M/S. Gujarat Fluorochemicals Limited vs Vestas Wind Technology India Private ... on 1 April, 2019

Author: R.D. Dhanuka

Bench: R.D. Dhanuka

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.1088 OF 2015

Vestas Wind Technology India)
Private Limited)
298, Old Mahabalipuram Road)
Sholinganallur, Chennai - 600 119.) .. Petitioner

Versus

1. M/s.Inox Renewables Limited)
having its registered office at Survey)
No.1837 and 1834 at Moje Jetaipur)
ABS Tower, 2nd Floor, Old Padra Road)
Vadodara 390 007, Gujarat.)

(Substituted in place of
Gujarat Flurochemicals Limited)
having its registered office at Survey)
No.16/3, 26 &27, Village Ranjit Nagar)
Taluka Ghoghamba, Dist.Panchmahals)
Gujarat- 389 390.)

2. Justice K.A. Swami (Retd.))
Presiding Arbitrator)
"Sai Nivas," 16, 8th Main, 2nd Cross,)
Rajmahal Vilas Ext.,)
Bangalore- 560 080.)

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3. Justice J.K. Mehra (Retd.))
Member Arbitrator)
S-388, Greater Kailash-I,)
New Delhi - 100 048.)

4. Justice R.Balasubramanian (Retd.))
Member Arbitrator)
5, Tiger Varadhachari First Road,)
Kalashetra Colony, Besant Nagar,)
Chennai - 600 090.) .. Respondents

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Mr. Sudipto Sarkar, Senior Advocate, a/w Mr. Parthasarthy a/w Mr. Madhan Babu Mr. Pralhad Bhat, Mr. Durgesh Kulkarni, i/by M/s.Lex Firmus for the petitioner.
Mr.Iqbal Chagla, Senior Advocate a/w Ms.Meenakshi Arora, Senior Advocate, a/w Mr.Naval Aggarwal, a/w Ms.Anannya Ghosh a/w Mr. Ranjit Prakash a/w Ms.Mahima Sareen i/by Mr.Sumit Raghani for the Respondent no.1.

Along with
ARBITRATION PETITION NO.599 OF 2015

M/s.Gujarat Fluorochemicals Limited)
substituted as per the order dated 3.12.14)
by M/s. Inox Renewables Limited)
having its registered office at Survey)
No.1837 and 1834 at Moje Jetaipur)
ABS Tower, 2nd Floor, Old Padra Road)
Vadodara 390 007, Gujarat.) .. Petitioner

Versus

Vestas Wind Technology India Private)
Limited, having its registered at298,)
Old Mahabalipuram Road)
Sholinganallur, Chennai - 600 119 and)
having its office at R.S. Nos.41/1, 3,)
4A, 42/4, 6, 10, 11 and 42/SC,)
Kothapurinatham Road,)
Thiruvandarkovil, Pondicherry-605102) .. Respondent

Ms.Meenakshi Arora, Senior Advocate, a/w Mr.Naval Aggarwal, a/w Ms.Anannya Ghosh a/w Mr. Ranjit Prakash a/w Ms.Mahima Sareen i/by Mr.Sumit Raghani for the for the petitioner.

Mr. Sudipto Sarkar, Senior Advocate, a/w Mr. Parthasarthy a/w Mr. Madhan Babu,Mr. Pralhad Bhat, Mr. Durgesh Kulkarni i/by M/s. Lex Firmus for the respondent.

CORAM : R.D. DHANUKA, J.

RESERVED ON : 31st October, 2018 PRONOUNCED ON : 1st April, 2019 Judgment :-

1. By these petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"), both the parties have impugned the part of the arbitral award dated 28 th January 2015 passed by the majority of arbitrators. In so far as the Arbitration Petition No.1088 of 2015 is concerned, the Petitioner has impugned the part of the majority award allowing the part of the claims made by the respondents whereas the Petitioner in Arbitration Petition No.599 of 2015 has challenged the part of the majority award, rejecting the part of the claim made by the Petitioner in that arbitration petition.

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2. Vestas Wind Technology India, Petitioner in Arbitration Petition No.1088 of 2015 was the original Respondent whereas M/s.Inox Renewables Limited was the original Claimant in the arbitral proceedings. For the sake of convenience, parties in the later part of this judgment are referred to as per their original status in the arbitral proceedings. By consent of parties, both the petitions are heard together and are being disposed of by a common order.

3. Some time in the year 2006, M/s.Gujarat Fluorochemicals Limited evinced interest in investing in Wind Turbine Generators (WTGs) and invited offers from various WEG manufacturers. The respondents along with several other parties submitted their offers to the Claimant for supply,erection and commissioning of 14 WTGs at Gude Panchghani Village Site, Sangli District. The offer was made by an entity called NEG Mircon (India) Private Ltd. for setting up of Wind Farm Projects at the locations situated in the States of Maharashtra and Tamil Nadu. The NEG Micon was globally acquired by the respondent's global holding company i.e. Vestas Wind System As. The Respondent i.e. Vestas Wind Technology (India) Private Limited took over the final negotiation with the Claimant and executed the contracts.

4. It was the case of the Claimant that business plan consisted of setting up around 1000 MW of capacity over the next three years.

During the said period, the Claimant began the exercise of identifying an appropriate developer who could assist the Claimant in setting up Wind Farm Projects in accordance with the business plan of the claimant. The Respondent represented itself to be a part of the ppn 5 arbp-1088.15 wt 599.15dt.01.04.19.doc Respondent group which was a world leader in the wind energy business having extensive expertise and exposure in installation of WTGs across the globe.

5. It is the case of the Claimant that the Respondent further represented that it would offer "Turnkey Solutions" for Wind Farm Projects and that the Respondent group had one of the best Research and Development Centers in the world and also had widest range in terms of both technology and capacity. The Claimant received proposals from other three major Wind Farm Project developers. The Respondent also submitted to the Claimant the indicative price of the Wind Farm Project, on a per WTG basis, and a statement of Cash Flow Projections, based on its offered price and claimed electricity generation to indicate the financial performance of the Wind Farm Project set up in accordance with the offer of the respondent.

6. It is the case of the Claimant that the proposal of the Respondent was the obvious choice due to the claimed substantially higher efficiency of its WTG, projected energy generation and the attractive cash flow projections for a period of 20 years represented by the respondent. According to the claimant, the Respondent had claimed and represented that the higher generation was the result of better site selection, better micro-siting and use of the state of the art advanced technology, more efficient WTG and its vast expertise in the field of installation of WTGs worldwide. It is the case of the Claimant that though the price of WTG offered by the Respondent was the highest amongst all the offers received by the claimant, however in view ppn 6 arbp-1088.15 wt 599.15dt.01.04.19.doc of the specific representations regarding generation estimates coupled with repeated claims of being the provider of most advanced technology and having extensive R & D base worldwide, the Claimant was induced into believing that the proposal of the Respondent was the most attractive proposal vis-a-vis the proposals received from the other developers.

7. It is also the case of the Claimant that the choice of the Claimant was also influenced by the fact that the parent company of the Respondent had globally acquired 'NEG Micon.' The Respondent had also allegedly assured the Claimant that with the merger of these two world leaders, a company like the Claimant would receive the best support in terms of technology, know-how and operations. The Respondent expressed its keen interest in undertaking the implementation and execution of the Wind Farm Project on "Turnkey Basis." The site that was selected and proposed by the Respondent for the said Wind Farm Project was evaluated, selected and acquired by the Respondent at Gude-Panchgani, Taluka Shirala, District Sangli, Maharashtra on its own, based on the wind resource assessment and energy production estimate claimed to have been carried out by the Respondent itself. It is the case of the Claimant that the Respondent had repeatedly represented, persuaded and finally prevailed upon the Claimant to set up its Wind Farm Project at Gude-Panchgani site which according to the respondent, was the most ideal location to propose Wind Farm Project of the Claimant from amongst those available.

8. It is the case of the Claimant that the initial offer made by the Respondent included supply, erection and commissioning of 14 ppn 7 arbp-1088.15 wt 599.15dt.01.04.19.doc WTGs of 1.65 MW each aggregating to 23.1 MW, based on a design and technology which has an operational history of more than 4 years internationally and 2 years in India at a value of approximately Rs.155 crore. The estimated average annual generation for the Wind Farm Project was projected by the Respondent at 49.71 lakh KWh per WTG (gross) at LCS corrected to park efficiency and air density. The Respondent was to carry out the operations and maintenance of Wind Farm Project to ensure that the Wind Farm Project operates in an efficient manner on a long term. The Respondent had also

made various other suggestions in the said initial offer.

9. On 24th November 2006, the Respondent submitted its final offer setting out the details of the project involving entire scope of the work. It is the case of the Claimant that the Respondent represented to the Claimant that the estimated average annual energy generation from the Wind Farm Project shall be 49.71 lakh Kwh per WTG per annum (gross) at LCS. The Respondent also forwarded the detailed projected cash flow statement derived on the basis of the said representation of estimated generation of 49.71 lakh Kwh (gross) at LCS for a period of 20 years. It is the case of the Claimant that the said projected cash flow statement submitted by the Respondent including various other critical parameters such as capital cost, energy generation estimate, tariff for sale of power, operation and maintenance cost etc. was the most crucial and decisive factor for the Claimant to assess and determine the commercial viability of the Wind Farm Project in terms of returns on investment.

