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Arb O.P(COM.DIV.) No. :
of 2023



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05-11-2025

DATE OF DECISION: 07-11-2025

CORAM

THE HONOURABLE MR JUSTICE N. ANAND VENKATESH

Arb O.P(COM.DIV.) No. 290 of 2023

Santha Spinning Mills Pvt Ltd.,
9/119-C, Car Street, Somanur,
Coimbatore, Tamil Nadu-641 669
Rep.by its Director, Mr.C.Cibi Vishnu

Petitioner

Vs

Asian Wind Energy Pvt Ltd.,
S/F No.746/1 & 2, 751/1 and 2,
Manmangalam Village, Semmadai,
Karur, Tamil Nadu- 639 006

Respondent

PRAYER

- a) To set aside the impugned Arbitral Award dated 30.04.2023 passed by the Arbitral Tribunal.
- b) Direct the Respondent to pay costs.

For Petitioner: Mr.Anand Ganesan for
Mr.J.Adithya Reddy



For Respondent: Mr.Rahul Balaji

ORDER

This original petition has been filed under Section 34(2)(b) and 34(2A) of the Arbitration and Conciliation Act, 1996 (for brevity, hereinafter referred to as “the Act”) challenging the award passed by the sole Arbitrator dated 30.04.2023.

2. The respondent/claimant filed the claim statement on the ground that they are engaged in the business of energy/power generation and transmission to third party consumers. They own and operate Wind Energy Generators with an installed capacity of about 18.45 MW across the State of Tamil Nadu. The petitioner entered into a Power Purchase Agreement (for brevity, hereinafter referred to as “the PPA”) on 24.09.2012 with the respondent, who is a Power Producer. The petitioner being one of the captive power consumers in relation to captive power plants, the legal requirement under the existing regulations require more than 51% of its electricity generated to be used collectively by the captive users and also required to hold at least 26% shareholding in the generating company. The shareholding of the petitioner constituted 1.25%, as it held 1250 shares in the respondent company at the time of entering into the PPA.



3. Under the PPA, the petitioner had agreed to purchase power from the respondent for a contracted quantity at the rate fixed in the agreement. This agreement was to be in force for a period of five years from the date of transmission of power. Accordingly, the respondent has to supply power to the petitioner during the period from 2012 to 2017. Clause 4 of the PPA mandated that the petitioner shall consume 20 lakh units of wind power per annum and shall also subscribe to 1250 shares in the respondent company. It is also mentioned in the PPA that the respondent's generation capacity would be 4,16,00,000 units. The respondent will supply 20 lakh units to the petitioner in case of achieving full generation depending upon the wind season in the State. If the generation is reduced, units will be accordingly reduced pro rata and would be allotted and consumed in terms of the shareholding of the captive power users.

4. The agreement further provided that the respondent shall endeavour to supply the contracted quantity of 20 lakh units and the petitioner shall ensure that it consumed power allotted to them at least to the extent of 80% of the contracted quantity annually. In case the petitioner does not consume the energy injected on its account by the respondent, such shortfall in consumption shall be banked with the Tamil Nadu Electricity Board (TNEB) to the User Member's account in terms of clause 6.3 of the PPA. The agreement further provided that the power meant for the petitioner actually not consumed and



banked with TNEB shall not be taken into consideration for calculating the consumption of the petitioner.

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5. In view of the above, the contracted quantity with the petitioner was 20 lakh units of power annually, the petitioner was allotted 1250 shares and the shareholding of the petitioner constituted 1.25 percentage of the entire shareholding of the captive users who totally represent 26% of the shareholding of the respondent.

6. Things were moving smoothly during the period from 2012 to 2015. For the financial year 2015-16, the petitioner requested the respondent to increase the units to be supplied from 20 lakh units to 60 lakh units with an increase of 40 lakh units. Pursuant to the same, the petitioner purchased additional 2750 shares towards the increase of allocation by mutual agreement. The original agreed price was also increased from Rs.5.90 per unit to Rs.6.54 per unit with effect from 12.12.2014. In terms of the renewed understanding, the petitioner held 4% of the entire shareholding of the captive users out of 26% and was required to off take 15.38% of the total generated power/capacity from the financial year 2015-16 onwards.

