimately, the WEG was repaired at a cost of Rs.20,21,552/-. The plaintiff had made the claim through the 4th defendant to the 1st defendant.

b) However, on 24.12.2018 the 4th defendant had sent an e-mail stating that the claim was inadmissible in terms of policy no.3 as it was only the result of wear and tear. Thereafter, on 10.04.2019 the 1st defendant had rejected the claim stating that the report of the 4th defendant would clearly show that the damage was on account of wear and tear occurring on account of continued operation of WEG with fluctuation in load. The 1st defendant had also rejected the request of



the plaintiff to re-consider the rejection of the claims. Therefore, left with no other alternative the plaintiff has approached this Court.

6. The 1st defendant had filed a written statement inter alia contending that the plaintiff was entrusted with the task of maintenance and servicing of WEGs and the 1st defendant's obligation under the policy was only to indemnify the plaintiff for accidental physical damage, loss or destruction. The policy did not cover expenses for maintenance and servicing of the WEGs for keeping them operational. It is also the contention of the 1st defendant that the maintenance and servicing of the WEGs including the spares, consumables, labour etc., are the responsibility of the plaintiff under the O & M agreement.

7. The 1st defendant would submit that the policy covers the following “property insured be accidentally physically lost destroyed or damaged other than by an excluded cause of the policy during the



subsistence of the insurance cover. "Clause 1 (a) sets out the exclusion clause which reads as follows:

1) This policy does not cover damage to the property insured caused by:

a)(i) faulty or defective design materials or workmanship, inherent vice, latent defect, gradual deterioration, deformation or distortion or wear and tear...".

8. It is the further case of the 1st defendant that the plaintiff had reported claims in respect of the 3 WEGs at Location Nos. 03, 13 and 14 as follows:

a. On 07.02.2018 it was intimated that Plaintiff carried out schedule maintenance activity at Location 13 (referred to in Plaint as WEG No.1) during which Gear Box was checked as per maintenance checklist and that gear wheel edges were damaged. It was further reported that for safety purpose the WEG was not started again. The Plaintiff claimed a sum of Rs.36,05,986/- for



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damages to Gear Box viz., Gear Wheel Tooth and Bearings.

b.On 21.02.2018 it was intimated that Plaintiff while carrying Schedule maintenance activity on WEG at Location 14 (referred to in Plaint at WEG No.2), gear box was checked as per maintenance checklist when planetary gear bearing failure was noticed and for safety purpose the WEG was stopped. The Plaintiff claimed a sum of Rs.29,01,727/- for damages to various Gears and Bearings.

c.On 07.05.2018 it was intimated that during inspection of WEG at Location 03 (referred to in Plaint as WEG No.3) a week before, Main bearing was found damaged. It appears that during maintenance inspection the Plaintiff had discovered damage to shaft and bearing of Gearbox.

9. The 1st defendant had engaged the independent surveyors namely the 3rd and 4th defendants. The 3rd defendant had surveyed



WEG 1 and 2 and the 4th defendant, WEG 3. The surveyors had conducted a thorough survey at the location of the repairer, obtained necessary documents and information and submitted a detailed report.

10. It is also the contention of the 1st defendant that the WEGs had been commissioned in the year 2002 and have been operating for more than 16 years. During this period the WEGs and its components were being exposed to constant fluctuating load of wind forces. This would necessarily cause wear and tear / gradual deterioration of the mechanical components of the WEGs like gear box, gears, shaft, bearings etc., It is the duty of the plaintiff to replace such of these components which have suffered wear and tear. The plaintiff is also under an obligation to regularly service the WEGs and incur expenses for the maintenance and servicing of the parts.

11. The 1st defendant would further point out that till the WEGs were stopped for maintenance there has no report of a breakdown or damage to the 3 WEGs. During the regular maintenance this wear and



tear of the parts had been discovered. In their inspection report Kay Arr has described the damage as “wear” besides pitting, scratches, pitting scoring, shearing. These damages are clearly on account of wear and tear and they are excluded by the policy. The repairs which has occurred during a regular maintenance cannot be mulcted on the 1st defendant.

12. The 1st defendant would submit that the plaintiff was attempting to pursue the claim on the basis of the self serving report from the repairer Kay Arr, whose report is factually incorrect, baseless and would not establish an accidental damage. The 1st defendant has thereafter countered each and every allegation contained in the plaint and would ultimately seek for dismissal of the suit.

13. The 2nd defendant has filed a written statement inter alia contending that they are neither a proper nor necessary party since no claim has been made against them. That apart, the 2nd defendant duty



was restricted only to liasoning between the 1st, 3rd and the 4th defendants. The claim has only been made against the 1st defendant.

Therefore, they would seek to have the suit dismissed against them.

14. Similarly the 3rd defendant has filed a written statement inter alia contending that they too are neither a necessary nor proper party to the proceedings and no relief has been claimed against them. The 3rd defendant's role is restricted to survey the loss and submit a report. Further, on inspecting the WEGs the 3rd defendant would submit that the repairs are not in respect of any accidental or physical loss to the damaged parts. The damage itself has been noticed only when the WEGs were stopped for their regular maintenance. The fact that the WEGs have been functional for over 16 years clearly indicates that the components had suffered wear and tear as components were exposed to constant fluctuation due to load of wind forces. They would further submit that the repairs to the WEGs was not the result of any



accidental physical loss or damage or destruction. Therefore, they sought to have the suit dismissed.

15. The 4th defendant had filed a written statement contending that he was an independent surveyor and was neither a proper nor necessary party to the proceedings. That apart, no claim has been made against him. He would also reiterate the contention of the 3rd defendant that the repairs was not on account of any accidental physical loss or damage to the parts of WEGs but was only due to regular wear and tear of the WEGs for ever so many years. The 4th defendant would also plead non joinder of necessary parties as he would submit that M/s. Clarion Wind Farm Pvt., Ltd., who is the owner of WEGs and for whom the O & M agreement had been entered into should also be made a party to the proceedings. Therefore, the 4th defendant would seek to have the suit dismissed.

ISSUES:-

16 . The following issues were framed:



“(i) Whether the first defendant was right in rejecting the three claims made by the plaintiff on the basis of “wear and tear” exclusion under the relevant policies?

(ii) Whether the first defendant is liable under the Industrial All Risks Policies for damage to the three Wind Electricity Generators WEG Nos.1, 2 and 3 as claimed by the plaintiff?

(iii) Whether the first defendant is liable to pay the plaintiff an amount of Rs.44,56,011/- towards Claim No.FT00000932 under Policy No.FT00000766000101, together with interest at 18 % p.a. on Rs.36,05,986.40 from 10.04.2019 till 31.07.2020, and further interest till realization?