10. It is the case of Claimant that since capital cost and other ppn 8 arbp-1088.15 wt 599.15dt.01.04.19.doc parameters of generation as well the tariff for the generation were already fixed, the only factor which critically influenced the returns from the Wind Farm Project was the energy generation output. In the offer letter dated 24th November 2006, the Respondent quoted estimated average energy generation of Wind Farm at (gross) LCS as 49.71 lakh Kwh per WTG per annum. The said representation was made by the Respondent to the Claimant constituted the essential premise for the Claimant for entering into a definitive contract with the respondent. It is the case of the Claimant that the Claimant had made it very clear to the Respondent several times prior to entering into the contract for the Wind Farm Project that the Claimant was desirous of setting up Wind Farm Project only if it would provide viable returns on a long term basis and thus it was vital that the estimated average annual energy generation as represented by the Respondent was carried out properly, diligently and reliably done to ensure viable operations of the Wind Farm Project.

11. According to the claimant, the Claimant accordingly decided to enter into the contract with the Respondent for setting up of the Wind Farm Project in Gude-Panchgani, Maharashtra entailing huge investment, totally relying on the genuineness and reliability of such figures of the estimated average annual energy generation. It is the case of the Claimant that the Respondent had made specific and categorical representations regarding the estimated energy output and its global credentials and achievements, particularly its achievements in India etc. in the said offer letter dated 24th November 2006.

12. The relevant paragraph of the said offer letter is extracted ppn 9 arbp-1088.15 wt 599.15dt.01.04.19.doc as under : -

> "Estimated Generation: The estimated average annual generation (Gross) at Local Control System (LCS) is 49.71 lakhs per WEG corrected to Park Efficiency and Air Density."

13. It is the case of the Claimant that the Respondent group being the global leader in Wind Power Energy and with its credentials, the specific representations made regarding the estimated generation by the Respondent were accepted by the Claimant as 'genuine and reliable estimation' and the Claimant proceeded to execute the contracts with the Respondent relying on and included by specific representations of the respondent.

14. It is the case of the Claimant that after receiving the cash flow projections of the respondent, the Claimant carried out its financial analysis and calculated its revenue projection on the basis of average generation output given by the respondent. As per assessment of the claimant, it would have earned a revenue of around 685.73 crores over a period of twenty years, after taking into account revenues from sale of power and CDM revenues. It is the case of the Claimant that the price of WTG finally negotiated to Rs.1095 lakhs was agreed by the Claimant only on the basis that gross energy generation from the Wing Farm Project would be at or around 49.71 lakh Kwh per WTG per annum (gross) at LCS as estimated and specifically represented by the respondent.

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15. The Claimant and the Respondent entered into (a) Supply Agreement dated 4th January 2007 for the supply of 14 Wind Turbine Generators (WTG's) of 1650 KW each and the land covering an area of 100 mtrs. X 100 mtrs. for each WTG; (b) Agreement dated 6 th January 2007 for erection, installation and commissioning of 14 numbers Vestas Type V82/1650 WTG; (c) Maintenance, Service and Availability Agreement dated 8th January 2007 for 14 numbers of 1650 KW wind mills located at Gudhe-Panchgani, Sangli District, Maharashtra.

16. Clause 9.1 of the Supply Agreement provided that the estimated average annual generation (Gross) at Local Control System (LCS) is 49.71 lakhs per WEG corrected to Park Efficiency and Air Density. During the period between February and March, 2007, all the 14 WTGs at the sites were identified by it. The said Wind Farm Project was required to be interconnected with the local grid to enable the evacuation of power from the Wind Farm Project.

17. It is the case of the Claimant that relying on the financial projections made out by the Respondent on the basis of the annual energy generation estimates of the Wind Farm Project, the Claimant entered into a 'Energy Purchase Agreement' dated 18 th June 2007 for the sale of power generated from all the 14 WTGs with the Maharashtra State Electricity Distribution Company Limited (MSEDCL) with minimum wind energy obligation of 50.589 MU per annum. The tariff and other critical parameters of the EPA were as per the stipulations laid down in the tariff order of the MEC dated 24 th November 2003 for procurement of wind energy and wheeling for third party sale or self use.

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18. It is the case of the Claimant that the standard of services provided by the Respondent was not at all satisfactory and short of the good engineering practices in design, implementation and operation of such projects as well as contractual commitments. The Claimant was shocked and disappointed to

discover that the actual generation levels of the WTGs consistently fell far short of the estimated annual average generation levels of 49.71 lakh Kwh per WTG per annum (gross) at LCS projected by the respondents. The respondents sought to clarify that the monthly generation profile of any site was not uniform and it would not be correct to compare the month to month generation with the pro-rata figure derived from annual energy generation estimates. The Claimant therefore asked for the monthly generation profile for the particular Wind Farm Project based on the wind resource assessment carried out by the respondents.

19. It is the case of the Claimant that even on the basis of comparison of the figures for the full year, the total average annual generation per WTG (gross) achieved by the project of the Claimant for the entire one year from 1st April 2007 to 31st March 2008 of operation was only 27.41 lakh Kwh against the projected generation of 49.71 lakh Kwh per WTG per annum (gross) at LCS.

20. It is the case of the Claimant that day-to-day estimated annual gross generation was higher than actual annual gross generation which was 81%. The representation made by the respondents was totally ppn 12 arbp-1088.15 wt 599.15dt.01.04.19.doc unsound, misleading, erroneous and highly exaggerated and as a result thereof, the revenue earned from sale of energy during the year was only Rs.11.99 crores against the projected revenues from sale of energy of Rs.21.10 crores for the 1st year. The said shortfall resulted in a very serious concern for the Claimant having regard to the fact that the Claimant had incurred huge liabilities on account of its project, including a foreign currency loan equivalent to Rs.125 crores.

21. It is the case of the Claimant that it did not receive any satisfactory explanation from the respondents during various personal meetings and tele/video conferences except for general and vague statement. It is the case of the Claimant that the Claimant relied on and was induced by the estimations, assumptions and projections made by the Respondent as a turnkey solution provider, for determining commercial feasibility of the Wind Farm and to decide on the investments to be undertaken in the Wind Farm Project.

22. The Respondent had provided to the Claimant cash flow projection for 20 years based on the expected annual average generation level estimated by the respondent, and claimed that the same was based on the vast knowledge and technical know how the Respondent possessed in this field. It is the case of the Claimant that the Respondent was fully aware that it was not possible for the Claimant to estimate the energy generation itself and develop any business model whatsoever without the expected annual average generation indicated by the respondent. The representation of the Respondent regarding the expected annual average generation of Wind Farm Project was therefore the most important and crucial factor for determining the feasibility and viability of the Wind ppn 13 arbp-1088.15 wt 599.15dt.01.04.19.doc Farm Project.

23. It is the case of the Claimant that the Respondent had represented that it had carried out the wind resource analysis for the site, based on its world class technical know how and knowledge and based on the same, had evaluated the site, and finding it viable, had acquired the site for development of the Wind Farm Projects. The Respondent had also represented that it had carried out micro-siting exercise, and thereafter had erected and commissioned the Wind Farm Project and

was thereafter operating and maintaining the said Wind Farm Project. The Respondent represented that it had the experience and expertise at its disposal to make the generation estimate.

24. The Respondent vide its e-mail dated 14th May, 2007 claimed that it had carried out estimation of generation in a wind park by factoring in effective losses of 22% while other players in the industry considered only 7% losses so as to make the IRR figure more attractive on paper. The Respondent sought to convey that its generation estimates were safe conservative estimates. The Respondent proposed that the Claimant should engage M/s.Garrad Hassan and Partners Limited, an internationally reputed wind energy consultant to validate the projections. It was strongly recommended by the Respondent that the said consultants were having technical skill and experience in the field. The Claimant received the said report of the said M/s.Garrad Hassan and Partners Limited titled 'Assessment of Energy Production of the operating Gude- Panchgani Wind Farm' dated 28th September, 2007.

25. It is the case of the Claimant that it was sought to learn that ppn 14 arbp-1088.15 wt 599.15dt.01.04.19.doc the generation estimates of Respondent were overstated by around 34%. The said GH report confirmed the apprehension of the Claimant in as much as it categorically stated in its report that the long term energy output from the project was likely to be 37.12 lakh KwH per WTG per annum instead of the projected estimate of 49.71 lakh Kwh per WTG per annum (gross) at LCS. In the said report, the said GH also pointed out several other flaws in the design of the Wind Farm Project by the respondent.

26. It is the case of the Claimant that the said report indicates that the data relied upon by the Respondent and generation estimates made on the basis of such data were completely misleading, erroneous and inaccurate, and that the expected level of generation was subsequently lower than what had been projected by the respondent. It is the case of the Claimant that such energy output projections was clearly with a fraudulent intention and was in total defiance of the reasonable expectation and skill expected from an internationally reputed group to which the Respondent claimed to belong. The Claimant forwarded the said report to the Respondent along with its letter dated 5 th October, 2007. The Claimant made it clear that because of the then experience of the Claimant in respect of the said project, it had to put on hold its programme for long term investment in establishing around 1000 MW capacity projects.

27. The Respondent however tried to justify energy generation estimates represented by the Respondent by producing a Performance Evaluation Report dated 26th October,2007. It is the case of the Claimant that the said report obtained by the Respondent dated 26th October,2007 ppn 15 arbp-1088.15 wt 599.15dt.01.04.19.doc was clearly an afterthought on the part of the Respondent wherein an attempt to create a paper trail was made so as to wriggle out of its responsibilities and liabilities. Vide its response dated 22 nd November, 2007, the respondent, re-affirmed its findings that the energy generation estimates provided by the Respondent were inflated by almost 34%.

28. It is the case of the Claimant that the said response of the consultant M/s.Garrad Hassan and Partners Limited reinforced the apprehension of the Claimant that right from the initial stages, the Respondent had worked to a design and had made reckless fraudulent representation to the

Claimant with a view to induce Claimant to enter into a contract with the Respondent for the Wind Farm Project.

