M/S.Suzlon Energy Limited vs Indowind Energy Limited on 26 November, 2019

Author: Senthilkumar Ramamoorthy

Bench: Senthilkumar Ramamoorthy

O.P.No.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on 07.11.2019
Judgment pronounced on 26.11.2019

CORAM

THE HONOURABLE Mr. JUSTICE SENTHILKUMAR RAMAMOORTHY

O.P. No.849 of 2017

M/s.Suzlon Energy Limited,
Having its Corporate Office at Suzlon,
One Earth, Hadapsar,
Pune - 411 028. ... Petitione

-vs-

Indowind Energy Limited,
Registered Office:4th Floor,
Kothari Building,
No.114, Nungambakkam High Road,
Chennai-600 034. ... Responde

PRAYER:- Original Petition is filed under Section 34 of the Arbitrat

and Conciliation Act, 1996 to set aside the Impugned Award dated

22.07.2017 passed by the Arbitral Tribunal.

For Petitioner : Mr.P.S.Raman, Senior Counsel
for M/s.K.Gowthamkumar

For Respondent : Mr.R.Sankara Narayanan

Senior Counsel
for M/s.Naveenkumar

O.P.No.8

ORDER

The respondent in the arbitration is the Petitioner herein. The Petitioner is a manufacturer of Wind Turbine Generators (WTGs), i.e. windmills. The Petitioner and the Respondent executed a Memorandum of Understanding on 24.01.2008 (the First MoU) (Ex.C1) and, pursuant thereto, the Respondent issued Purchase Orders dated 24.01.2008 (the Purchase Orders) (C2 series) along with associated work orders to the Petitioner for the purchase of 12 windmills of 1.5 MW each to execute a 18 MW project at Elkornahalli, Chitraduraga District, Karnataka. These windmills were to be purchased in two lots of six windmills each at a total price of Rs.108.60 crores. This was followed by a meeting held on 22.06.2008 wherein the Petitioner stated, as under, as per the minutes thereof (Ex.C3) (the MoM of 22 June 2008):

> " Suzlon will confirm 42 lac units as per prognosis estimated generation at 95% machine availability guarantee."

2.Thereafter, the Petitioner and the Respondent executed a Memorandum of Understanding dated 26.02.2009 (Ex.C4) (the Second MoU), wherein, in clause 4 thereof, the Petitioner provided a warranty of minimum 95% machine availability of the windmills, on an annual basis, to the Respondent through the operation and maintenance service provider. In the Second MoU, the Petitioner undertook that in case http://www.judis.nic.in 2 of 27 machine availability, when calculated on annual basis, falls below 95%, the Petitioner was liable to compensate for loss of power generation based on prevailing BESCOM/KERC tariff. The Petitioner, thereafter, provided a Generation Certificate dated 10.03.2009 [Ex.C5(a)](the Generation Certificate) to the Respondent in respect of the windmills that were supplied to the Respondent. In the Generation Certificate, the Petitioner confirmed that "42 lakh units per WTG, as per prognosis, will be the estimated generation for this captioned project." In addition, by letters dated 10.03.2009 [Ex.C5(b) and Ex.C6], that were addressed both to the Respondent and to the Indian Renewable Energy Development Agency Limited (IREDA), the Petitioner confirmed that "any claims/settlements/ compensation for the shortfall in the actual generation from the estimated generation/performance guarantee/any payment obligations calculated on an annual basis as per the supply agreement (purchase offer)/MOU between Indowind Energy Ltd and M/s.Suzlon Energy Ltd will be deposited in the designated Trust and Retention Account only." The Respondent and Suzlon Infrastructure Services Ltd(SISL), a group company of the Petitioner also agreed upon two Operation and Maintenance(O&M) Agreements (Ex.C8 series) (the O&M Agreement), by initialling the draft, at the meeting held on 24.08.2009. In the recitals of the O&M Agreement, it was stated that "as per the generation prognosis, the estimated generation is 42 lakh units per WTG per annum at 100% grid availability http://www.judis.nic.in 3 of 27 and 95% machine availability at the controller. Any shortfall in actual generation from the estimated generation of 42 lakh units per WTG per year shall