(iv) Whether the first defendant is liable to pay the plaintiff an amount of Rs.38,10,052.50/- towards Claim No.FT00000934 under Policy No.FT000007769000101,



together with interest at 18 % p.a. on Rs.30,83,250/- from 10.04.2019 till 31.07.2020, and further interest till realization?

(v) Whether the first defendant is liable to pay the plaintiff an amount of Rs.24,98,084/- towards Claim No.FT00000988 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs.20,21,552/- from 10.04.2019 till 31.07.2020, and further interest till realization?

(vi) To what other reliefs, the parties are entitled to?

17. Elaborate oral arguments were adduced on the either side and these oral arguments have been elaborately set out in the written submissions. Therefore, I propose to rely on the written submissions.

The suit relates to three claims which are detailed herein below:

“(a) Directing the 1st Defendant to pay the Plaintiff an amount of Rs.44,56,011/- towards Claim No. FT00000932 under Policy No.FT00000766000101,



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together with interest at 18% p.a. on Rs. 36,05,986.40 from 10.04.2019 till 31.07.2020, and further interest till realization;

(b)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.38,10,052.50/- towards Claim No. FT00000934 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs. 30,83,250/- from 10.04.2019 till 31.07..2020, and further interest till realization;

(c)Directing the 1st Defendant to pay the Plaintiff an amount of Rs.24,98,084/- towards Claim No. FT00000988 under Policy No.FT000007769000101, together with interest at 18% p.a. on Rs.20,21,552/- from 10.04.2019 till 31.05.2020, and further interest till realization;

SUBMISSIONS:

I. PLAINTIFF'S SUBMISSIONS:



18. The written submissions sets out each of these claims, the date when the WEGs had been stopped for schedule maintenance, the damage discovered, the inspection done by the surveyor, the report of the surveyors and the repairer M/s.Kay Arr, the claim made by the plaintiff and the refusal by the defendants.

(i) WITH REFERENCE TO CLAIMS 1 AND 2:

19. The learned counsel for the plaintiff has addressed the arguments with reference to the various grounds on which the defendant had negated their claim and their response to that. Claim 1 and 2 has been surveyed / inspected by the 3rd defendant, the surveyor appointed in respect of both these claims. The 3rd defendant had recommended that the 1st defendant was not bound to indemnify the plaintiff since they did not come within the purview of policy No.1 and 2 respectively, inasmuch as they fell within the exclusion clause of "wear and tear".



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20. The learned counsel in his written submissions would submit that the 1st defendant has blindly accepted the recommendation made by the 3rd defendant, who according to the plaintiff is not a party to the policies 1 and 2. Further, the person who has signed and verified the written statement and deposed before the Court were also not signatories to these policies and neither way they are involved in the drafting or negotiation of the policy. Therefore, it is the argument of the learned counsel that their statement / deposition cannot be relied upon.

21. The reasons for rejecting the request of the plaintiff has been addressed under the following heads:

A. Failure to establish applicability of the "wear and tear" exclusion.

Relying upon the Judgement of the Hon'ble Supreme Court reported in *2023 SCC Online SC 648 – National Insurance Co. Ltd.,*



Vs. Vedic Resorts and Hotels Pvt, Ltd., the plaintiff would contend that the burden of proof and establishing that a claim falls within the exclusion clause in the Insurance Policy lies exclusively upon the insurer and not upon the insured.

22. The plaintiff would also place reliance upon the following Judgements of the Hon'ble Supreme Court in support of the above submission:-

(i) National Insurance Company Limited vs. Ishar Das Madan Lal, (2007) 4 SCC 105

(ii) General Assurance Society Ltd. Vs. Chandumull Jain and Another - AIR 1966 SC 1644

(iii) United India Insurance Co. Ltd. v. Pushpalaya Printers - (2004) 3 SCC 694,

(iv) M/s Peacock Plywood Pvt. Ltd. v. The Oriental Insurance Co. Ltd. - 2006 (14) SCALE 300 and

(v) United India Insurance Co. Ltd. v. Kiran



Combers & Spinners - (2007) 1 SCC 36.

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Therefore, the contention of the plaintiff is that the burden of proof to establish "wear and tear" in terms of the exclusion clause lies upon 1st defendant.

23. The plaintiff would submit that the 1st defendant has chosen to simply adopt the conclusion of the 3rd and 4th defendants and their report and has not independently considered the report. Therefore, it is the contention of the plaintiff that the 1st defendant has failed to prove the exclusion clause, namely, "wear and tear".

24. The learned counsel would submit that the 3rd defendant has predicated their premise that the damage was only on account of "wear and tear" under the following heads:

(i) WEGs have been commissioned in the year 2002 and



therefore by reason of efflux of time "wear and tear" is bound to happen.

24.1. It is the contention of the plaintiff that before arriving at this conclusion the 3rd defendant and the 1st defendant had failed to consider the technical and operational parameters of the subject WEGs in order to ascertain as to whether long usage has resulted in the damage and having failed to do so their analysis and final report stand vitiated.

25. The plaintiff would submit that the 3rd defendant's survey report is primarily based on presumptions without specific analysis of the damage in question. In fact, under the terms of the policy, power is granted upon the 1st defendant or their surveyor to enter and take possession of the site / damaged items.

26. The plaintiff would submit that the WEGs do not operate



365 days a year or at 100% of their rated capacity. Since wind generation is seasonal and is a varying phenomenon, the extent / actual period of operation of WEGs are related to the period of the year which is conducive for wind generation. The plaintiff would draw attention of the Court to the deposition of D.W.1 and D.W.2, who have stated that the conducive season is for a period of 5 months and this would only go to show that the WEGs are functioning only to 50% of their capacity every year and therefore, it is their contention that it has not functioned for the entire period of 16 years.

27. The learned counsel has also relied upon the fact that the surveyor has not placed reliance upon the Plant Load Factor (PLF) on the wind mills. It is these factors that are relevant for evaluating as to whether the damage is due to "wear and tear" and not only on account of the age of the WEGs. The 3rd and the 1st defendant having failed to consider these issues the analysis arrived at is therefore flawed. He would rely upon the admission of D.W.1 in her cross examination to



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question No.80, which is extracted herein below:

“Q80: Has the actual usage of the subject WEGs in terms of number of hours of usage been considered in the claim rejection (Ex. P36, Ex. P80 and Ex. P100) or the survey reports (Ex. D2 to Ex. D4) filed in the present proceedings?”