29. The Claimant thereafter decided to get an independent expert opinion on the energy generation estimates and consulted another internationally well reputed wind energy consultant 'Tripod Wind Energy ApS, consulting Engineers' and assigned the work of independently verifying the energy generation estimates of the respondent. It is the case of the Claimant that the Claimant supplied the same set of data, which was made available by the Respondent to the Claimant for submission to M/s.Garrad Hassan and Partners Limited to Tripod Wind Energy ApS, consulting Engineers.

30. It is the case of the Claimant that the said report further re- confirmed the fact that the energy generation estimates given by the Respondent for the Wind Farm Project were grossly overstated. The average annual energy generation level projected by Tripod per WTG was very close to the average annual energy generation level projected by ppn 16 arbp-1088.15 wt 599.15dt.01.04.19.doc M/s.Garrad Hassan and Partners Limited. It is the case of the Claimant that the said Tripod report not only re-confirmed the stand of Claimant and M/s.Garrad Hassan and Partners Limited but also confirmed the fact that there were glaring discrepancies in the calculation of the average annual energy generation estimates by the respondent.

31. On 4th December, 2007, the Claimant issued a notice to the Respondent alleging various material breaches and fraudulent misrepresentations and demanded damages from the respondent. By letter dated 3rd January, 2008, the Respondent replied to the said notice dated 4th December,2007 and denied its liability on various grounds. In the meanwhile the Claimant invoked the arbitration agreement. The said reply dated 4th December,2007 of the Respondent was after invoking the arbitration agreement by the claimant. The Claimant vide its letter dated 12th January,2008 reiterated its stand already taken in the notice dated 4th December,2007 and denied the allegations made by the respondent.

32. On 2nd June, 2008, the Claimant filed a statement of claim before the arbitral tribunal. The Claimant claimed refund of the entire contract consideration with interest including the compensation period, the time and the expenditure wasted by the Claimant under Head 'A'. In 2nd paragraph of the Heads of Claim, the Claimant stated that the Claimant was entitled to recession of the contracts and to be put back in position it was, before the agreements were executed. In 3 rd paragraph of Heads of Claim under claim 'A', the Claimant urged that the Claimant was entitled for the compensation towards the huge valuable time and recovery of expenditure wasted in reliance of the contract. The Claimant quantified the claim at Rs.200,40,09,750/- i.e. in three parts (A) refund of ppn 17 arbp-1088.15 wt 599.15dt.01.04.19.doc the consideration paid by the Claimant to the Respondent in the sum of Rs.154,46,19,305/-, (b) interest at the rate of 24% per annum Rs.34,35,24,856/- and (c) compensation towards the time and expenditure wasted on the contract Rs.11,58,65,589/-. The said calculation was made only upto 30th May, 2008. The Claimant sought leave of the arbitral tribunal to submit recalculated figure as and when directed to do so.

33. Under Head 'B', the Claimant made alternate claim for damages alleged to have been suffered by him due to fraudulent and reckless grossly negligent misrepresentations made by the Respondent as

may be assessed by the arbitral tribunal on the basis of the material on record and evidence led by the claimant. It was alleged that the said loss was likely to keep resulting in colossal recurring loss of revenue to the Claimant even in the future for 20 years. It was contended that the Respondent was liable to pay the compensation to the Claimant for the loss suffered by it due to the under performance of the Wind Farm Project set up by the Respondent and huge capital investment being locked up for 20 years. The Claimant craved leave to lead appropriate evidence for assessment of such loss/damages. The Claimant has also prayed for the legal cost.

34. On 27th July, 2008, the Respondent filed a counter statement before the arbitral tribunal denying the claims made by the claimant. It was contended by the Respondent that the project had already been completed and handed over to the Claimant and that the Claimant had unconditionally accepted the performance by taking over the wind farm and it was not entitled to rescind the contract and seek the wheel to be put ppn 18 arbp-1088.15 wt 599.15dt.01.04.19.doc back in the position prior to the agreement. The Claimant filed rejoinder to the said claimant's statement filed by the Respondent on 11 th September, 2006. Both the parties led oral evidence before the arbitral tribunal and also filed written submissions before the arbitral tribunal.

35. Two members of the arbitral tribunal i.e. Shri Justice J.K.Mehra (Retd) and Shri Justice K.A. Swami (Retd) rendered a majority award on 28th January, 2015 allowing only part of the claims made by the claimants whereas Shri Justice R.Balasubramanian, a former Judge gave a descending award. The majority award has been impugned by the Respondent in this Arbitration Petition No.1088 of 2015, allowing part of the award, allowing part of the claims of the claimants.

36. Insofar as Arbitration Petition No.599 of 2015 is concerned, the Claimant has filed the said arbitration petition inter alia impugning the part of the majority award by which part of the claims made by the Claimant was disallowed.

Submissions of Shri Sudipto Sarkar, learned Senior Counsel for the respondent.

37. Learned Senior Counsel for the Petitioner (original respondent) invited my attention to some of the annexures to the arbitration petition and also to the compilation of documents, some of the paragraphs from the pleadings filed by both the parties, oral evidence led by the parties and also some of the findings rendered by the arbitral ppn 19 arbp-1088.15 wt 599.15dt.01.04.19.doc tribunal. He submits that on 9 th July, 2006 his client and also NEG Micon had submitted two identical offers one each for Tamil Nadu and Maharashtra containing various disclaimers including the fact that long term wind data was not available, seasonal variations between different years had not been taken into account. There could be thus variations in generation from year to year, the annual general may vary within the wind farm for each WEG.

38. On 28th July, 2006, the Claimant sent an email to the Respondent demanding guarantees for generation. On 1st August, 2006, the Respondent sent an email to the Claimant declining to give any generation guarantee. On 3rd August, 2006, the Claimant sent an email to the Respondent reiterating its demand for guarantee generation. On 5 th August, 2006, the Claimant sent an email to the Respondent once again demanding guarantee generation and stipulating penalties for breach

of guarantee.

39. On 7th August, 2006, the Respondent replied to the email dated 5th August, 2006 and informed the Claimant that time frame for supply by September was not possible and it could be possible only by December. The Respondent could not guarantee any shortfall on account of lower wind. The penalty suggested by the Claimant was not accepted and the Respondent did not guarantee the wind. On 7 th August, 2006, the Claimant replied that since the supply by September was not possible and since the gap in expectations was too high, the Claimant called off on going negotiations.

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40. On 24th November, 2006, the Respondent made final offer which according to the Respondent included that no long term data for wind was available. The Respondent had not taken into account seasonal variation between different years and thus there would be variation from year to year estimated generation would be 44.86 KwH per WTG after applying various correction factors. The said figure did not include line loss of 4% (assumed but not guaranteed) and also did not constitute any guarantee. It was made clear by the Respondent that various benefits which would accrue to the Claimant by setting up the wind farm were set out in the offer.

41. It is submitted by the learned Senior Counsel that in spite of various qualifications and disclaimers made by the respondent, the Claimant vide its letter dated 27th November, 2006 informed the Respondent of their desire to proceed with the contract. On 29 th November, 2006, the Claimant sent an email to the Respondent fixing a meeting for reviewing the offer along with local and technical experts and requested to review the draft supply agreement before the proposed meeting. On 2nd December, 2006, a meeting between the Claimant and the Respondent came to be held which was also attended by the technical expert of the Claimant and the legal experts of the respondent. It is the case of the Respondent that in the said meeting, the contract between the parties was discussed clause by clause. The Claimant did not raise any issue relating to power generation guarantee.

42. It is the case of the Respondent that on 5 th December, 2006 and on 6th December, 2006, Mr.C.M. Jain, the technical expert of the ppn 21 arbp-1088.15 wt 599.15dt.01.04.19.doc Claimant demanded various technical details and also missing page no.9 of production estimate dated 19th September, 2006. It is the case of the Respondent that on 6th December, 2006, the Respondent refused to hand over any information as sought for by the Claimant including missing page no.9.

43. On 23rd December, 2006, the Claimant addressed a letter to their wind energy and legal experts stating that the draft supply contract had to be reviewed in its entirety to their satisfaction. On 4 th January, 2007, the Claimant and the Respondent entered into a supply agreement. Learned Senior Counsel placed reliance on paragraphs 26, 27, 27.1, 30, 31, 31.3 and 31.4 of the arbitral award and submits that those paragraphs of the arbitral award will clearly indicate that the Claimant proceeded to enter into the supply agreement in spite of refusal by the Respondent to hand over wind data information sought for by their expert. The supply agreement had been entered into after

scrutinizing its clause by clause. The considerable changes had been made in the supply agreement as compared to the final offer. The supply agreement was discussed threadbare and was entered into by both parties with equal bargaining power as a bilateral document with full knowledge of all consequences.

44. It is submitted that the impugned award would also indicate that once a well informed party enters into a commercial contract after due negotiations, the said party is bound by the terms of the contract and cannot seek the help of Court to wriggle out of the consequences. The terms of the commercial contract must be given full effect too. Primacy must be given to the express clauses in the document and only ambiguity can be resolved by resorting to the "business common sense approach". It ppn 22 arbp-1088.15 wt 599.15dt.01.04.19.doc is submitted that the business common sense cannot be used to ignore the express terms of the contract, especially when the surrounding circumstances at the time of entering into the contract clearly establishes that the Claimant had voluntarily assumed the risk of the terms with the knowledge that the Respondent did not guarantee regarding generation of wind energy. There was an inherent uncertainty in wind generation.

45. Learned Senior Counsel for the Respondent placed reliance on an email dated 7th March, 2007 from the Respondent to the Claimant suggesting M/s.Garrage Hassain and presently as an independent consultant for validating generation figures in view of the fact that the Claimant was unhappy with the energy generation. ON 28 th September, 2007, the said consultant submitted a report. The Respondent also placed reliance on the report prepared by RISO in the month of February, 2009.