be calculated/compensated at prevailing BESCOM tariff by SEL directly or indirectly through SISL as per clause No.6.1 of the Agreement." The O&M Agreement was initialled at the outset, as stated earlier, but was not executed and returned by the Petitioner to the Respondent. Nevertheless, O&M activities were admittedly carried out and payments were made in respect thereof. According to the Respondent, the Petitioner was liable to pay compensation of Rs.23,71,60,109/- (including interest at 18% per annum from 2011-12 to 2014-15) on account of shortfall in power generation when compared to the guaranteed 42 lakh units per WTG per year. Therefore, claims were made by letters dated 28.04.2011, 02.09.2011, 16.01.2013 and 25.02.2015. In response, the Petitioner refuted the demand on the basis that it is not liable for generation loss. This resulted in a dispute that was referred to Arbitration.

3.In the arbitration, the Respondent made a claim for the sum of Rs.23,71,60,109/- with interest thereon at 18% per annum from 01.04.2015 till the date of actual payment and also requested that the original signed O&M Agreement should be returned to the Respondent. Upon completion of pleadings, the Arbitral Tribunal framed 12 issues on 28.07.2015. Both parties adduced oral and documentary evidence: the http://www.judis.nic.in 4 of 27 Respondent adduced evidence through one witness and exhibited documents as Ex. C1 to C55; and the Petitioner adduced evidence through one witness and also exhibited documents as Exs.R1 to R6. By Arbitral Award dated 22.07.2017 (the Award), the Petitioner was directed to pay a sum of Rs.20,73,52,228/- as compensation for generation loss during the period April 1, 2010 to March 31, 2015 with interest thereon at 12% per annum from 01.04.2011 to 31.03.2015 and at 18% per annum from 01.04.2015 till the date of actual payment. The Award is under challenge in this Petition.

4.I heard Mr.P.S. Raman, the learned senior counsel for the Petitioner, and Mr. Sankaranarayanan, the learned senior counsel for the Respondent.

5.The learned senior counsel for the Petitioner opened his submissions by adverting to the fact that the supply contract was for supply of 12 windmills at a price of Rs.108.60 crores, whereas the Award in respect of alleged generation losses is for a sum of Rs.20.73 crores with interest thereon, which aggregates to about Rs.27 crores. Even at first blush, according to the learned senior counsel, this shows that the amount awarded as compensation is grossly disproportionate. The principal contention of the learned senior counsel was that the Petitioner http://www.judis.nic.in 5 of 27 provided a warranty only in respect of 95% machine availability in the Purchase Orders, the MoM of 22.06.2008, the Second MoU or the O&M Agreement. As regards power generation, he contended that multiple variables come into play and that these variables are not within the control of the Petitioner. Therefore, in respect of power generation, he submitted that a prognosis was made of an estimated 42 lakh units per WTG at 100% grid availability and with the warranty of 95% machine availability. According to the learned senior counsel, as a supplier of windmills, the Petitioner is required to ensure that such windmills operate to optimal capacity. Towards this end, the Petitioner provided the 95% machine availability warranty.

6.He pointed out that the Respondent did not plead that machine availability was below 95% in its statement of claim before the Arbitral Tribunal. Instead, the case was built entirely on power generation. He also pointed out that the Petitioner categorically asserted that it fulfilled the 95%