7. During the financial year 2016-17, the respondent allotted the entire 60 lakh units. But, however, the petitioner sought allotment of only 47,01,812



units, but actually consumed 38,00,325 units leaving behind 9,01,487 units unutilized/banked units. In effect, the total unutilized/banked units were 21.99 lakh units.

8. The petitioner sought to terminate the agreement by its letter dated 20.02.2017. At that point of time, the respondent claimed the payment towards unutilized/banked units to the extent of 21.99 lakh units. An invoice was raised on 14.09.2017 for a sum of Rs.69,28,967/-. The respondent also claimed for interest at 1% per month on the delayed payments until the date of final payment. Since the payment was not made, the dispute was referred to the sole Arbitrator by virtue of an order passed by this Court in Arb O.P.(Com.Div.)No.25 of 2022 dated 27.04.2022.

9. The respondent made the following claims:-

(a) Direct the petitioner to pay a sum of Rs.69,28,967/- towards invoice raised by the respondent dated 04.09.2017 for the unutilized banked units in terms of clause 8.5 of the PPA;

(b) Direct the petitioner to pay a sum of Rs.40,18,421/- being the interest payable to respondent at the rate of 1% per month in terms of clause 12.4.1;

(c) Direct the petitioner to pay further interest at the rate of 18% per annum from the date of claim until date of actual payment;

(d) Direct the petitioner to pay costs of arbitration.



10. The petitioner took a stand that the respondent is only entitled for the actual quantity of energy consumed by the petitioner and there was no obligation for the petitioner to pay anything beyond what was actually consumed. They took a further stand that the minimum off take guarantee under clause 6 of the PPA was fixed, which was independent of the shareholding. The petitioner is also not liable to pay for the banked units which were unutilized. The petitioner denied the fact that they had agreed for the increase in the allocation of energy units from 20 lakh to 60 lakh annually. According to the petitioner, the terms and conditions of the PPA remained unaltered. The petitioner took a further stand that the unilateral letter issued on the part of the respondent will not amount to an amendment of the PPA and it will not change the obligation between the parties. Thus, the petitioner denied the entire claim that was made by the respondent.

11. Before the sole Arbitrator, C.W.1 was examined on the side of the respondent and Exhibits C1 to C25 were marked. The petitioner relied upon three documents.

12. The sole Arbitrator, on considering the rival claims and on appreciation of evidence, came to the conclusion that the respondent is entitled to the claims (a), (b) & (c) in terms of paragraph 38 of the claim statement. Aggrieved by the award passed by the sole Arbitrator, the present petition has



been filed before this Court.

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13. The learned counsel for petitioner submitted that in terms of Rule 3 of the Electricity Rules, 2005, the obligation to consume including proportionality to shareholding is only 51% of the total generation, as per the judgment of the Apex Court in the case of *Dakshin Gujarat Vij Limited v. M/s Gayatri Shakti Paper & Board Limited and another etc.*, reported in 2023 SCC OnLine SC 1276. An affidavit was filed by the Director of the petitioner company by taking a specific stand that during the relevant year (2016-17), 26% of the shareholding of the respondent was held by four companies. The total electricity generated by the respondent was 3,94,87,900 units. 51% of the same is 2,01,38,829 units. Thus the obligation of the four companies to consume electricity will have to be in accordance with the proportionality rule and insofar as the petitioner company is concerned, the actual units consumed was 38,00,326 and the share of electricity to be consumed out of the 51% was only 30,97,351. However, contrary to the judgment of the Apex Court, the sole Arbitrator has taken into account 100% of the electricity generated. The consequence of non consumption of electricity will lead to non fulfillment of captive status and it can only ultimately lead to levy of cross-subsidy surcharge and additional surcharge, which levy is on the petitioner and not on the generator.



14. The learned counsel further submitted that the petitioner consistently denied the letter dated 23.02.2015 (Ex.C2), since this letter was not even communicated to the petitioner and it was a unilateral letter created by the respondent. Even if this letter is taken to be true, at the best, only clause 4.2 and 4.3 are amended and all the other clauses are unchanged. Therefore, clause 8.5 providing for compensation is only for 20 lakh units and this clause was not amended.