46. Learned Senior Counsel placed reliance on clauses 7.1, 8, 9.2, 9.3 and 10 of the supply agreement entered into between the parties. He submits that the Respondent had only given an estimate to the Claimant and had not given any guarantee. The liability, if any, of the Respondent was very limited. The Respondent was not liable to pay any consequential losses, if any, to the claimant. He submits that the Respondent had not given any guarantee to the claimant. The Claimant had accepted the terms with open eyes.

47. Learned Senior Counsel invited my attention to various portions of the statement of claim filed by the Claimant including the heads of claim. He submits that the prayer for refund of various amounts ppn 23 arbp-1088.15 wt 599.15dt.01.04.19.doc in the statement of claim was not pressed by the claimant. The arbitral tribunal has awarded the claim for damages. He submits that the arbitral tribunal did not refer to section 19 of the Indian Contract Act, 1872 in the impugned award. He also placed reliance on paragraphs 51.1 and 53 of the majority award. He invited my attention to the written arguments filed by the Claimant before the arbitrator tribunal and would submit that even in the written arguments filed by the claimant, there was no reference to section 19 of the Indian Contract Act, 1872. In paragraph 64 of the written arguments, the Claimant had made the submissions in respect of its claim for damages.

48. It is submitted that the basis of the claim for damages was neither pleaded nor argued before the arbitral tribunal by the claimant. The arbitral tribunal has, however, awarded damages under second part of section 19 of the Indian Contract Act, 1872. In support of this submission, he invited

my attention to paragraphs 53.1 and 55 of the majority award. He submits that no opportunity was at all given by the arbitral tribunal to the Respondent before considering the effect of section 19 of the Indian Contract Act, 1872. Learned Senior Counsel invited my attention to some of the portions of the oral evidence led by the claimant.

49. It is submitted by the learned Senior Counsel that although the arbitral tribunal had in paragraph 51.1 of the majority award had clearly recorded that the Claimant had given up claim (A), and though even according to the arbitral tribunal, the Claimant had alleged a fraud and misrepresentation insofar as the alleged claim is concerned without any arguments advanced on the second part of section 19 of the Indian ppn 24 arbp-1088.15 wt 599.15dt.01.04.19.doc Contract Act, 1872, the arbitral tribunal in paragraphs 51.1, 53, 53.1, 54 and 54.1 of the majority award has awarded the alternate claim made by the Claimant in violation of principles of natural justice. The arbitral award thus lacked a judicial approach. The Respondent was not given any opportunity to address the case under section 19 of the Indian Contract Act, 1872 at all.

50. It is submitted by the learned Senior Counsel that the written submissions filed by the Respondent before the arbitral tribunal would clearly indicate that it was specially contended by the Respondent that the Claimant had not made any legal basis of its alternate claim cleared even at the stage of final arguments and that alternate claim was being treated as the claim of contractual damages. He submits that the arbitral tribunal had directed both the parties to submit the written submission simultaneously. Only in its written arguments, the Claimant had come out with a case that the alternate claim was on the basis of Tort of deceit. In support of this submission the learned Senior Counsel relied upon above referred paragraphs of the majority award and would submit that those paragraphs would also clearly indicate that the damages were sought for by the Claimant under the head of "loss suffered" and not on the basis stated in section 19 of the Indian Contract Act, 1872.

51. Learned Senior Counsel placed reliance on paragraphs 27 to 32 of the judgment of the Hon'ble Supreme Court in case of Associate Builders vs. Delhi Development Authority, (2015) 3 SCC 49 and would submit that since the majority award is in gross violation of the principles of natural justice and lacks judicial approach, on that ground itself, the majority award deserves to be quashed and set aside.

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52. It is submitted by the learned Senior Counsel that the law does not permit any party to claim damages on the basis of performance under section 19 of the Indian Contract Act, 1872 once a case of the party is that the contract was terminated. In this case, the contract was not terminated by the Claimant or by the respondent. Learned Senior Counsel placed reliance on section 27 of the Specific Relief Act, 1963 and would submit that since the Claimant had applied for rescission of contract, the second part of section 19 of the Indian Contract Act, 1872 could not have been invoked by the claimant.

53. Learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Prem Raj vs. D.L.F. & Construction Private Limited, AIR 1968, SC 1355 and more particularly paragraph 4. He also placed reliance on section 35 of the Specific Relief Act, 1963 and paragraph 45.1 of the majority award and would submit that there is neither any provision in section 35 of the Specific Relief Act, 1963 nor any other section of the said Act permitting a party to sue for rescission of the agreement and in the alternate for specific performance. He also placed reliance on a passage from "Fry of Specific Performance, 6th Edition" referred in the judgment of the Hon'ble Supreme Court in the aforesaid judgment.

54. It is submitted by the learned Senior Counsel that though election of the relief as was at the stage of filing the proceedings cannot be permitted to be made subsequently and that also without rendering an opportunity to the respondent. No evidence was led by either party on the claim for damages. He submits that the claim for damages made by the Claimant was on the basis of rescission of contract. The Claimant did not ppn 26 arbp-1088.15 wt 599.15dt.01.04.19.doc rescind the contract but only made a prayer in that regard in the statement of claim itself.

55. Learned Senior Counsel invited my attention to the minutes of the meeting of the arbitral tribunal dated 17 th December, 2011 on page 44 of Volume-II clearly recording that on 18th December, 2011 the Claimant had not pressed the reliefs in terms of prayer clause (A). He submits that the Respondent thus could not have dealt with any submissions in the rejoinder on applicability of section 19 of the Indian Contract Act, 1872 at the stage of sur-rejoinder. He submits that in any event even if section 19 of the Indian Contract Act, 1872 would have been attracted, for the purpose of considering and allowing the claim for damages, the principles of section 73 of the Indian Contract Act, 1872 would still apply.

56. Learned Senior Counsel placed reliance on the judgment delivered by House of Lords in case of Johnson & Anr. vs. Agnew (1980) A.C. 367 and in particular at page 298 in support of the submission that alternate claim could not be pressed at the stage of rejoinder arguments by the claimant.

57. Learned Senior Counsel distinguished the judgment of the Queen's Bench reported in (1976) QB 801 which was relied upon by the Claimant before the arbitral tribunal. He also placed reliance on the statement of claim filed by the Claimant and would submit that in the facts and circumstances of this case, reliance placed by the arbitral tribunal in the majority award on the judgment of the Queen's Bench referred to aforesaid was totally misplaced.

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58. Learned Senior Counsel invited my attention to various

portions of the statement of claim filed by the Claimant and would submit that the Claimant had not mentioned any figure in respect of the claim for damages and the same was totally without any quantification. The arbitral tribunal had considered the average without any basis and contrary to law. He invited my attention to the findings of the arbitral tribunal recorded in paragraph 55.4 and

also paragraphs 34.7.4, 34.9, 34.11.2, 34.11.3, 35.7, 35.15, 36 and 55.5 of the majority award and would submit that various findings recorded therein is based on no evidence and shows perversity.

59. It is submitted that reliance placed by the arbitral tribunal in paragraph 49.8 of the majority award on the judgment of the Court of Appeal in case of Esso Petroleum Company Limited vs. Mardon (1976), 1 Q.B. (801) (Court of Appeal) on the issue of liability was totally misplaced. He submits that in the said judgment it was specifically held that a party cannot be compensated for the loss of bargain and has to be placed in the position as if he had performed the contract. No evidence at all was led by the Claimant on the measure of damages under section 19 of the Indian Contract Act, 1872 which was to be concluded on the basis of what would have been the position if the contract was performed.

60. Learned Senior Counsel invited my attention to paragraphs 34.11.2 and 34.11.3 of the majority award and would submit that the arbitrator tribunal could not have used the reports of both the experts, to arrive at any definite conclusion. Though the arbitral tribunal in paragraphs 35.7, 35.10, 35.15, 35.23 and 35.24 has held that the expert examined by the Claimant was not an independent witness, the arbitral ppn 28 arbp-1088.15 wt 599.15dt.01.04.19.doc tribunal still considered the said opinion of the expert of the Claimant though there was no expert evidence on the basis of which the arbitral tribunal could come to any conclusion. He submits that the findings thus rendered by the arbitral tribunal in the majority award is based on no evidence and are ex-facie perverse.

61. It is submitted by the learned Senior Counsel that though the Respondent had not given any guarantee to the Claimant and had made it clear in various correspondence exchanged between the parties before execution of formal contract and also in the meetings held between the parties, the arbitral tribunal erroneously proceeded on the premise that the Respondent had issued a guarantee in favour of the Claimant for a particular generation of the guaranteed energy. The award shows patent illegality on this ground. In support of this submission, learned Senior Counsel placed reliance on paragraphs 46.3, 46.4, 46.5.1, 46.6 and 48.7 of the majority award. He also relied upon clauses 9.1 to 9.3 of the supply agreement and would submit that the last line of clause 9.3 could not become repugnant to the earlier portion of the said clause or even clause 9.1. Clause 9.3 had elaborated clause 9.1 and was part of the whole system. He led emphasis on clauses 9.3 (b) to (d) of the supply contract.

62. Learned Senior Counsel placed reliance on clauses 9 and 10 of the supply agreement and condition no.81 of Orgalime S.E. 94 of supply contract and also various paragraphs i.e. from 46 to 48.7 of the majority award and would submit that the arbitral tribunal has erroneously held that those provisions were un-workable and inapplicable in cases of damages or fraud. The arbitral tribunal has read estimate energy as guaranteed energy. The arbitral tribunal totally ignored the said ppn 29 arbp-1088.15 wt 599.15dt.01.04.19.doc provision which expressly disclaimed the guarantee. The arbitral tribunal has erroneously held that the exemption clause would not operate in case of damages, fraud. The arbitral tribunal thus could not have ignored any part of the contract as otiose.