machine availability warranty in its statement of defence and that the Respondent's denial of this statement, in its rejoinder, was not substantiated, thereafter, with particulars or evidence. In this connection, he pointed out that the Arbitral Tribunal was cognisant that the compensation claim should be correlated with machine availability but erroneously concluded that the burden of proof, in that regard, was on the http://www.judis.nic.in 6 of 27 Petitioner and not on the Respondent. He, thereafter, adverted to the formula for machine availability and as to how the parties agreed to a removal of the cap on liability provided machine availability was below 95%. In order to substantiate the submission that the liability of the Petitioner would flow only from deficiency in machine availability, he referred to the O&M Agreement. In specific, he pointed out that this entailed an assessment of the average annual combined machine availability across the 12 windmills, whereas the claim for compensation by letter dated 17.08.2010 did not make any reference to machine availability. He pointed out that the computation of the compensation claim (pages 123 to 128 of volume 2) is also based entirely on the alleged shortfall in power generation. As regards machine availability data, he adverted to the monthly generation reports, which were part of the CRMS, at pages 130-198 of volume 2, and pointed out that these documents show an average machine availability of about 95% during the relevant period and that this would have to be computed as per the formula prescribed in the contract for the computation of average annual machine availability across the 12 windmills. According to the learned senior counsel, unless the aforesaid exercise is carried out, it cannot be concluded that the Petitioner is liable as per the contract. In these facts and circumstances, he submitted that the Arbitral Tribunal disregarded the available evidence on machine availability and, instead, committed the http://www.judis.nic.in 7 of 27 patent illegality of imposing the burden of proof on the Petitioner with regard to machine availability. The judgments of the Hon'ble Supreme Court in Anil Rishi v. Gurbaksh Singh (2006) 5 SCC 558 and Rangammal v. Kuppuswami (2011) 12 SCC 220 were relied upon, in this connection, to contend that it is the settled legal position that the burden of proof is on the person alleging breach of warranty. Consequently, he contended that breach of warranty was not proved by the Respondent. In this regard, he referred to paragraph 50 of the statement of defence wherein a categorical statement was made that the method of arriving at the alleged loss is totally against the agreed understanding as per the contract.

7.He further submitted that no oral evidence was adduced by the Respondent with regard to machine availability and that the Respondent admitted this position and that the compensation was computed entirely on the basis of shortfall in power generation in answers to questions 100, 102, 103, 113, 52 and 53 by CW-1. Similarly, he relied upon the cross examination of the Petitioner's witness (RW-1) and, in particular, to the answers to questions 52 and 54. He next referred to paragraphs 114, 116, 117 and 121 of the Award and concluded by referring to and relying upon the judgment of the Supreme Court in Ssyangyong Engineering and Construction Co. Ltd. v. NHAI, 2019 http://www.judis.nic.in 8 of 27 SCC Online SC 677 (the Ssyangyong case), wherein the Hon'ble Supreme Court set aside an Arbitral Award wherein the Arbitral Tribunal disregarded the formula specified in the agreement for the calculation of escalation by applying the RBI indices. Likewise, he contended, in conclusion, that the Arbitral Tribunal, in this case, completely disregarded the formula for the calculation of compensation and instead accepted the computation of the Respondent, which was entirely based on the shortfall in power generation. Thus, he submitted that the Award is liable to be set aside.

8.In response and to the contrary, the learned senior counsel for the Respondent submitted that the Petitioner provided a warranty in respect of power generation of 42 lakh units per windmill and not only in respect of 95% machine availability. According to him, this is borne out by the fact that the Petitioner pleaded economic duress in the statement of defence at paragraph 29. By referring to the said paragraph 29, he pointed out that it was stated therein by the Petitioner that the Respondent withheld payments for work done so as to force the Petitioner to agree to prejudicial terms and conditions as a pre-condition for releasing payments.