A: No. It is only mentioned in terms of number of years since commissioning.”

28. He would also rely upon the evidence of D.W.2 with reference to PLF. D.W.2 has deposed that the PLF during peak season would be higher than the PLF during the lean season and has also admitted that PLF has not been taken into consideration in the survey report.

29. The learned counsel would further submit that in the survey report of the 3rd defendant (Ex.P.43) reliance is placed upon the age of



the WEGs. However, the actual period of operation vis-a-vis the over all life span of the WEG has not been taken into consideration. D.W.1 in the cross examination would submit that lifespan of WEG would be around 15 years, totally overlooking the fact that the subject WEGs were 15 years old on the date it was insured by the 1st defendant. D.W.2 would admit that lifespan of wind mill would vary from OEM to OEM. The defendant has however concluded that the damage was on account of “wear and tear” without even considering actual usage or the make / type of the WEG.

(ii) That wind speed variation and turbulence is an inherent phenomenon associated with wind mill operations which wears out internal components, the learned counsel would submit that such conclusion has been arrived at by the 3rd defendant surveyor without even considering the technical specification / designs of the subject WEGs or the wind speed conditions to which it is subjected to. Therefore, in the light of the above, the conclusion that the damage



was on account of "wear and tear" is once again totally erroneous.

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30. He would also rely upon the admission of D.W.2 in this regard. He would draw the attention of the Court to the following answers of D.W.2:

Q. No. 14: Would there be a difference in design and specification between turbines manufactured by different OEMs?

Ans. Yes.

Q. No. 15: Would you be able to elaborate as to the parameters on which the similarly rated Wind Turbine of one OEM manufacturer would differ from another?

A. Some times the tower itself may vary. i.e. Between Tubular and Lattice Structure. The blades dimension. Height of the tower. Internal Control Systems may also differ.



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Q. No. 19: Did you go through the design

documentation of the two subject Wind Turbines surveyed

by 3rd defendant as part of survey?

A: No. It will not be shared with the surveyor.

31. He would also draw the attention of the Court to the answer to the question as to Whether she was aware that WTG has a tolerance range for wear and tear?, the witness has replied that she was aware and had added that she would not be aware of the exact tolerance limit since the same will vary based on the recommendation of the OEM from Wind Turbine to Wind Turbine.

32. The witness has further stated that she is not aware of the tolerance range for the WEGs which are subject matter of the suit that had been surveyed. Witness has also admitted that they have not collected the wind speed data which is clear from the answer to question No.107. Therefore, the counsel would submit that the



reasoning given by the 3rd defendant which has been adopted by the 1st defendant has not been proved by them.

(iii) The rejection was also on the ground that Kay Arr had submitted a report that damages were due to "wear and tear" and this contention is responded to by the plaintiff's counsel as follows:

33. The statement with reference to "wear and tear" relates only to certain components, comprising only 3 to 4 out of approximately 25 components in the inspection report in these two WEGs. These components have been repaired and re-used and not charged which is evident from Ex.P.39 and Ex.P.82. Therefore, the damage to the remaining components does not constitute "wear and tear".

34. That apart, in the root cause analysis provided by Kay Arr, it is stated as follows:

“frequent braking at high torque which might have



axially acted on NJ320 bearing and damaged it, and that as the machine may have run some more times with bearing failure and misalignment, it might have damaged the intermediate gear engaging side profile and other bearings too”.

The same is evident from a perusal of Ex.P.16, with reference to Claim No.1.

35. With reference to Claim No.2, Ex.P.56 root cause analysis would read as follows:

“breakage at high torque (heavy axial load) planet gear bearing SL 18 5032 failure caused on the planet pin shaft bearing seating area depreciation (undersized) and also reason for other bearings failure. Where ever running for some more time with misalignment due to bearing failure caused to excess load (beyond its design



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limit) on other bearings which damaged itself and damaged the its seating bores on casing”

36. Therefore, a mere perusal of a reading of the above would indicate that the existence of sudden variations in wind force is the cause for the damage and not a gradual deterioration through "wear and tear". This root cause analysis of Kay Arr has not been addressed by the 3rd and 1st defendants. The report has been rejected by the 3rd defendant only on the ground that it has not been provided by OEM. It is the further contention of the plaintiff that neither the 1st defendant nor the 3rd defendant has sought for separate analysis report, which is admitted by D.W.1 in Question No.40. D.W.2 in answer to Question Nos.73 and 74 has also admitted the same.

37. The learned counsel would submit that though the root cause analysis had been rejected on the ground that it has not been provided by OEM, no steps whatsoever has been taken by the 3rd defendant to



send the same for the inspection by the OEM. That such an inspection was not made is evident from the answers given by D.W.2 to Question Nos.83 and 84.

38. The fact that they had not sought for independent Inspection Report only goes to show that the 1st and 3rd defendants had accepted the report of Kay Arr and therefore the conclusion that the damage was on account of "wear and tear" is absolutely without any basis.

39. The next ground on which the 3rd defendant has rejected the claim is that there was no evidence of sudden external force / physical damage as damages were observed only at the time of inspection during maintenance. It is the response of the plaintiff that this is on account of erroneous construction of the Insurance Policy to the effect that only accidental damages are covered by the policy. D.W.1 answers to question Nos.41, 42 and 43 would bear ample testimony to the same.



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40. The learned counsel seeks to interpret Section 1 of the Policy by stating that the terms “physically lost, destroyed, damage other than by an excluded clause” only goes to show that physical damage to the property is covered by the policy and it is not necessary that such loss, destruction or damage is the one that causes stoppage of machine. Therefore, the damage noticed at the time of stoppage for maintenance is also covered by the policy and would not be covered by the exclusion clause. The question that requires an answer is *whether the damage was gradual or otherwise accidental?*

41. The learned counsel would further contend that if the damage was on account of gradual process of deterioration / "wear and tear" by reason of the usage of WEGs over 16 years, it would definitely have manifested itself during the earlier maintenance and would have been recorded in the maintenance record / log books. However, such a noting has not been made in the log book and the



same is admitted by D.W.2.

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42. In answer to a Question *Did you find any observation as to damage in respect of the gear box of the subject wind turbines n the maintenance record reviewed?* D.W.2 would depose that prior to the incident date there was no remark of any damage to gear box recorded in the maintenance record.