63. Learned Senior Counsel placed reliance on paragraph 46.4 of the majority award and would submit that the arbitral tribunal has erroneously applied the principles that the earlier clauses of contract prevail over latter clause without appreciating the fact that supply contract entered into between the parties was entered into after extensive negotiations of clause by clause and the parties had entered into supply contract with each other at arms length.

64. Learned Senior Counsel placed reliance on paragraph 35.2 of the arbitral award and would submit that in this case, the Claimant had specifically requested the arbitral tribunal to rescind the contract and thus had forfeited its right of performance of contract and to claim damages under section 19 of the Indian Contract Act, 1872. The arbitral tribunal has however, erroneously held that the Claimant was entitled to claim damages under section 19 and had not elected to either rescind the contract or to sue the performance and had requested the arbitral tribunal to do so. He submits that the award thus shows perversity and patent illegality on the basis of it.

65. Learned Senior Counsel for the Respondent invited my attention to paragraph 39.11(xiii) of the majority award and would submit that the finding of the arbitral tribunal that the Respondent had duty to ppn 30 arbp-1088.15 wt 599.15dt.01.04.19.doc disclose all the information on the basis that there was complete reliance on the Respondent by the Claimant shows perversity and irrationality in the impugned award. He submits that the findings of the arbitral tribunal are contrary to the principles laid down by the Hon'ble Supreme Court in case of Associate Builders (supra) and more particularly paragraphs 31 and 42 thereof . He submits that the arbitral tribunal has totally failed to appreciate that none of the actual statements made by the Respondent at the stage of negotiations of contract or even in the supply contract entered into between the parties were false. The finding of the arbitral tribunal that the Respondent failed to provide the information which would amount to misrepresentation is ex-facie perverse and irrational.

66. Learned Senior Counsel placed reliance on paragraph 32.1.5 of the majority award and would submit that though the Claimant had not examined Mr.Richard Whiting, who had allegedly checked the report dated 28th September, 2007 submitted by M/s.Garrage Hassain, the arbitral tribunal considered the said report dated 28th September, 2007 erroneously and has awarded the claim for damages also based on the said report, which was not substantiated or proved. Learned Senior Counsel placed reliance on the judgment delivered by Lord Clarke in case of Rainy Sky S.A. & Ors. vs. Kookmin Bank, (2011) UKSC 50 and more particularly paragraph 16 on the issue as to how a contract has to be interpreted by a Court or the arbitral tribunal.

67. Learned Senior Counsel strongly placed reliance on clause 18 of the supply contract in support of his submission that the said clause clearly provided that the said contract superseded all the past correspondence. He also placed reliance on the judgment of the Hon'ble ppn 31 arbp-1088.15 wt 599.15dt.01.04.19.doc Supreme Court in case of Nabha Power Limited (NPL) vs. Punjab State Power Corporation Limited (PSPCL) & Anr., (2018) 11 SCC 508 and in particular paragraph 49 in support of the submission that since the term of the supply contract was explicit, principles of interpretation so as to give business efficacy to the contract cannot apply with regard to the intention of parties.

68. Learned Senior Counsel placed reliance on the judgment of the Queen's Bench Division Commercial Court delivered on 11th June, 2010 in case of Raiffeisen Zentralbank Osterreich AG vs. The Royal Bank of Scotland Plc (2010) EWHC 1392 (Comm) and in particular page 21 in support of the submission that the arbitral tribunal ought to have read the entire clause 9 together along with other provisions of the supply contact and could not have dealt with the said clause in piece meal and could not have declared clause 9.3 thereof as void. Clause 9.1 provided for estimate, clause 9.2 provided for computation. The arbitral tribunal ought to have examined clause 9 based on the principles laid down by the Queen's Bench Division Commercial Court in the aforesaid judgment. It is submitted by the learned Senior Counsel that several judgments relied upon by the Respondent before the arbitral tribunal have not been been even considered in the impugned award. Learned Senior Counsel placed reliance on the judgment of the Court of Appeal in case of Oscar Chess Ltd. vs. Williams (1957) 1 WLR 370 and in particular relevant paragraphs at pages 373 and 375.

69. Learned Senior Counsel invited my attention to the finding of the arbitral tribunal in paragraphs 49.5 and 49.6 of the majority award dealing with issue nos.4 and 5 and would submit that the arbitral tribunal ppn 32 arbp-1088.15 wt 599.15dt.01.04.19.doc had excluded the portion of clause 9.3 of the supply agreement executed by the parties. He also invited my attention to the finding of the arbitral tribunal on issue no.6 at pages 376 and 397 of the majority award. He also placed reliance on paragraphs 46.3, 46.5.1 and 46.5.2 of the majority award in support of the submission that the arbitral tribunal has relied upon part of clause 9.3 in those paragraphs and at the same time has nullified another part of clause 9.3 in the impugned award which is not permissible and shows perversity. The arbitral tribunal did not site any provision of law empowering the arbitral tribunal to declare any part of the contract and more particularly clause 9.3 in this case as invalid.

70. Learned Senior Counsel placed reliance on clause 71 of the supply agreement and would submit that clause 9.3 of the supply contract could not be clubbed with clause 71 and clause 10 of the supply contract. Clause 9.3 qualify clauses 9.1 and 9.2 and thus could not be repugnant to clauses 9.1 and 9.2. It is submitted that the correspondence exchanged between the parties clearly indicated that the Claimant had demanded guaranty from the Respondent which was refused by the Respondent specifically.

71. Learned Senior Counsel distinguished the judgment of the Privy Council in case of Forbes vs. Git & Ors. (1921) SCC OnLine PC 102 which was relied upon by the Claimant and considered by the arbitral tribunal on the ground that the clauses under consideration of the Privy Council in the said judgment were totally different. Learned Senior Counsel distinguished the judgment of the Supreme Court in case of Radha Sundar Dutta vs. Mohd. Jahadur Rahim & Ors., AIR 1959 SC 24 which was relied upon by the Claimant and followed by the arbitral ppn 33 arbp-1088.15 wt 599.15dt.01.04.19.doc tribunal on the ground that clause 9.3 in this case is not an independent clause but was part of clauses 9.1 and 9.2 which clauses were totally different than the clause under consideration of the Hon'ble Supreme Court in the said judgment.

72. Learned Senior Counsel for the Respondent distinguished the judgment of the Hon'ble Supreme Court in case of Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravardan, AIR 1987 SC 1184 relied upon by the Claimant and was considered by the arbitral tribunalon the ground that the facts before

the Hon'ble Supreme Court in the said judgment were totally different. Learned Senior Counsel distinguished the judgment of the Hon'ble Supreme Court in case of B.V. Nagaraju vs. Oriental Insurance Co. Ltd., Divisional Officer, Hassan, (1996) 4 SCC 647 which was referred to and relied upon by the Claimant and was considered by the arbitral tribunal on the ground that the principles of element of social legislation has to be applied differently in commercial contract. Those principles cannot be extended to the commercial contract. In that case, the Hon'ble Supreme Court had considered a clause in an insurance policy. He submits that the principles of reading down of any part of contract cannot apply to a commercial contract.

73. Learned Senior Counsel distinguished the judgment of the Westlaw India in case of 1462 Schneider & Anr. vs. Health (1813) 3 Campbell 505 on the ground that the facts considered by that Court were totally different than the facts before the arbitral tribunal. In that case the sale was effected by description of the property. Learned Senior Counsel distinguished the judgment of the Queen's Bench in case of Curtis vs. Chemical leaning & Dyeing Co. 1 KB at page 80 5 in support of his ppn 34 arbp-1088.15 wt 599.15dt.01.04.19.doc submission that the said judgment relied upon by the arbitral tribunal was totally irrelevant. In the said judgment, the effect of the printed clause in a receipt was considered. He submits that the cases relating to exemption does not apply to clause 9.3. Clauses 9.1 to 9.3 of the supply agreement provided for different obligation of the parties.

74. Learned Senior Counsel for the Respondent distinguished the judgment of the Kerala High court in case of M. Alavi & Anr. vs. State, AIR 1960 Ker. 94 and would submit that the said judgment relied upon by the arbitral tribunal in paragraph 49.11 of the impugned award was based on estimate and not based on a guarantee. He invited my attention to paragraphs 8, 9 and 12 to 14 of the said judgment and would submit that the said judgment can not assist the case of the Claimant at all.

75. Learned Senior Counsel placed reliance on the judgment of the Chancery Division in case of Mills vs. United Counties Bank Limited (1910) 1 Ch. 281 in support of the submission that in that case, there was express indemnity. Learned Senior Counsel for the Respondent placed reliance on the judgment of the Hon'ble Supreme Court in case of Rajasthan State Mines & Minerals Ltd. vs. Eastern Engineering Enterprises & Anr. (1999) 9 SCC 283 and in particular paragraph 44(h) and (i) in support of the submission that the arbitral tribunal cannot disregard the terms of reference or terms of contract and cannot act arbitrarily, irrationally, capriciously or independently of the contract.

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76. Learned Senior Counsel for the Respondent placed reliance on the judgment of the Hon'ble Supreme court in case of Security Printing & Minting Corporation of India Limited & Anr. vs. Gandhi Industrial Corporation, (2007) 13 SCC 236 and in particular paragraphs 14 and 16 thereof in support of the submission that the written contract entered into between the parties is binding and not the earlier offer and correspondence exchanged between the parties which would not be relevant after execution of a written contract.