15. The learned counsel further submitted that by letter dated 09.03.2017 (Ex.C16), the petitioner had denied any change in the consumption obligation except for 2015-16 when the petitioner had requested for higher quantity. It was further submitted that the Tribunal erred in relying upon the letter dated 04.05.2015 (Ex.C4) to hold that there was an amendment to the PPA. The letter does not in any manner give an understanding that the petitioner undertook to consume 60 lakh units in 2016-17. In fact, this letter is only on shareholding and there is no reference to consumption. The counsel also questioned the Tribunal relying upon Ex.C5, which is an email dated 30.08.2016 to hold that there was an amendment to the PPA. This email communication only pertains to a protest made by the petitioner on the new calculation formula adopted by the respondent while preparing the invoice for July, 2016. Thus, it was contended that there is no document much less any clause under the agreement, which links with the minimum consumption required with the percentage of the



shareholding of the petitioner in the respondent company. The learned counsel concluded his arguments by submitting that the respondent failed to prove their claim and the award passed by the sole Arbitrator suffers from patent illegality and it also disregards the evidence available on record and completely lost sight of the fact that there was absolutely no amendment to the PPA.

16. Per contra, the learned counsel for respondent submitted that the sole Arbitrator had dealt with each and every defence that was taken by the petitioner and had rendered the finding in line with the express terms of contract between the parties and it does not fall afoul of any of the requirement under Section 34 of the Act and hence the petition is to be dismissed by this Court.

17. This Court has carefully considered the submissions made on either side and the materials available on record.

18. The short issue that arises for consideration in the present petition is as to whether there was an amendment to the PPA, whereby the petitioner had agreed for the increase in the supply from 20 lakh units to 60 lakh units and consequently is liable to pay the sum of Rs.69,28,967/- for the unutilized/banked units of 21.99 lakh units.

19. The entire claim was made in terms of clause 8.5 of the PPA and for



proper appreciation, the same is extracted hereunder:-

“8.5 Tariff Rate Sharing: In case the consumption of user member in a year is less than 20 Lacs units, the unutilised power, ie., the difference between 20 Lacs units and actual units utilised, banked with the TNEB shall bear a sharing in the tariff rate charged by TNEB at the rate of Rs.3.15 per unit, subject to revision by the authority concerned.”

20. The undisputed position is that as per the original PPA, clause 4.2 provides that the petitioner shall consume 20 lakh units per annum. Clause 6.2 imposes an obligation on the petitioner to consume a minimum of 16 lakh units of electricity per year provided that the respondent is able to achieve full capacity generation. The petitioner has to pay to the respondent for the 16 lakh units or for the actual consumption, whichever is higher. The entire claim of the respondent is made on the premise that the obligation to consume power was amended to 60 lakh units for the year 2016-17, which is in proportion of the increased shareholding of the petitioner in the respondent company.

21. The petitioner has denied the letter dated 23.02.2015 (Ex.C2). According to the petitioner, they were not even aware of this letter and that this unilateral letter relied upon on the side of the respondent does not create any obligation on any new set of obligations on the petitioner.



22. The sole Arbitrator had dealt with this specific issue at paragraph 8.2 of the award. The sole Arbitrator has taken into consideration the subsequent developments that took place after the communication received from the respondent dated 23.02.2015. The first development was that there was transfer of share certificates in favour of the petitioner on 01.04.2015. For this purpose, the sole Arbitrator has taken into account the communication dated 04.05.2015 (Ex.C4) addressed to the respondent for transfer of 12 lakh units of shares and also for increased unit allotment for that month. The sole Arbitrator has also taken into account the communication dated 29.08.2016 (Ex.C5), where the petitioner has admitted the fact that the respondent had supplied 27 lakh units and whereas they were expected to supply 60 lakh units per year. Thus, the sole Arbitrator came to a conclusion that the subsequent conduct after the issuance of communication dated 23.02.2015 makes it clear that the parties had consented for the amendment to the PPA for the increased stakes. Hence the sole Arbitrator has rejected the stand taken by the petitioner that there was no amendment to the PPA and therefore no new obligation was cast upon the petitioner.

23. The above finding rendered by the sole Arbitrator is based on appreciation of evidence and is a possible/plausible view and this Court, exercising its jurisdiction under Section 34, cannot interfere with the same on the ground that a different view is possible from the same set of evidence.