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9.He next turned his attention to the cross-examination of the Respondent's witness, CW-1. In particular, he referred to question 47, which was a suggestion that the Respondent withheld payment of Rs.4.3 crores so as to extract a guarantee from the Respondent for an estimated generation of 42 lakhs units per WTG at 95% machine availability. According to the learned senior counsel, this question establishes beyond doubt that the Petitioner understood the MoM of 22.06.2008 as containing a warranty in respect of power generation. In this context, he referred to the MoM of 22.06.2008 and, in particular, to paragraph 4 thereof with regard to the warranty provided by the Petitioner. He, thereafter, referred to the Second MoU and to clause 4 thereof, which contains a warranty with regard to 95% machine availability, and to the Generation Certificate (Ex.C-6). After referring to the said documents, the learned senior counsel adverted to Section 19 of the Indian Contract Act 1872 (the Contract Act), which deals with voidable contracts. On that basis, he contended that the Petitioner had the option of avoiding the contract if its consent was vitiated by duress, whereas it did not avoid the contract. He also referred to Section 27 of the Specific Relief Act, 1963, which deals with rescission and contended that the Petitioner did not sue to rescind the contract on the ground that it is voidable. The next document that he referred to was the O&M Agreement. By referring to recital (c) thereof, he pointed out that three cumulative elements are present in the warranty, namely, (i) http://www.judis.nic.in 10 of 27 power generation of 42 lakh units per windmill; (ii) 100% grid availability; and (iii) 95% machine availability. He also referred to Section 16 of the Sale of Goods Act, 1930 so as to contend that, in this case, there is both an express and implied warranty as to power generation because the Respondent relied on the expertise, skill and judgment of the Petitioner after indicating the purpose of purchase of the windmills. He next referred to paragraph 49 of the Supreme Court's judgment in Associate Builders v. DDA (2015) 3 SCC 49 (the Associate Builders case), so as to contend that contractual interpretation does not warrant interference under Section 34 of the Arbitration Act. He also referred to the judgment of the Hon'ble Supreme Court in Nabha Power Ltd. v. Punjab State Power Corporation Ltd. (2018) 11 SCC 508 (the Nabha Power case) to contend that an interpretation that promotes business efficacy should be preferred. He also referred to a recent judgment of the Bombay High Court in Vestas Wind Technology India Pvt. Ltd. v. Inox Renewables Ltd. 2019 SCC Online Bom 554, wherein the Nabha Power case relied upon and it was held, at paragraph 299, that the word "estimate" should be construed so as to give business efficacy to the contract. Accordingly, he submitted that the warranty of 42 lakh units per windmill cannot be disregarded and meaning should be given to the said words. He next referred to question 71 and the answer thereto by the Respondent's witness, CW-1, to the effect that 42 lakh units is not just an http://www.judis.nic.in 11 of 27 estimate but an assurance in view of the fact that it is stated in Exhibit C5 that any shortfall in

generation would be compensated by depositing the amount in the designated Trust and Retention Account. He, thereafter, referred to the Award. In specific, he referred to the issues at page 147 of the pleadings volume and to the findings in paragraphs 113, 114, 115, 116 and 117 wherein the Arbitral Tribunal examined the evidence of loss and concluded that the Respondent had established that it had incurred loss, as claimed, except for the revision in the amount awarded towards interest. He also pointed out that the Arbitral Tribunal concluded that the Petitioner failed to prove that the machine availability was 95%. For all these reasons, he concluded by submitting that interference with the Award is not warranted.

10.By way of rejoinder, the learned counsel for the Petitioner reiterated that the responsibility of the Petitioner is confined to supplying, installing, commissioning and providing a warranty with regard to the functioning of the windmills. He further submitted that the words "42 lakh units" per windmill are not rendered otiose by the interpretation placed thereon by the Petitioner. In specific, it is his contention that the warranty is confined to 95% machine availability but in case the Petitioner fails to ensure the warranted machine availability, compensation would be computed on the basis of reduction in power generation when compared http://www.judis.nic.in 12 of 27 to the prognosis and estimate of 42 lakh units per windmill. Therefore, he submitted that the stipulation of 42 lakh units per windmill in the MoM of 22.06.2008 and the O&M Agreement has an object and purpose. As regards the Generation Certificate, he submitted that machine availability is not relevant in that context and, therefore, the Generation Certificate cited the MoM of 22.06.2008 and the First MoU but only referred to the prognosis and estimate on power generation. He further submitted that the formula specified in the O&M Agreement with regard to ascertaining the average annual machine availability across the 12 windmills was not taken into consideration by the Arbitral Tribunal. In this regard, he reiterated that the Hon'ble Supreme Court in the Ssangyong case set aside the majority award, which applied a circular instead of the specified formula for price escalation. He also pointed out, in conclusion, that the Arbitral Tribunal did not take into consideration the use of the words "prognosis" and "estimate" in the relevant MoM and other contract documents while deciding the case and referred to the definition of prognosis, which means forecast.