77. Learned Senior Counsel for the Respondent placed reliance on the judgment of the House of Lords in case of Photo Production Ltd. vs. Securicor Transport Ltd. (1980) A.C. 827 (House of Lords) and in particular relevant paragraphs at pages 839 to 843 and 848 to 852 and would submit that the parties were free to agree what would be their obligation and after such agreement is arrived at, could not read anything not provided in the contract. He submits that though this judgment was cited by the respondent, the arbitral tribunal did not consider these judgments.

78. Insofar as the appointment of M/s.Power and Energy Consultants by the Claimant is concerned, it is submitted by the learned Senior Counsel that the finding of the arbitral tribunal that in absence of any other material available, it would not be possible to hold that Mr.C.M. Jain of M/s.Power and Energy Consultants was an expert in wind and bound by wind energy much less with reference to Gude Panchgani Wind Farm Site is concerned, is totally perverse. Learned Senior Counsel relied upon the findings rendered in the dissenting award at page 455 of the arbitration petition. He submits that since the ppn 36 arbp-1088.15 wt 599.15dt.01.04.19.doc Claimant herein was advised by the consultants, the question of the Respondent committing any fraud or misrepresentation upon the Claimant did not arise.

79. Learned Senior Counsel invited my attention to the finding rendered by the arbitral tribunal in paragraph 39.11 of the majority award and would submit that the finding rendered by the arbitral tribunal on the issue of misrepresentation, concealment and suppression of facts against the Respondent are contrary to the evidence on record. The arbitral tribunal has erroneously considered the letter of offer and not the concluded contract between the parties. Learned Senior Counsel placed reliance on section 17 of the Indian Contract Act, 1872 and more particularly the explanation to the definition of "fraud" and would submit that there was no silence on the part of the respondent. The Respondent had all through out refused to give all the details sought by the Claimant for various reasons. He relied upon the illustration (A) to section 17 of the Indian Contract Act, 1872.

80. Insofar as the issue whether section 18 of the Indian Contact Act, 1872 was at all applicable to the facts of this case or not is concerned, it is submitted that no case was made out by the Claimant under section 18 of the Indian Contract Act, 1872. The conditions thereof were not at all satisfied by the claimant. Learned Senior Counsel placed reliance on the finding rendered by the arbitral tribunal in paragraph 39.11(xiii)(d) of the majority award and would submit that the finding of the arbitral tribunal that both the parties were not equals in the field of wind energy is also perverse. The Claimant had already engaged several advisors and thus could not contend that the parties were not equals in the ppn 37 arbp-1088.15 wt 599.15dt.01.04.19.doc field of wind energy. The Respondent had sold the entire lot to the claimant. The finding of the arbitral tribunal that there was complete silence on the part of the Respondent is also ex-facie perverse.

81. Learned Senior Counsel placed reliance on the judgment of the Court of Queen's Bench in case of Smith vs. Hughes, Vol. VI 597 and more particularly at page 606 and would submit that since in this case the Respondent had categorically refused to provide further information and also to furnish the guarantee to the claimant, the arbitral tribunal could not have held that the Respondent was responsible and could not have held that the Respondent had committed any breach of the

provisions of the Indian Contract Act, 1872. Learned Senior Counsel invited my attention to paragraph 39.11(x) of the majority award and would submit that various findings rendered by the arbitral tribunal on the "case flow statement" is totally perverse.

82. It is submitted that since the Claimant was fully aware of the fact that the Respondent had not furnished any guarantee and had specifically refused to furnish any guarantee, there was no question of any fraud upon the claimant. It was for the Claimant to decide whether to enter into a contract with the Respondent or not though the Respondent had clearly refused to furnish further information or to furnish any guarantee in favour of the claimant. He submits that the arbitral tribunal has applied the principles of insurance contract which principles are not at all applicable to the commercial contract. Under the contract of indemnity, the party who issues such indemnity has right to disclose.

83. Learned Senior Counsel for the Respondent distinguished ppn 38 arbp-1088.15 wt 599.15dt.01.04.19.doc the judgment of the Hon'ble Supreme Court in case of Mithoolal Nayak vs. Life Insurance Corporation of India, AIR 1962 SC 814 and would submit that the said judgment delivered by the Hon'ble Supreme Court was based on the interpretation of the insurance policy. The conditions considered by the Hon'ble Supreme Court in the said judgment were totally different with the conditions contained in this case. The principles laid down by the Hon'ble Supreme Court in the said judgment have no bearing on the commercial contract. Learned Senior Counsel placed reliance on a passage from Chitty on contract and would submit that in this case the Claimant had specifically given up its claim for rescission and had prayed for damages based on the breach of contract.

84. It is submitted that if the Claimant would have elected to claim damages and would have given up prayer (A) of the statement of claim at the thresh-hold, the Respondent could have decided to lead oral evidence on the issue of damages and breaches. Various submissions based on facts cannot be allowed to be urged before this Court for the first time while opposing the petition under section 34 of the Arbitration & Conciliation Act, 1996 which submissions were not advanced before the arbitral tribunal. The arbitral tribunal at their own have decided the claim by invoking section 19 of the Indian Contract Act, 1872 which is not permissible.

85. Learned Senior Counsel placed reliance on the judgment of this Court in case of Hemant Bhimrao Kalghatgi vs. Gururao Swamirao Kulkarni & Anr. (1943) ILR Bombay 55 and more particularly relevant pages at pages 67 to 70 in support of the submission that if a party has claimed inconsistent rights, he must elect which of them he is going to ppn 39 arbp-1088.15 wt 599.15dt.01.04.19.doc rely and having elected one right he is not allowed to retract his election. Learned Senior Counsel for the Respondent placed reliance on the judgment of the Madras High Court in case of R. Samudra Vijayam Chettiar vs. Srinivasa Alwar & Ors., (1969) L.W. 62 in support of the submission that if the contract survives for both the parties, both the parties have to perform their part of contract.

86. Learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Umabai & Anr. vs. Nilkanth Dhondiba Chavan & Anr. (2005) 6 SCC 243 and would submit that

the judgment of the Hon'ble Supreme Court in case of Prem Raj (supra) has been followed by the Hon'ble Supreme Court in the said judgment in case of Umabai & Anr. (supra). He submits that if a contract is discharged, a party cannot seek specific performance thereof. Learned Senior Counsel placed reliance on the judgment of the High Court of Australia in case of Sargent vs. ASL Developments Ltd., (1974) HCA 40 and in particular paragraphs 16, 17 , 18, 29, 31 and 32 in support of the submission that if the Claimant had chosen to rescind the contract, there was no question of any revival of the contract.

87. Learned Senior Counsel placed reliance on the judgment of the Privy Council in case of Lakshmijit vs. Faiz Mohammed Khan Sherani decided on 2nd May, 1973 and in particular relevant paragraphs at pages 7 and 8 thereof and would submit that the parties must follow doctrine of election at appropriate time i.e. at the beginning and not later.

88. Learned Senior Counsel distinguished the judgment of the Hon'ble Supreme Court in case of Srinivas Ram Kumar vs. Mahabir ppn 40 arbp-1088.15 wt 599.15dt.01.04.19.doc Prasad & Ors., AIR 1958 SC 177 and in particular paragraph 9 on the ground that the Claimant had not led any foundation under section 18 of the Indian Contract Act, 1872. No opportunity was granted by the arbitral tribunal to the Respondent to deal with the said alleged alternate claim under section 19 of the Indian Contract Act, 1872. Learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Sarva Shramik Sangh vs. Indian Oil Corporation Limited & Ors. (2009) 11 SCC 609 and in particular paragraph 19 in support of the submission that the arbitral tribunal could not have allowed the Claimant to raise any inconsistent plea. The finding of the arbitral tribunal is contrary to the principles of law laid down by the Hon'ble Supreme Court in case of Sarva Shramik Sangh (supra).

89. Insofar as the quantification of the claim allowed by the arbitral tribunal is concerned, learned Senior Counsel placed reliance on paragraphs 34.11.2, 34.11.3, 35.24, 36.2, 36.9, 36.13 and 52 of the impugned award and would submit that the arbitral tribunal had already rejected the evidence of Mr.Richard Whiting. The evidence of the claimant's witness was already rejected. Though the evidence of the witness of the Respondent was not rejected by the arbitral tribunal, the same has been discarded. The arbitral tribunal has rejected the reports of the Consultants of both sides. The calculations made by the arbitral tribunal at page 418 of the arbitration petition forming part of the award is made by the arbitral tribunal on its own without any assistance from any party. Though the arbitral tribunal has rejected the evidence produced by the claimant, contrary to that, the arbitral tribunal has still awarded the claim for damages made by the claimant.

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90. Learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Draupadi Devi & Ors. vs. Union of India & Ors. (2004) 11 SCC 425 and in particular paragraphs 76 and 77 in support of the submission that though the Claimant had not furnished any proof of the alleged damages suffered by the claimant, the arbitral tribunal contrary to the principles laid down by the Hon'ble Supreme Court in case of Draupadi Devi & Ors. (supra) has allowed the substantial claim of damages in favour of the claimant.

91. Learned Senior Counsel for the Respondent placed reliance on paragraph 56.2 of the majority award holding that the damages or the loss suffered by the Claimant was determined without taking into consideration various benefits set out in the earlier paragraphs of the award as damages were determined as per the second part of section 19 of the Indian Contract Act, 1872. He submits that the conditions of sections 73 and 74 of the Indian Contract Act, 1872 could not have been ignored by the arbitral tribunal. The proof of damages under section 73 could not have been dispensed with by the arbitral tribunal.