43. It is also the contention of the plaintiff's counsel that in order to prove the case of "wear and tear", the report regarding the testing of oil and lubrication of gear box would play a significant role and these reports have not been called for by the 1st defendant, which is admitted by D.W.2. D.W.2 was asked the following question:

“Q. 91: Please refer to Q. No. 31 where in you have stated that (a) testing of oil/lubrication, (b) oil replacement, (c) replacement of oil filter, (d) visual inspection of gear box etc. would be covered within the



purview of schedule/preventive maintenance but that the duration and type of inspection or testing would be determine by OEM recommendation as per your experience what is the significance/purpose of such inspection or testing?

A: If it is oil or lubrications there will be standard specification of its condition. The test is done to see whether it is within the specific limit. In case of any leakage it will be revealed by visual inspection.

44. Therefore, once again the learned counsel would submit that failure to seek this report would also vitiate the findings of the 3rd defendant and consequent rejection of the claim by the 1st defendant. The learned counsel would further submit that the report is vitiated by contradictions and non-application of mind and failure to consider data / rely upon the data furnished by the plaintiff. P.W.2 in his proof affidavit had clearly stated that where significant components undergo "wear and tear" the WEGs would rapidly have to be stopped due to



breakdown and this will impact the electricity generation.

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45. He would submit that a perusal of Ex.P.33, Ex.P.40 and Ex.P.83 would demonstrate, between July 2015 and June 2018 there has been machine availability of more than 95%, with reference to WEG 1 and 2 which would clearly prove that the WEGs were in a good working condition up to the scheduled maintenance which has been genesis for the claim.

46. As regards WEGs 1 to 3 from the period 2016 to 2018, they have been performing extremely well till the time of the reported damage. In the year 2017 the quantum of generation was higher than that of the year 2016 and these facts would indicate that there was no "wear and tear" issue. The learned counsel would submit that none of the data have been referred to in the survey reports, which is evident from the report submitted by the 3rd defendant. Therefore, there is a complete non application of mind on the part of the 3rd defendant and



the 1st defendant. There is no independent application of mind on the part of the 1st defendant.

47. That the 1st defendant has not independently analysed the report is evident from the admission of D.W.1 in her deposition, which are as follows:

“Q. No. 23: Was the 1st defendant's rejection of the suit claims based on the Surveyors Report or on other factors?”

A: It was based on the Surveyor's Report and as well as other documents submitted by the plaintiff.

Q. No. 24: Is it your case that there were materials other than those considered by the Surveyor in their reports that formed the basis for the 1st defendant rejection of claim?”

A: No.

Q. No. 27: In rejecting the claims of the Plaintiff



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did the defendant No. 1 rely on any factors other than those recorded by the surveyors in their respective reports dated 11.03.0219 and 26.03.2019?

A: No

48. In this regard, he would rely upon the Judgement of the Hon'ble Supreme Court reported in **2009 (7) SCC 787 – New India Assurance Co. Vs. Pradeep Kumar**, to support his contention that the survey report is not the last and final word and that the same is not binding upon the insurer or the insured. In the light of the above, the repudiation of the claim solely based upon the report of the 3rd defendant is totally erroneous and the conclusion therefore that the damages is on account of "wear and tear" has not been proved by the 1st defendant.

(ii). WITH REFERENCE TO CLAIM NO.3:

49. In respect of WEG 3, the breakdown was on account of 24 V



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missing fault when the machine was stopped for scheduled maintenance the main bearing grease was seen coming out at high temperature. Therefore, the machine was not restarted by the plaintiff. On the following morning, when the WEG was checked it was seen that main bearing was in a failed condition and therefore WEG 3 could not be operated from 02.05.2018 to 15.05.2018 and was re-commissioned only on 16.05.2018.

50. The plaintiff had informed the 2nd defendant about the damage on 07.05.2018 as evidenced by Ex.P7 and requested them to depute surveyor to the site. They had also informed the 2nd defendant that they intended to carry out de-erection activity in WEG 3 on 08.05.2018. On 08.05.2018, while de-erection activities were being carried out, the 4th defendant was also present and he had conducted the survey on site and recorded it. Ex.P.91 would substantiate the same.



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51. The gear box along with the main shaft and pedestal was sent to repair to Kay Arr. Kay Arr had disassembled the gear box along with the main shaft in the presence of the 4th defendant. In their inspection report dated 10.05.2018 (Ex.P.89) Kay Arr noted that the main bearing was broken. The plaintiff had got the gear box and re-commissioned the WEG on 16.05.2018. The plaintiff would further submit that all the records sought for by the 4th defendant was provided to him. The 4th defendant had issued an e-mail to the 1st plaintiff as well as the 1st defendant stating that Claim No.3 was not admissible under Policy No.2. This was followed by Ex.P.100, letter dated 10.04.2019 from the 1st defendant addressed to the plaintiff that the 4th defendant.

52. The 4th defendant had concluded that the damages was on account of "wear and tear". Pursuant to the rejection the plaintiff sought for clarification from Kay Arr under Ex.P.102 dated 14.09.2019. Kay Arr had stated as follows:



“replace main bearings, V-ring, felt seal, bolt... etc. as these parts were broken/damaged. In our technical opinion, this could be due, to sudden load on planetary (Input Stage).”

They had ultimately stated that the damage was not on account of deterioration, deformation, distortion or wear and tear.

53. It is the contention of the plaintiff that the 4th defendant whose survey report, Ex.D.4 basis the following as the reason for the damage:

“Above Wind Mill had been commissioned on 29-02-2002 and damage to the above wind Mill had occurred at 21:10 Hrs on 01.05.2018 after normal working of about sixteen years. Since the main shaft and main bearing will work normally for ten to twelve years,



it is clear that main shaft and main bearing had served more than the normal working period. Since normal working had already exhausted there could have been lot of possibilities for occurrence of damage to the main shaft and main bearing at any time. Since normal working hours had already exhausted, damage to the above main shaft and main bearing cannot be considered under the purview of the concerned insurance policy.”

He had rejected the claim on the basis of "wear and tear" exclusion and had also stated that normal working hours of main shaft and main bearing has already been exhausted.

54. The learned counsel for the plaintiff would submit that such an analysis is totally contrary to the true facts. He would submit that the policy does not contain any clause which excludes the risk



coverage on account of the age of the WEG and the same has been accepted by D.W.3, the surveyor.

55. The plaintiff would submit that no evidence has been let in to prove the above statement that the damage is on account of "wear and tear" and long usage. Even in the case of their claim the petitioner would submit that the 1st defendant has rejected the claim only on the basis of Ex.D.4, survey report and has not independently examined the damage by engaging another inspection.

56. The witness who has been examined as D.W.3 had admitted that he was not aware about the type of control panel installed in WEG 3. He has infact not sought for the manual. His admissions in this regard is in response to question Nos.98, 99 and 100. The witness has admitted that he has not checked 24 V electric signal.