11.The records were examined and the oral and written submissions were considered carefully. At the outset, it may be pertinent to state that the arbitration clause was invoked on or about 02.09.2011 and, therefore, the Arbitration Act, as applicable in relation to disputes http://www.judis.nic.in 13 of 27 where arbitration proceedings commenced prior to 23.10.2015, would apply. The claims of the Respondent in the arbitration are undoubtedly in the nature of an action for damages for the alleged breach of warranty. Therefore, the principal question that is required to be decided, in this case, is whether the Petitioner provided a warranty in respect of power generation per se or whether the warranty was confined to machine availability and the loss in power generation as a consequence of the breach of the warranty in respect of machine availability. The learned senior counsel for the Respondent referred to the pleadings and the cross-examination of CW-1 in the arbitration so as to contend that the Petitioner pleaded economic duress as the reason for providing a prognosis, estimate and warranty in respect of power generation of 42 lakh units per windmill. He also contended that the contract should have been avoided or rescinded by the Petitioner, if its consent was vitiated by duress, but it did not do so. On perusal of the

pleadings and oral evidence, in this regard, it cannot be said that this establishes that the Petitioner provided a warranty in respect of power generation de hors machine availability. At best, it establishes that the Petitioner did provide a prognosis and estimate of 42 lakh units of power generation. Therefore, the nature of the warranty and its width and amplitude can only be determined by examining the relevant contractual clauses. The learned Arbitrator framed the following issue as Issue 6:

14 of 27 Whether the Claimant has proved that it suffered a generation loss on account of shortfall of machine availability below 95% per year per machine?

12.It is self-evident from the above issue that the burden of proof is on the Respondent/Claimant therein, as it should be, in view of the assertion of breach of warranty. In order to record a finding on this issue, the learned Arbitrator should have examined whether the Respondent/Claimant proved that annual average machine availability across the 12 windmills was below 95%. In fact, evidence was available, in this regard, in the form of Monthly Generation Reports, which contained data on machine availability, i.e. the raw data for computing annual average machine availability as per the O&M Agreement. However, this evidence was disregarded. Instead, at paragraph 117, the learned Arbitrator strangely inverted and imposed the burden of proof on the Petitioner/respondent therein and recorded the following finding:

"They have not proved that the machine availability was 95% and they were not obliged to compensate any loss at that level".

In addition, the requirement of proving that the generation loss was on account of not meeting machine availability requirements was also not satisfied. Nevertheless, a finding is recorded, in the said paragraph 117 that the "... the Claimant has convincingly proved that there was http://www.judis.nic.in 15 of 27 generation loss and as per the terms of the O&M Agreement, the Respondent was bound to compensate the same." This conclusion can only be justified if the Arbitral Tribunal also examined the contract documents and concluded that there is a warranty in respect of power generation per se and de hors machine availability, and that issue would be considered next.

13.In order to determine and conclude as to whether the Petitioner provided a warranty with regard to power generation per se, i.e. de hors machine availability, all the relevant contract and other documents should have been examined by the Arbitral Tribunal and, on that basis, a reasoned conclusion should have been drawn. While the Arbitral Tribunal sets out all the contract documents and the clauses thereof beginning with the Purchase Orders, the MoM of 22.06.2008, the Second MoU and the O&M Agreement, I do not find any analysis and reasoning as to the basis of concluding that there is a warranty with regard to power generation per se in light of the contractual documents although the said conclusion is reached. In specific, this is not a case where the contract has been interpreted by the Arbitral Tribunal; instead, it is a case where the Arbitral Tribunal failed to do so and proceeded on assumptions. One of the questions that arises, in this situation, is whether a case