92. Learned Senior Counsel placed reliance on the judgment of this Court in case of Bhogilal Purshottam Shah vs. Chimanlal Amritlal Shah & Ors. VOL.LII 116 (Bom.) and in particular paragraph at page 119 in support of the submission that the arbitral tribunal in this case had rendered interim award after expiry of 37 months from the date of conclusion of argument and on that ground itself, the award deserves to be set aside.

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93. Learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Anil Rai vs. State of Bihar, (2001) 7 SCC 318 in support of the submission that in view of the gross delay of 37 months in delivering the award after conclusion of arguments in large number of meetings, such gross delay in pronouncing the arbitral aware has vitiated the entire arbitral proceedings and has defeated the purpose of discharging the arbitral proceedings expeditiously. He submits that the arguments were concluded by both the parties finally before the arbitral tribunal on 19th Deceased, 2011 and the matter was reserved for pronouncement of the award, whereas the award was rendered only on 28th January, 2015. He submits that on this ground alone, the award deserves to be set aside.

94. Learned Senior Counsel for the Respondent invited my attention to some of the minutes of the arbitral tribunal and would submit that the arbitral tribunal had revised fees three times even after conclusion of the arguments and had charged very exorbitant amount of fees. He submits that the arbitral tribunal had collected a sum of approximately Rs.4.35 crores from both the parties towards the sitting fees, has collected approximately Rs.1.35 crores towards, reading, discussion and award writing fees and a sum of Rs.4.05 lacs towards secretarial charges from the parties. Though the arbitral tribunal had exorbitantly fixed the fees of Rs.22,50,000/- towards preparing of award, vide proceedings dated 20th April, 2008, the same was unilaterally revised to Rs.97,50,000 by the arbitral tribunal.

95. It is submitted that though the arbitral tribunal had tried to suggest such exorbitant fees on account of meeting for discussion on ppn 43 arbp-1088.15 wt 599.15dt.01.04.19.doc five occasions, however, in realty, the arbitral tribunal had actually convened the discussion only on three occasions. The additional sum of Rs.37.5 lacs has been thus levied and collected by the arbitral tribunal vide the proceedings dated 3rd December, 2014 for pronouncing the award after having finalized the same. Huge amount of fees had been exploited from the parties by the arbitral tribunal which has resulted in the Respondent loosing complete confidence in the arbitral tribunal to justify the dispute. The entire majority award thus deserves to be set aside on this ground itself.

96. On the issue of rescission of contract, learned Senior Counsel placed reliance on the judgment of the Andhra Pradesh in case of Kilaru Venkatasubbayya vs. Kalluri Padmalayamba & Anr. (1968) SCC OnLine AP 290 and in particular paragraph 15 and would submit that rescission must be express and unequivocal, whether it be by communicating the rescission as provided for in section 66, or bringing a suit to set aside the contract. The entire award is contrary to the principles rendered by the Andhra Pradesh High in case of Kilaru Venkatasubbayya (supra).

Submissions of Shri I.M. Chagla, learned Senior Counsel for the Claimant :-

97. It is submitted that at the relevant time, the Claimant was not in the business of wind energy generation and decided to diversify into this business as an investor for return offered by the respondent, most attractive in terms of generation for megawatt when compared with other offers. The Respondent also made specific representations of ppn 44 arbp-1088.15 wt 599.15dt.01.04.19.doc estimate energy generation of 49.71 lakhs KWh/WTG/annum for the period of 20 years from its WTGs to be installed for the Claimant at Gude Panchgani Wind Farm Site. The Respondent also submitted a detailed projection by way of cash flow statement based on its representation of the estimated generation of 49.71 lakhs KWh for a period of 20 years.

98. It is submitted that the cash flow statement offered was most crucial factor for the Claimant to determine commercial viability of the project. Reliance is placed on paragraph 16 of the statement of defence filed by the Respondent in support of the submission that the Respondent had admitted that cash flow statement offered by the Respondent was most crucial factor for the Claimant to determine commercial viability of the project. Reliance is also placed on the answer to question no.54 given by the Director, Sales of the Respondent (RW - 1) who admitted during the course of his cross-examination that anticipated Internal Rate of Return (IRR) was one of very important factors taken into consideration by the company to decide as to whether to accept the said project or not. The said estimated generation of 49.71 KWh/WTG/annum (gross) was reiterated by the Respondent in its email dated 6th December, 2006.

99. It is submitted that since the Respondent was the world leader in energy sector, the Claimant relied on the genuineness and fairness of the figure of 49.71 lakhs KWh and various cash flow and revenue projection provided by the Respondent on its space available and executed various contracts with the respondent. The Claimant invested about Rs.155 crores in the said wind farm project. Three contracts were entered into between the parties i.e. Supply Agreement dated 4 th January, 2007, Agreement for Erection and Commissioning dated 6 th January, ppn 45 arbp-1088.15 wt 599.15dt.01.04.19.doc 2007 and the Agreement for Maintenance, Service and Availability dated 8th January, 2007. He submits that all operations, including supply, erection, commissioning, maintenance and service of the said WTG's was the sole responsibility of the respondent.

100. It is submitted that the role of the Claimant was only that of an investor. The Respondent reiterated the supply agreement with estimate generation of 49.71 lakhs KWh/WTG/annum. The entire scope of the work included without limitation, evaluation of location potential based on wind resource assessment and energy production estimate ; site acquisition and transfer of land to the

claimant, contour survey and micrositing, engineering, designing, manufacture, testing and supply of WTG's, foundation construction, etc.

101. It is submitted that the figure of 49.71 lakhs Kwh/WTG/annum estimated by the Respondent was a very perfect figure and was not approximately 49 or not approximately 50. It was the case of the Respondent itself that the estimate given by the Respondent was fair, reasonable and genuine. In support of this submission the learned Senior Counsel placed reliance on paragraphs 16 and 28 of the statement of defence filed by the respondent.

102. It is submitted that immediately upon commissioning of 14 WTG's at the wind farm site of the respondent, the Claimant ppn 46 arbp-1088.15 wt 599.15dt.01.04.19.doc was shocked to discover that the actual generation of the WTGs was substantially short of the estimated energy generation. It was noticed that the average actual energy generation from 14 WTGs since the date of commissioning in the year 2011 had only been 24.48 lakhs KWh/WTG/annum. The total revenue from the sale of power was computed by the Claimant at Rs.225.25 crores for a period of 20 years. Based on actual average generation for the past four years, average annual generation figure was applied by the Claimant for the entire tenure of 20 years of the contract. After applying HT tariff , total actual revenue from the sale of power was computed at Rs.128.09 crores for a period of 20 years. The difference of loss is the revenue arrived at Rs.97.17 crores i.e. the difference between Rs.225.25 crores and Rs.128.09 crores. Learned Senior Counsel invited my attention to various correspondence exchanged between the parties forming part of the record and the issues framed by the arbitral tribunal including two additional issues.

The submissions of the Claimant on the issue of fraud allegedly committed by the Respondent :-

103. It is submitted that only after execution of the contract between the Claimant and the respondent, the Claimant realized that it had been induced by the Respondent for entering into a contract on the basis of the representation made by the Respondent which were fraudulent and were known to be so by the respondent. The Respondent fraudulently misrepresented to the Claimant in its final offer as well as in the supply agreement that the energy difference ppn 47 arbp-1088.15 wt 599.15dt.01.04.19.doc put forth from the WTG's was 49.71 lakhs KWh/WTG/annum (gross) with an intent to induce the Claimant to enter into a supply agreement.

104. It is submitted that the Respondent had forwarded its Production Estimate dated 19th September, 2006 along with its final offer dated 24th November, 2006. Page no.9 of the said Production Estimate was however, deliberately suppressed by the respondent. Learned Senior Counsel invited my attention to the correspondence exchanged between the Claimant and the Respondent in this regard by which the Claimant had called upon the Respondent to furnish a copy of page no.9. The Respondent however, though reconfirmed the figure of 49.71 lakhs Kwh/WTG/annum, refused to furnish any further details including a copy of page no.9 of the supply agreement. He submits that only after execution of the supply agreement on 4th January, 2007, the Production Estimate dated 8 th February, 2007 was furnished by the Respondent to the Claimant which it contained the said page no.9 which clearly showed that neither 14 WTGs, nor WEGs of the entire field could achieve the estimate of 49.71 lakhs. It is the case of the Claimant that the average

of 14 WEGs was far less than farm average.

105. Learned Senior Counsel placed reliance on the cross examination of RW - 2, the witness examined by the Respondent and would submit that the said witness of the Respondent admitted that the average of 14 WEG the entire farm was only 49.29 lakhs ppn 48 arbp-1088.15 wt 599.15dt.01.04.19.doc KWh/WTG/annum. He submits that the said witness admitted that the gross annual energy generation of 14 turbines of the claimant, after taking into account wind direction shift, could only be 43.40 lakhs KWh/WTG/annum as against 49.71 lakhs mentioned by the Respondent in the final offer and supply agreement entered into between the parties. It is the case of of the Claimant that the computation shows that net annual average generation was at 29.73 lakhs KWh/WTG/annum.

106. Learned Senior Counsel placed reliance on the final offer of the Respondent dated 24th November, 2006 stating that the estimate average annual generation (gross) was 49.71 lakhs per WEG. The said final offer also clearly indicated that generation estimate had been carried out using WAsp and Wind Pro software, that the calculations were based on wind data from masts in close proximity to the site, long term data had not been available. It was stated that the seasonal variations between different years had not been taken into account and there could be variations in generation from year to year. It was stated by the Respondent that after applying the said correction factors, the estimated annual average generation was 44.86 lakhs per WEG per annum. It is submitted that even cash flow statement was also attached containing projections for 20 years after accounting for correction factors. Learned Senior Counsel placed reliance on the answer of RW - 1 to question no.86 admitting that the final offer was the out come of all the negotiations and agreed points between the parties.