57. The 4th defendant totally overlooked the fact that after the



stoppage due to 24 V missing fault when the main bearing, pedestal bearing and gear box were disassembled they found parts of the main shaft and the entire main bearing had been broken and had to be replaced. All of this would go to show that the 4th defendant has not applied his mind and surveyed the damage properly.

58. In fact, the 4th defendant as D.W.3 would admit that he has not observed the details of the main bearing and noticed the fact that main bearing had shattered. Therefore, the rejection of the claim by the 1st defendant is without any basis.

59. Another allegation made by the plaintiff was that the 1st defendant has not considered the data furnished by the plaintiff. This is evident from the admission of D.W.3 during his cross examination. D.W.3 does not allude to the root cause analysis of the damage to the WEG. Therefore, the rejection of the 3rd claim is also per se



erroneous. Therefore, the suit ought to be decreed and the plaintiff be indemnified.

(ii) DEFENDANTS SUBMISSIONS:-

60. In the written submissions of the 1st defendant, the learned counsel would submit that as per the terms of the Industrial All Risk Policy, the plaintiff was to be indemnified to the value of the property on the happening of its accidental, physical loss or damage. The coverage for accidental physical loss would be subject to the following exclusion:

“faulty or defective design materials or workmanship, inherent vice, latent defect, gradual deterioration, deformation or distortion or wear and tear”.

61. IER policy covers accidental physical loss or destruction or damage and not gradual deterioration, deformation, distortion or "wear



and tear". It is the contention of the learned counsel for the 1st defendant that the coverage cannot be widened beyond the scope of the risk undertaken. In support of this arguments, the learned counsel would rely upon the following Judgements of the Hon'ble Supreme Court:

(i)Oriental Insurance vs Sony Cheriyan - 1999 6 SCC 451;

(ii)Polymat vs National - 2005 9 SCC 174;

(iii)Deokar Exports vs New India - 2008 14 SCC 598;

(iv)Vikram Greentech vs New India - 2009 5 SCC 599;

(v)Export Credit Guarantee Corpn. vs Garg Sons - 2014 1 SCC 686;

(vi)United India vs Orient Treasures - 2016 3 SCC 49;

(vii)National Insurance vs Chief Electoral Officer -



2023 6 SCC 44.

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62. The policy which has been taken by the plaintiff specifically covers only accidental, physical loss or damage and the burden of proving that the loss has been occasioned by reason of an accidental damages to the equipment insured is on the plaintiff as set out by the Hon'ble Supreme Court in the Judgement of *Bajal Vs. State of Madhya Pradesh – 2020 SCC Online SC 401*.

63. It is the contention of the 1st defendant that the evidence does not show any accidental damage but only gradual deterioration. The machine was not stopped on account of damage but it had been stopped for the scheduled maintenance; in other words, the WEGs had not come to a sudden halt on account of any damage. The plaintiff had forwarded Ex.P.7, Ex.P.8, Ex.P.47, Ex.P.48, Ex.P.86 to Ex.P.88 which



are e-mails regarding the report of the damage from the site. Ex.P.9 and Ex.P.49 are the failure reports prepared by the plaintiff. Ex.P.11, Ex.P.53 and Ex.P.89 are inspection report of the repairer, Kay Arr. Ex.P.16 and Ex.P.54 are their root cause analysis.

64. The learned counsel for the 1st defendant would submit that from the records it is clear that WEGs 1 to 3 were operating normally and there was no incident of accident or breakdown. They were stopped for scheduled maintenance at which point in time the gearbox was checked and repairs carried out for damages noticed. WEG 3 was stopped for 24 Volt fault and there was no breakdown of the gear box and it is only while attending the fault, the gearbox was checked and decided that it had to be repaired.

65. The electricity generation of each of the wind mills would reveal that till they are manually stopped for scheduled maintenance by the plaintiff they have been operating efficiently. According to the



1st defendant, the repairs had been done as a preventive maintenance.

A reading of the inspection report Ex.P.11, Ex.P.53, Ex.P.89 of Kay Arr supported by photographs and description would clearly show that the damages have been described as micro pitting, moderate wear, bore oversize, crack in brake disc pad, teeth severe polishing, scoring, adhesive wear, denting and punching in roller bearings. All of these would only indicate "wear and tear". These damages cannot be held to be accidental damage.

66. The root cause analysis submitted by Kay Arr for WEGs 1 and 2, Ex.P.16 and Ex.P.54 attributed damage primarily due to frequent braking at high torque which is normally the operating condition of the wind mills which rotates due to force of the wind and brakes are frequently applied to control the speed of rotation. All of these would indicate that the damage had developed over a period of time and was not a sudden occurrence.



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67. The 1st defendant would submit that the plaintiff has not produced any evidence to establish that there has been accidental damage or evidence to rebut the surveyor's report. In fact the opinion from Kay Arr had been examined.

68. The plaintiff has merely relied upon the evidence of the Director and a Chartered Accountant and no competent witness, who has a technical knowledge, has been examined. P.W.2, who has been examined on the side of the plaintiff and who claims to be an expert on wind mills has not given any reason for the damage but has simply stated that damage is not due to "wear and tear". This evidence appears to have been made only to overcome the 1st defendant's contention that the damage was on account of "wear and tear". Though the evidence seeks to contest the conclusion of the surveyor of the 1st defendant, however it does not establish the fact that the damage was accidental. P.W.2 evidence, according to the 1st defendant cannot be relied upon as he is not an expert and has not provided any



details about his professional expertise or experience.

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69. Further, P.W.2 evidence is not based on a first hand understanding of the case on hand. On the contrary, it is the contention of the plaintiff that defendants have let in evidence through D.W.1 to D.W.3 to prove their case that the damage was purely on account of "wear and tear". The defendant would submit that the arguments of the counsel for the plaintiff that test had not been conducted by the 1st defendant or the surveyor has no effect since no such test was necessary as there was no accidental or fortuitous, to which the damage can be attributed and it was the damage discovered during the scheduled maintenance with reference to WEG 1 and 2 and stoppage for cable with reference to WEG 3.

70. The plaintiff is attempting to create doubt over the surveyor's report on the ground that certain test had not been conducted. He would submit that Hon'ble Supreme Court has held that surveyor's



report has to be given due importance and no sufficient grounds have been made out to disagree with the surveyor's report. The learned counsel would rely upon the following Judgements:

- (i) Sri venkateswawra Syndicate Vs. Oriental – 2009*
(8) SCC 507. (ii) Sikka Papers Ltd., Vs. National
Insurance Co.Ltd – 2009 (7) SCC 777.
- (iii) New India Vs. Luxra Enterprises – 2019 (6)*
SCC 36.