is made out for remission under Section 34(4) of the Arbitration http://www.judis.nic.in 16 of 27 Act. Given the limited scope of Section 34(4) and the fact that an Arbitral Tribunal can only take steps to rectify the errors in an award upon such remission, this would not be an appropriate case for remission because the Arbitral Tribunal would not have the power to carry out the interpretation of the contract with an open mind, upon remission, so as to reach an objective conclusion. Instead, it would be constrained to rationalise and interpret the contract in such a manner as to justify the earlier conclusion. Therefore, the said analysis has to be carried out herein so as to test the validity of the Arbitral Tribunal's conclusion. The first set of documents that have a bearing on this question are the Purchase Orders. Clause 7 of each Purchase Order deals with performance guarantee and provides for compensation at 1% of the energy income based on EB tariff for every 1% shortfall in machine availability below 95% or pro-rate thereof subject to the maximum of 5% of the energy income. Undoubtedly, the warranty in clause 7 of the Purchase Orders is confined to 95% machine availability and Clause 8 of the Purchase Orders specifies the formula for the calculation of the percentage of machine availability. The next document is the MoM of 22.06.2008. Paragraph 3 of the MoM of 22.06.2008 states that the Petitioner will "confirm 42 lakh units as per prognosis estimated generation at 95% machine availability guarantee." In this document, the Petitioner confirms 42 lakh units albeit on the basis of the prognosis with regard to the estimated power http://www.judis.nic.in 17 of 27 generation at 95% machine availability. This document certainly indicates that a prognosis was made by the Petitioner and, on that basis, the estimated power generation is 42 lakh units per WTG but it is ambiguous as to whether this amounts to a warranty in respect of power generation per se and de hors machine availability. Moreover, this document does not specify the consequences of not fulfilling the commitment and, therefore, cannot be looked at on a stand-alone basis. The Second MoU was executed after the MoM of 22 June 2008 and also throws light on the matter. Clause 4 of the Second MoU specifies that the Petitioner agrees and undertakes to compensate the Respondent, subject to force majeure events, proportionately to the extent of any shortfall in machine availability of less than 95%. It further provides that the Petitioner hereby removes any cap on the compensation arising out of shortfall in the machine availability leading to loss of power generation in all the 12 WTGs. As far as this document is concerned, it cannot be said that there is a warranty as regards power generation per se. On the other hand, it is evident that the warranty is in respect of 95% machine availability and that whenever there is default in fulfilling the machine availability warranty, the Petitioner would compensate the Respondent for the resultant loss in power generation. By comparison, the Generation Certificate does not refer to machine availability at all but confirms that the power generation estimate is 42 lakh units per windmill as per http://www.judis.nic.in 18 of 27 prognosis. Equally, the letter dated 10 March 2009 confirms that any compensation for shortfall in power generation as compared to the estimated generation would be deposited in the designated Trust and Retention Account. Therefore, the implication of these two documents should be considered while bearing in mind that these documents also refer to the Purchase Orders, MoM of 22.06.2008 and the Second MoU thereby indicating that the obligation and liability would have to be determined by looking at those documents. The last document to be considered is the O&M Agreement, which was initialled by both the Respondent and SISL and was held to be valid and binding by the Arbitral Tribunal. Recital (c) of the O&M Agreement provides for the estimated generation of 42 lakh units per windmill per annum as per generation prognosis at 100% grid availability and 95% machine availability at the controller. It further provides that any shortfall in actual generation from this estimated generation of 42 lakh

units per windmill per year shall be compensated at prevailing BESCOM tariff by SEL directly or indirectly through SISL as per clause 6.1 of the Agreement.Clause 6.1 deals with machine availability and reads as under:

> "6.1 Machine Availability SISL warrants a combined machine availability of 95% per year for all the WTGs put together covered under this Agreement. After stabilisation period of 90 days from the DOC, in case the annual http://www.judis.nic.in

19 of 27 average machine availability of all the WTGs together falls below 95%, then SISL shall compensate to IWEL proportionately to the extent of shortfall in actual generation from the estimated generation of 42 lakh units per WTG per annum at the prevailing BESCOM tariff. Any and all such compensation shall be paid to IWEL/deposited in TRA account by SISL within 60 days from due date. Any delay in crediting any compensation amount on the due date shall attract interest at 12% per annum."