24. The next issue that was raised on the side of the petitioner is that the petitioner is not liable to make any payment towards the unutilized/banked units as no such understanding is found in the PPA. While dealing with this issue, the sole Arbitrator has rendered his findings in paragraphs 8.22 and 8.23. While dealing with the issue, the sole Arbitrator has also taken note of the decision of the Appellate Tribunal for Electricity in the matter of *Kadodara Power Private Limited case*, where the Tribunal had held that the minimum percentage of ownership to be held by captive users and to maintain the proportionality between the consumption and ownership as an association of persons. It was contended that this view was subsequently held to be per incuriam in the subsequent order passed by the Tribunal in the case of *Tamil Nadu Power Producers Association* and ultimately, the law was settled by the Apex Court in the case of *Dakshin Gujarat Vij Company Limited case* (referred supra). The award was passed on 30.04.2023. At that point of time, the principle of proportionality between the shareholding and consumption was a well recognised concept. Even insofar as the subsequent order of the Appellate Tribunal for Electricity, it did not relate to unsettling the proportionality principle, but what was unsettled was only the timing of when the compliance is to be tested. Subsequently, the Apex Court in *Dakshin Gujarat Vij Company Limited case*, confirmed the correctness in entirety of *Kadodara case*. Thus, the view expressed by the sole Arbitrator has almost been confirmed by the Apex Court.



25. The interpretation of a contract is exclusively within the domain of the sole Arbitrator. The sole Arbitrator had interpreted the contract along with all the attendant circumstances, which included the subsequent conduct and the correspondence between the parties and it concluded that the parties had mutually agreed to vary the terms and thereby they have waived the formal requirement. Therefore, the finding of the sole Arbitrator by mulcting the liability on the petitioner for payment towards the unutilized/banked units was not only based on the order in *Kadodara case*, but also based on the understanding of the express terms of the contract.

26. The Hon'ble Supreme Court in the case of *McDermott International Inc. v. Burn Standard Co. Ltd.*, reported in 2006 (11) SCC 181 has reiterated the same principle as under:-

“122.It is trite that the terms of the Contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of consideration of a contract.... It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a Contract.”

In the process of arriving at the true meaning, the Court is entitled to take into consideration the surrounding circumstances as well as the correspondences,



which are relevant as pointed out by the Hon'ble Supreme Court in *D.D.Sharma Vs. Union of India*, reported in 2004 (5) SCC 325, wherein paragraph 24 reads thus:

“24. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law.”

27. An attempt was made on the side of the petitioner by placing reliance upon Section 74 of the Contract Act. In the case on hand, the claim is only a debt and not damages. Thus the debt/liability is based on the contractually agreed price for a specific quantity of power that was allotted/reserved to the petitioner. In any case, this was not even an issue that was raised before the learned Arbitrator and it is raised for the first time before this Court. Hence, it is liable to be rejected by this Court.

28. The learned counsel for petitioner submitted that the PPA under clause 20.8 provided that any amendment can be only with the written consent of both the parties. Such consent between the parties can be gathered from the



communication made between the parties and also the circumstances of the case. The learned counsel for petitioner also submitted that even if the letter dated 23.02.2015 (Ex.C2) is acted upon, it is clear that the amendment pertains to only clause 4.2 and 4.3 and all the other remaining clauses are unchanged.

29. The above contention is not sustainable, for the simple reason that clause 4.2 and 4.3 is directly relatable to clause 8.5 and clause 8.5 cannot be read independently. Even otherwise, if the ground raised by the learned counsel for petitioner is taken to its logical end, the petitioner will be worse off, since even for the unutilized power, the petitioner had to pay the cost as was fixed in the original PPA.

30. In the considered view of this Court, the findings have been rendered by the sole Arbitrator based on the interpretation of the contract by considering the subsequent conduct and correspondence between the parties. Apart from that, the findings rendered by the sole Arbitrator are based on evidence. These findings do not suffer with perversity or with patent illegality warranting interference of this Court. The award is supported by reasons which are intelligible and hence, this Court finds that the case in hand does not fall under any of the eight pigeon holes as was identified by the Apex Court in the case of *Ssangyong Engineering & Construction Company v. National Highways Authority of India* reported in (2019) 15 SCC 131.



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31. In the result, this original petition stands dismissed and there shall be
a direction to the petitioner to pay costs of Rs.2,50,000/- to the respondent.

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Index:Yes/No

Speaking/Non-speaking order

Internet:Yes

Neutral Citation:Yes/No

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