71. The learned counsel would would rely upon the following circumstances:

- “(i) The age of the Windmills and the long duration*
of operations already undergone,
- (ii) the repairs being done during Scheduled*
Maintenance in respect of WEG Nos.1 & 2 or during
stoppage for an unrelated electrical line fault in respect
of WEG No.3,



(iii)the performance of the WEGs prior to the repairs,

(iv)the cause of damage attributed to “frequent braking” by the repairer,

(v)the nature of damage such as pitting, scoring, moderate wear, adhesive wear etc. and

(vi)the absence of any specific incident such as breakdown of the Gearbox have led the 3rd Defendant Surveyors to reasonably conclude that the parts of the Gearbox did not suffer “accidental physical damage” but due to “gradual deterioration, wear and tear”, while 4th Defendant had also concluded that the parts had exhausted their normal working hours.

72. The surveyor's conclusion are adequately supported by evidence and they have not found accidental damages but have on the contrary stated that the damage was on account of gradual



deterioration and that preventively the WEGs have been repaired to maintain the wind mills in running condition.

73. The learned counsel would submit that even assuming that the surveyor's report cannot be relied upon even then the plaintiff having failed to establish the fact that the damage was accidental and covered by the policy, the plaintiff is not entitled to the relief claimed by them and the suit deserves to be dismissed.

DISCUSSION:-

74. On a perusal of the above submissions, evidence both documentary as well as oral and the issues framed, it is clear that the dispute revolves around a narrow compass; an interpretation as to whether the damage discovered when the WEGs were stopped for their scheduled maintenance can be termed as accidental damage or a damage attributable to wear and tear by reason of the long usage of the WEGs?



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ISSUE NOS 1 AND 2:

75. On sifting through the pleadings and the evidence that has been let in by the plaintiff, it is clear that the plaintiff seeks to be indemnified for the loss suffered by them on account of the damage that has been caused to 3 WEGs on the ground that these damages were accidental damages.

76. On the contrary, the 1st defendant's case is that the damages were not accidental damages, but damages caused due to "wear and tear", which falls under the exclusion clause and therefore, the first defendant is not liable to indemnify the plaintiff.

77. In order to substantiate the fact that the damage was accidental, the plaintiff has proceeded to submit that the defense put forward by the defendant has not been proved by them and therefore, their contention that the damage is an accidental one stands proved.



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This is evident from the arguments that have been extracted by this Court in para Nos.21 to 58 of this judgment. The plaintiff has attempted to give reasons as to why the defense was wrong with reference to the issue of wear and tear, which is the ground on which the claim has been rejected.

78. The plaintiff at the outset would justify their argument of shifting the burden of proof upon the first defendant on the ground that *prima facie* the burden of proof for establishing that the claim falls within the exclusion clause rests heavily on the insurer and not upon the insured and that the 1st defendant/the insurer has failed to prove the same. The plaintiff would submit that the survey report, which forms the basis for the conclusion, has not taken into consideration several factors, like the plant load factor, lifespan of WEG, wind speed variation/turbulence, the design of the wind mill, the tolerance range of these wind mills, etc., and also the root cause analysis provided by Kay Arr, their repairer. They would submit that the root cause



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analysis, which has been marked as Exs.P16, P56 with reference to claims 1 and 2 would state that the damage had occurred on account of “frequent braking at high torque” and with reference to claim 3, it is stated that "this could be due to sudden load on planetary (Input Stage)" as set out in Ex.P102. The plaintiff would also take umbrage in the contention that despite rejecting the report of the Repairer that it was not received from the OEM, the insurer has not taken steps to examine the OEM. Therefore, from the arguments, it is clear that the plaintiff has come forward to submit that the 1st defendant, namely the insurer, has failed to prove their reasons for the rejection.

79. The judgment reported in **2023 SCC Online SC 648** (**National Insurance Company Ltd., Vs. Vedic Resorts and Hotels Private Ltd.,**) has been pressed into service in this regard. That was also a case, where the Insurance Company had rejected the claim on the ground that the risk was covered by the exclusion clause. The Hon'ble Supreme Court in para 14 of the said judgment has observed



as follows:

"14. It is trite to say that wherever such an exclusionary clause is contained in a policy, it would be for the insurer to show that the case falls within the purview of such clause. In case of ambiguity, the contract of insurance has to be construed in favour of the insured."

80. On the same lines, the plaintiff has sought to rely upon the judgments, which have been set out in para 22 of this judgment.

81. This Court has to therefore first consider, if the plaintiff, who has come to the Court, has established the fact that the damage, which was noticed when the WEGs were stopped physically for maintenance, was a sudden accidental damage. This has to be first *prima facie* established to shift the onus upon the first defendant to prove that the damages fall within the exclusion clause. This onus of proving that the damages were accidental damages would not have arisen in a case



where the WEGs had come to a stop on account of the damages.

Therefore, let us peruse the evidence that is let in by the plaintiff. The evidence that has been let in would indicate that when the 3 WEG's on various dates had been stopped for their scheduled maintenance, the damage to some of the parts had been taken note of and therefore, the WEGs were not restarted. In the *Vedic Resorts's case (referred supra)*, the insured had discharged its duty by proving that the damage had been caused by a frenzied mole and the insurer had sought to repudiate its claim on the ground that it was a malicious act. Therefore, since the insured had discharged their onus, the Hon'ble Supreme Court had observed that the insurer had to prove that the damage will fall within the exclusion clause. Further, the judgment of *Bajaj Allianz (stated supra)* had not been brought to the notice of the learned Judge.

82. The letters that have been addressed to the second defendant at the first instance, namely Ex.P7, would clearly show that the



damage had been noticed when the WEGs were stopped for the scheduled maintenance. The question therefore that requires to be considered and answered is whether it is an accidental damage. The plaintiff would rely upon the report submitted by their Repairer, Kay Arr, under Exs.P16, P56 and P102 to substantiate their contention that the damages are accidental damages, which has been caused by the reasons of braking at high torque in respect of claims 1 and 2 and in respect of claim No.3 on account of windmill bearing grease having broken and a sudden load on planetary (Input Stage). All of this, according to the plaintiff, would clearly show that the damage was accidental.

83. The plaintiff, who relies heavily upon these reports, have not chosen to examine any witness from Kay Arr to substantiate the root cause analysis report submitted by them and there is no explanation as to why they have not examined them. The plaintiff has in fact chosen not to examine even a technical expert. The reasons compelling the



Court to draw the adverse inference for this non-examination is herein below set out.