Clause 6.1 clearly links the liability of the Petitioner to a shortfall in machine availability below the stipulated 95%, albeit compensation, in that event, would be computed on the benchmark of the estimated 42 lakh units per WTG per year.

14.In light of the presence of clauses, which deal with warranty, in various documents, namely, the Purchase Orders , the MoM of 22.06.2008, the Second MoU, the Generation Certificate, the letter dated 10.03.2009 and the O&M Agreements, it is necessary to construe all these documents harmoniously. While construing the documents harmoniously, it is also necessary to give meaning and effect to all the words used in the relevant clauses. As stated earlier, the Purchase Orders, the Second MOU and the O&M Agreement are fairly lucid and unambiguous with regard to the scope of warranty in the sense that it http://www.judis.nic.in 20 of 27 cannot be inferred on reading the said documents that a warranty was provided in respect of power generation de hors machine availability. On the other hand, the MoM of 22.06.2008 certainly states that the Petitioner confirms that 42 lakh units would be the estimated power generation as per the prognosis of the Petitioner at 95% machine availability guarantee. Keeping in mind that this document does not specify the consequences of non-compliance, it certainly cannot be construed on a stand-alone basis. When the MoM of 22.06.2008 is compared with subsequent documents such as the Second MOU dated 26.02.2009 and the O&M Agreement, it is evident that the subsequent contract documents do not contain any indication that the Petitioner provided a warranty in respect of power generation except to the extent that power generation is adversely impacted by lower than 95% machine availability. Nonetheless, the effect of the Generation Certificate and the letter dated 10.03.2009 should also be considered before drawing a definitive conclusion. In these documents, there is no reference to machine availability; instead, these documents refer to the estimated power generation of 42 lakh units per windmill, as per prognosis, and the letter of even date confirms that the Petitioner would deposit any compensation for shortfall in actual generation when compared to the estimated generation in the Trust and Retention Account. As stated earlier, these documents refer to the Purchase Orders, MoM of 22.06.2008 and http://www.judis.nic.in 21 of 27 the Second MoU and would have to be construed in that context. When viewed holistically, the question that arises is whether it can be concluded that a warranty was provided in respect of power generation per se.

15.The learned senior counsel for the Respondent contended that the contract documents and, in particular, the O&M Agreement would have business efficacy only if the commitment with regard to power generation of 42 lakh units per windmill is implied in the O&M Agreement and held to be an enforceable commitment in as much as power generation is the object and purpose of the contract. This contention cannot be accepted for two reasons. First, such an interpretation would not be in conformity with Clause 6.1 of the O&M Agreement which indubitably links the Petitioner's liability to a shortfall in machine availability. It would also not be compatible with the relevant clauses of the Purchase Orders and the Second MoU. Secondly, business efficacy is one of the conditions for implying terms in a contract as held in B.P. Refinery (Westernport) Pty. Ltd. v. Shire of Hastings (1978) 52 A.L.J.R., wherein five conditions were set out as under:

> (i) it must be reasonable and equitable;
>
> (ii) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
>
> (iii) it must be so obvious it goes without saying;

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(iv) it must be capable of clear expression; and

(v) it must not cotradict any express term of the contract.

16.The above conditions and test for deciding whether a term should be implied in a contract were cited with approval by the Hon'ble Supreme Court in several judgments, including in the Nabha Power case, which was cited in this regard by the learned senior counsel for the Respondent and, more recently, in Adani Power (Mundra) Ltd. v. Gujarat Electricity Regulatory Commission 2019 SCC Online SC

819. When these conditions are applied, including the business efficacy test, it is clear that it is a test of necessity, i.e. whether the O&M Agreement or the other contract documents would be rendered unworkable unless a term/warranty as to power generation per se and de hors machine availability is implied therein and the obvious answer is in the negative. Besides, such an interpretation would contradict the plain language of Clause 6.1 of the O&M Agreement and thereby the fifth condition as regards implying terms in a contract.