84. The plaintiff has not produced the service report dated 20.02.2018 given by Kay Arr, which is referred to in Ex.P39. That apart, Ex.P7, which is an E-mail sent by the plaintiff to the second defendant contains a trailing mail, which is an inter office mail wherein one Kumar M addresses Victor and K.Kumaresan stating as follows:

"Dear Sir,

This is to bring your kind notice that, we have carried scheduled maintenance activity on 05.02.2018 11.13 am., at Loc:13.

While doing the same, we have checked gear box also as per maintenance checklist and found intermediate gear wheel teeth edges damage. For safety purpose we did not restart the WTG again."



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85. This would clearly go to show that after the WEG was physically stopped for its scheduled maintenance and when the various parts were being checked as per the maintenance checklist the damage is WEG1, ie., the damage to the intermediate gearwheel teeth edges were noted.

86. Similarly, under Ex.P47, the petitioner has reported the damages to WEG 2. This mail has a trailing inter office mail which reads as follows:

"Dear Sir

This is to bring your kind notice that, we have carried scheduled maintenance activity on today (16.02.2018)

While doing the same, we have checked gear box also as per maintenance checklist and found planetary gear bearing failure. For safety purpose we are stopping the



WTG."

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87. A perusal of Ex.P55 gearbox Field Service Report indicates that WEG 2 which was stopped on 'Service Mode' has a gearbox planetary bearing failure condition. This report is unsigned.

88. Ex.P82 dated 14.09.2019 is a letter addressed by Kay Arr to the plaintiff. In the reference there is a mention of an Inspection Report dated 02.03.2018 which has not been produced for the scrutiny of this Court. Ex.P82 is issued after the 1st defendant had denied their liability on the ground that the damage would fall within the exclusion clause. This relates to WEG 2.

89. As regards WEG 3 under Ex.P86, the petitioner has intimated the damage in respect of WEG 3 to the second defendant as follows:

"Dear Sir

This is to bring your kind notice that, Location No.03



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HTSC.No.458 was stopped due to 24V missing fault at 21.10.

While checking the WTG we found Main Bearing Grease was came out with high temperature. For safety purpose we did not start the WTG again, morning we done the inspection again and found Bearing got failed condition."

90. The petitioner has marked Ex.P89, an Inspection Report alleged to have been issued on 10.05.2018 by Kay Arr. However, this report has not been signed by the Authorized Signatory.

91. Therefore, when the petitioner seeks to establish their case that the damages are accidental damages on the basis of the reports of Kay Arr, they have not taken any steps to examine the Officials of Kay Arr, who the plaintiff contend had undertaken the initial inspection, submitted the Inspection Report and the Root Analysis Report.



91.1. This Court has to therefore draw an adverse inference for the examination of the Officials of the Repairer, Kay Arr.

92. In the judgment reported in *(2020) 18 Supreme Court Cases 376 (Bajaj Allianz General Insurance Company Vs. State of Madhya Pradesh)*, the Hon'ble Supreme Court has extensively discussed how to prove a loss and upon whom the burden rests. That was the case, where a Helicopter in its knocked down state was being transported from Langley, Canada to Bhopal, India. The policy that had been taken by the insured was to cover the transportation of a Bell-430 Helicopter from Langley, Canada to Bhopal, India. The transit details from Langley, Canada to Pithampur, Bhopal, was by road/by air. The subject matter was insured from the time it leaves the warehouse, premises or place of storage, named in the policy for commencement of transit and continues during the ordinary course of transit and terminates at the place described under the clauses therein. The helicopter was being transported in a knocked down state. In that



case, the helicopter in its knocked down state was sought to be being assembled at the Hangar of Indamer Company Limited located at Delhi, so that the helicopter could fly from Delhi to Bhopal. The damage had been noticed when the helicopter had been stationed at the aforesaid place in Delhi. The Insurance Company refused to indemnify the insured/the State of Madhya Pradesh on the ground that the respondents had taken delivery prior to its arrival at its final destination, Bhopal and by storing in a Hangar at New Delhi. Therefore, it is their contention that when the helicopter moved into the Hangar at Delhi, the liability under the policy came to an end. The learned Judges while discussing the facts referred to MacGillivray on Insurance Law and proceeded to hold as follows:-

"16. The provisions of an insurance contract must be imparted a reasonable business like meaning bearing in mind the intention conveyed by the words used in the policy document. Insurance policies should be construed



according to the principles of construction generally applicable to commercial and consumer contracts. The court must interpret the words in which the contract is expressed by the parties and not embark upon making a new contract for the parties. A reasonable construction must therefore be given to each clause in order to give effect to the plain and obvious intention of the parties as ascertainable from the whole instrument. The liability of the insurer cannot extend to more than what is covered by the insurance policy. In order to determine whether the claim falls within the limits specified by the policy, it is necessary to define exactly what the policy covered and to identify the occurrence of a stated event or the accident prior to the expiry of the policy. Hence, while considering the rival submissions, it is necessary to preface our analysis with the provisions of the policy."

93. In para 30 of the said judgment, the damage was discussed



in relation to the policy and the learned Judges had discussed what was covered under the policy and what was not. The burden of proof was discussed in para No.42 as follows:-

"42. For the respondent to prove its case, a mere assertion that the loss incurred during the course of transit is not sufficient. The burden of proof lies on the respondent to show that the loss incurred was covered within the terms of the policy and that on a balance of probabilities there existed a proximate cause between the loss incurred and the helicopter being in transit. The respondent has adduced no evidence to supports its case."

94. Further, the Hon'ble Supreme Court in yet another judgment reported in **(2023) 6 Supreme Court Cases 441 (National Insurance Company Vs. Chief Electoral Officer)**, has also reiterated the fact that the terms of the insurance policy have to be strictly construed. In para 28, the learned Judges had observed as follows:-



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"28. The insurance contracts are in the nature of special class of contracts having distinctive features such as utmost good faith, insurable interest, indemnity subrogation, contribution and proximate cause which are common to all types of insurances. Each class of insurance also has individual features of its own. The law governing insurance contracts is thus to be studied in three parts, namely, (1) general characteristics of insurance contracts, as contracts; (2) special characteristics of insurance contracts, as contracts of insurance, and (3) individual characteristics of each class of insurance."

95. A perusal of Ex.P6, policy, which is replicated in other policies, would read as follows:-

"In consideration of the Insured paying to the Company, the premium shown in the Schedule, the Royal Sundaram General Insurance Co. Limited (formerly



known as Royal Sundaram Alliance Insurance Company Limited) (hereinafter called the Company) agrees (subject to the terms, conditions and exclusions contained herein or endorsed or otherwise expressed hereon which shall so far as the nature of them respectively will permit be deemed to be conditions precedent to the right of the Insured to recover hereunder) that if after payment of the premium any of the property insured be accidentally physically lost destroyed or damaged other than by an excluded cause during the period of Insurance or any subsequent period in respect of which the Insured shall have paid and the Company shall have accepted the premium required for the renewal of this policy, the Company will pay to the Insured the value of the property at the time of happening of its accidental physical loss or destruction or damage (being hereinafter termed Damage) or at its



option reinstate or replace such property or any part thereof.

.....

EXCLUSION

A. Excluded Causes

1. This Policy does not cover damage to the property insured caused by:

*(1) faulty or defective design, materials or workmanship,
Inherent vice, latent defect, gradual deterioration
deformation or distortion or **wear and tear**
....."*

(emphasis supplied by this Court)

96. A reading of this would clearly indicate that in order to be indemnified, the physical loss, destruction, deterioration or damage to the property must be accidental. In case, the damages occur on account of a gradual deterioration/deformation/distortion or wear and tear, the Insurance Company cannot be called upon to indemnify the plaintiff.



The defendant in order to substantiate the fact that the damage was on account of wear and tear has examined D.Ws 2 and 3 and marked their survey reports as Exs.D2 to D4. This survey report has not been challenged by the plaintiff by letting in contra evidence and they have only cross-examined D.Ws.2 and 3, who have issued the survey reports. The plaintiff has not been able to rebut the evidence of these two witnesses or elicit any answer in their favour.

97. In the judgment reported in ***(2009) 8 Supreme Court Cases 507 (Sri Venkateswara Syndicate Vs. Oriental Insurance Company Limited and another)***, the Hon'ble Supreme Court had discussed the importance of Surveyor's report in paras 31 and 32 as follows:

"31. The assessment of loss, claim settlement and relevance of survey report depends on various factors. Whenever a loss is reported by the insured, a loss adjuster, popularly known as loss surveyor, is deputed who assess the loss and issues report known as surveyor report which



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forms the basis for consideration or otherwise of the claim. Surveyors are appointed under the statutory provisions and they are the link between the insurer and the insured when the question of settlement of loss or damage arises. The report of the surveyor could become the basis for settlement of a claim by the insurer in respect of the loss suffered by the insured.

32. There is no disputing the fact that the Surveyor/Surveyors are appointed by the insurance company under the provisions of [Insurance Act](#) and their reports are to be given due importance and one should have sufficient grounds not to agree with the assessment made by them. We also add, that, under this Section the insurance company cannot go on appointing Surveyors one after another so as to get a tailor made report to the satisfaction of the concerned officer of the insurance company, if for any reason, the report of the Surveyors is



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not acceptable, the insurer has to give valid reason for not accepting the report."

98. The Surveyor's reports assume significance in the light of Scheme of Section 64-UM of the Insurance Act, 1938. The judgment reported in ***(2009) 7 Supreme Court Cases 777 (Sikka Papers Limited Vs. National Insurance Company Limited and others)*** was also a case, where the Insurance Company had taken the defense of wear and tear. There while discussing the Surveyor's report, the learned Judges had observed that although the survey report may not be the last word, there must be legitimate reasons given to depart from the report. In the case on hand, the plaintiff has not made out a case for not relying upon Exs.D2 to D4.

99. In the Colinvaux's Law of Insurance, the phrase 'accidental, sudden and unforeseen damage' has been discussed as follows:

"20-091. Meaning of phrase. Property policies



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*generally require a loss from one or more specified perils to arise from an accidental, sudden or unforeseen event or occurrence. The words "event" and "occurrence" are more or less interchangeable, and both require that something has actually happened. The word "accidental" means that the loss suffered by the assured has been an "unlooked-for mishap or an untoward event which is not expected or designed". The mere fact that the insured subject matter has sustained damage is, therefore, not sufficient to trigger coverage under a property policy. By way of example, if the subject matter disintegrates or collapses, and the assured cannot show that there has been an accidental event triggering the damage, then there is no recovery. In *Leeds Beckett University v Travelers Insurance Company Ltd* an old brewery converted into a student accommodation began to crack some 15 years after the work had been carried out. Investigation showed that the foundations had turned to mush as a result of the failure of the contractors to take account of the absence of adequate drainage. The collapse was inevitable from the outset and there was no accidental event triggering the loss. It was held in *Pacific Chemicals Pte Ltd v MSIG Insurance (Singapore) Pte Ltd* that the*



phrase "any unforeseen and sudden physical loss destruction or damage" meant that the damage had to be sudden and accidental, so that it was irrelevant that the peril which had caused the damage itself occurred slowly. In Pacific Chemicals itself the subject-matter insured was phthalic acid stored in a heated tank. The assured shut down the plant temporarily and transferred molten acid from the tank to a heated tank truck, but due to a malfunctioning gauge on the tank some 376 metric tonnes of acid was left in the tank and it solidified. In addition, the drop in temperature caused a blockage in a vent line leading from the tank, leading to pressure building up inside the tank and the bucking of its walls. The Singapore High Court held that the assured would be able to recover if it could show that that the solidifying of the acid and the buckling of the tank were "unforeseen" and "sudden".

100. The learned counsel for the first defendant had also provided literature with reference to the gear failures, which is the damage that has been caused with reference to WEGs.,. The literature



would discuss that a gear is considered to have failed, when it can no longer efficiently do the job for which it is designed. Cause of failure may range from excessive wear to catastrophic breakage. Wear has been defined as follows:

"Wear: A surface phenomenon in which layers of metal are removed, or "worn away", more or less uniformly from the contacting surfaces of the gear teeth."

101. A reading of the Surveyor's report, Exs.D2 to D4 would clearly show that the observation of the Surveyor that the damage was only on account of the wear and tear appears justified, consequently, the risk falls within the exclusion clause and the first defendant, Insurance Company is not bound to indemnify the plaintiff. Therefore, issues 1 and 2 are answered against the plaintiff.

ISSUE NOS (iii) to (v):

102. Since the issue Nos. (i) and (ii) have been answered against



the plaintiff, the question of the first defendant being liable to pay damages to the plaintiff with interest would not arise. Therefore, issue Nos. (iii) to (v) are also answered against the plaintiff.

ISSUE NO.(vi):

103. In the light of the above discussion the Commercial Suit stands dismissed with costs.

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Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No
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P.T. ASHA, J,



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