17.Given the fact that except for the Generation Certificate and the letter of 10.03.2009, none of the contract documents subsequent to the MoM of 22.06.2008 indicate that a warranty was provided in respect of power generation per se and, on the contrary, indicate that the http://www.judis.nic.in 23 of 27 warranty is confined to loss in power generation as a consequence of not ensuring 95% machine availability, the only reasonable interpretation is that the Petitioner made a prognosis or forecast that each windmill would generate an estimated 42 lakh units per annum provided there is 100% grid availability and 95% machine availability, which is assured or warranted by the supplier

of the windmills, namely, the Petitioner. As regards power generation, as correctly contended by the learned senior counsel for the Petitioner, multiple variables are at play, including natural forces such as wind, and, therefore, the reasonable inference is that the Petitioner's warranty is confined to machine availability and that if the machine availability falls below the assured threshold, the Petitioner would compensate the Respondent proportionately to the extent that power generation has fallen below the estimate of 42 lakh units per windmill as per the Petitioner's prognosis. This interpretation lends meaning to all the words in the MoM of 22.06.2008. More importantly, it is also in conformity with the warranty provided both in earlier documents such as the Purchase Orders and in subsequent documents such as the Second MOU and the O&M Agreement.

18.In addition, it is evident that even in the MoM of 22.06.2008 and the recital to the O&M Agreement, the words "prognosis" and "estimate" are used. Moreover, the word "guarantee" is used only http://www.judis.nic.in 24 of 27 after the words 95% machine availability in the MoM of 22.06.2008. Therefore, the interpretation set out in the previous paragraph is the only interpretation that stands to reason. However, in this case, as stated earlier, the Arbitral Tribunal did not consider the import of the multiple documents wherein the warranty is contained by examining, analysing and construing the relevant clauses and also disregarded the use of the words "prognosis" and "estimate". By so disregarding the said words, the learned Arbitrator proceeded on the patently erroneous assumption that an assurance was given by the Petitioner that there would be power generation of 42 lakh units per windmill per year. Therefore, the challenge to the Award is tenable in light of the law laid down in ONGC v. Saw Pipes (2003) 5 SCC 705, the Associate Builders case and, as correctly pointed out by the learned senior counsel for the Petitioner, the Ssyangyong case where the Supreme Court in a case to which the Arbitration and Conciliation(Amendment)Act,2015 applied, interfered because the contractual formula for price variation was disregarded. Likewise, in this case, the formula in the O&M Agreement to determine machine availability, so as to compute the consequential generation loss was disregarded. For all these reasons, I am of the view that the Award is contrary to the contract documents, including the O&M Agreement, which is the basis of the Award. Besides, as stated earlier, the burden of proof in respect of machine availability was erroneously imposed on the Petitioner http://www.judis.nic.in 25 of 27 although Issue No.6 indicates otherwise. Furthermore, the available evidence, in this regard, in the form of Monthly Generation Reports should have been used as the basis to compute the average annual machine availability, as per the formula in the O&M Agreement, whereas the evidence was disregarded and the average annual machine availability was not calculated. In fine, the conclusion, in the Award, that the Petitioner is liable for generation loss per se is liable to be set aside.

19.In the result, the Arbitral Award dated 22.07.2017 is set aside. In view of the stand of the Petitioner that a claim on the basis of machine availability is maintainable and keeping in mind that such a determination was not made by the Arbitral Tribunal, in this case, the Respondent is granted leave to make a claim and initiate appropriate legal proceedings on that basis and, in such event, would be entitled to the benefit of Section 14 of the Limitation Act, 1963, in respect of time taken in the arbitration and this Petition. In the facts and circumstances, there will be no order as to costs.

26.11.2019 Speaking order Index: Yes Internet: Yes rrg http://www.judis.nic.in 26 of 27 SENTHILKUMAR RAMAMOORTHY, J.

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