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107. Learned Senior Counsel placed reliance on the Production Estimate produced by the Respondent dated 19 th

September, 2006 stating that the estimated park production was 119.3 GWH / year i.e. 49.71 lakhs KWH / years per WEG. Page no.9 of the Production Estimate however was missing at the relevant time and was furnished only after execution of the supply agreement by the Respondent though the Claimant called upon the Respondent to furnish various details and the copy of page no.9 for quite some time.

108. Learned Senior Counsel for the Claimant placed reliance on clause 9.1 of the supply agreement dated 4th January, 2007 executed between the parties in respect of 14 WEGs. He submits that clause 9.1 thereof clearly reiterated specific representation of the Respondent that the estimated average annual generation (gross) was 49.71 lakhs KWh per WEG. Clause 9.2 provided that the generation estimate had been carried out using WASP and Wind Pro Software. The calculations were based on the wind data for the period September, 2005 to August, 2006. It was further stated that the long term data had not been available. The said page no.9 which was furnished subsequently by the Respondent had set out a table listing the coordinates and the individual

production for each of the 24 turbines in the farm. It is submitted that the contents of page no.9 clearly proved that the estimate of 49.71 lacs Kwh/WTG per annum was false to the knowledge of the Respondent and was thus deliberately given by the Respondent only ppn 50 arbp-1088.15 wt 599.15dt.01.04.19.doc after the execution of the supply agreement between the parties.

109. It is submitted that on perusal of page no.9 of the supply agreement, it clearly showed that neither 14 WEGs nor the WEGs of the entire field could achieve the estimate of 49.71. Reliance is also placed on the reply to question nos.215, 216 and 222 of the witness (RW - 1) examined by the Respondent admitting that the average production estimate of 14 WTG's of the Claimant was about 5% lower than the average of the 24 WTG's in the wind farm. On the date of execution of the contract with the Claimant by the respondent, the balance 10 WTG's had already been sold by the respondent. The said table showed that the energy result of 14 WEGs of the Claimant was 66.95 GWH / annum. The average production of each WEG was arrived at by dividing 66.95 x 14 = 4.7 WGH/WEG/Annum which on conversion into KWH is 47.80 lakhs KWH/WEG/Annum.

110. Learned Senior Counsel placed reliance on the answer given by the witness (RW - 2) of the Respondent admitting that the gross annual average generation of 14 turbines of the claimant, after taking into account the wind direction shift, could only be 43.40 lakhs KWh/WEG/annum as against 49.71 mentioned in the final offer and the supply agreement entered into between the parties. Reliance is also placed on the answer given by RW - 2 to question no.168 admitting that the average in the entire farm was only 45.29 lakhs KWh/WEG/annum on that basis. It is submitted by the ppn 51 arbp-1088.15 wt 599.15dt.01.04.19.doc learned Senior Counsel that the documents that were critical for verification of the wind energy generation were not provided by the Respondent to the Claimant prior to the execution of the contract. He also relied upon the reply given by the witness (RW - 1) to question nos.207 to 210 admitting that the documents critical for verification of the wind energy generation were not provided by the Respondent to the Claimant prior to the execution of the contract.

111. Learned Senior Counsel also placed reliance on paragraph 16 of the statement of defence and would submit that the Respondent had clearly admitted in the said paragraph that the projected cash flow and energy generation estimate was the most crucial and decisive factor for the Claimant to assess and determine the commercial viability of the wind farm project in terms of returns on investment. The said witness (RW - 1) also admitted in reply to question 54 that when a company envisages setting up a project, the IRR is one of the very important factor that is taken into account by the company to decide as to whether to go in for that project or not. He submits that the submission of the Respondent that providing page no.9 was meaningless is totally baseless. According to the claimant, it was admitted position that the balance 10 WTG had been already sold on the date of execution of the supply agreement between the Claimant and the respondent. In support of this submission, learned Senior Counsel placed reliance on reply of the RW - 1 to question no.216.

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112. It is submitted by the learned Senior Counsel that even if exceptionally high wind period from 1 st September, 2005 to 31st August, 2006 from amongst the available wind data of 23 months was taken into consideration to compound the average, energy estimate figure of 49.71 lakhs KWh/WEG/annum could never had been achieved. Reliance is placed on reply given to question no.168 by RW - 2 admitting that even that high wind period energy generation of the farm was only 45.29 lakhs KWh/WEG/annum.

113. Learned Senior Counsel for the Claimant submits that wind data of only a period of one year from 1 st September, 2005 to 31st August, 2006 was used, whereas the witness examined by the Respondent (RW - 2) admitted in response to question no.320 that admittedly the period must be 4-5 years to 10 years to make a long term estimate. He submits that though the Respondent had long term government wind data available with the Respondent from the year 1948, the Respondent refused to furnish such data to the Claimant though the Claimant had called upon the Respondent to furnish the same. Though the Respondent had itself installed a wind mast at the site in the year 2004, the mast installation report was not made available to the claimant. The Respondent made a false statement in its final offer that "the wind mast was installed during 2005 March". It is submitted that in clause 9.2 of the supply agreement, the Respondent again made a false statement that "long term data has not been available". He submits that even the long term data which the Respondent chose not to utilize despite the same being in its ppn 53 arbp-1088.15 wt 599.15dt.01.04.19.doc possession would not have led to number of 49.71 lakhs KWh/WEG/annum.

114. Learned Senior Counsel placed reliance on the reply given by RW - 1 to question no.68 admitting that there would be a difference between the energy estimates about specific 14 turbines sold to the Claimant and the entire wind farm estate. There was obvious deliberate misrepresentation by the Respondent to the Claimant and more particularly when the Respondent had data with regard to each WEG as borne out from the table at page no.9 which was deliberately withheld prior to the execution of the supply agreement between the parties by the respondent. It is submitted that the Respondent did not take into consideration all the deductions that were required to be taken into consideration so as to inflate the estimate. In support of this submission, learned Senior Counsel placed reliance on paragraph 16 of the affidavit of evidence filed by RW - 1. He submits that the Respondent had deliberately inflated the cash flow statement so as to induce the Claimant to execute the agreement with the respondent. The cash flow statement was an important factor to decide upon whether to make an investment or not. The Respondent did not take into consideration all the deductions while preparing the cash flow statement only with a view to make it more attractive and to influence the Claimant to enter into the agreements.

115. Learned Senior Counsel submits that all these aspects ppn 54 arbp-1088.15 wt 599.15dt.01.04.19.doc have been rightly taken into consideration by the arbitral tribunal in the majority award in various paragraphs and more particularly paragraphs 39.11, 41 and 42.5 of the majority award. It is submitted by the learned Senior Counsel that the Respondent failed to lead any evidence or to prove that estimate generation of 49.71 lakhs KWh/WEG/annum made by it was fair and genuine. This crucial aspect also has been considered by the arbitral tribunal in paragraph 42.6 of the majority award while deciding issue no.1(b) by the arbitral tribunal.

116. It is submitted by the learned Senior Counsel that the arbitral tribunal has also considered and more particularly in paragraph 55.2, admissions of the Respondent that 49.71 lakhs KWh/WEG/annum could never be achieved. It is held by the arbitral tribunal that the Claimant was entitled to rely upon on the lowest of such admissions being item no.9 mentioned in the tabulated statement in the award and more particularly in paragraph 55.2. After deducting the correction factors as per clause 9.3 of the supply agreement, net annual production worked out by the Claimant at 29.73 lakhs KWh/WEG/annum. It is submitted that the average of various items mentioned in the table was rounded off by the arbitral tribunal to 31 lakhs Kwh/WEG/annum which is detrimental to the interest of the claimant. The Respondent thus could not challenge the said computation being beneficiary of the said finding of the arbitral tribunal. He submits that sections 17 and 19 of the Indian Contract Act, 1872 attracted to the facts of this case ppn 55 arbp-1088.15 wt 599.15dt.01.04.19.doc clearly.

117. It is submitted by the learned Senior Counsel that the arbitral tribunal has after appreciating the oral and documentary evidence, the pleadings and the provisions of the contract have allowed the claims made by the Claimant partly though ought to have allowed the entire claim. The findings rendered by the arbitral tribunal in the majority award are not perverse and cannot be interfered with by this Court under section 34 of the Arbitration & Conciliation Act, 1996.

118. Insofar as the submissions of the learned Senior Counsel for the Respondent that the figure of 49.71 lakhs mentioned in the contract document was only an estimate or that there was no guarantee or that the contract provided for limitation of liability and the consequential losses is concerned, it is submitted by the learned Senior Counsel for the Claimant that the estimate of 49.71 lakhs given by the Respondent was a warranty. It is submitted by that the arbitral tribunal has rightly rejected the contention of the Respondent with regard to their being not a guarantee, the limitation of liability and consequential losses.

119. Insofar as the submission of the learned Senior Counsel for the Respondent that the Respondent was not liable to pay any damages to the Claimant in view of the express contractual stipulation is concerned, Mr.Chagla, learned Senior Counsel for the ppn 56 arbp-1088.15 wt 599.15dt.01.04.19.doc Claimant submits that the contentions of the Respondent would amount to contracting contrary to statutes i.e. sections 17 to 19 of the Indian Contract Act, 1872 which cannot be permitted. No person can validly contract that he will not be responsible for his own fraud. He submits that the said figure 49.71 lakhs repeatedly expressed by the Respondent all through out constituted a warranty. In case of conflict, the clause is liable to read down to give effect to the object of the agreement.

120. It is submitted by the learned Senior Counsel that since the Respondent had committed fraud which was established by the Claimant before the arbitral tribunal, the Respondent could not be permitted to rely upon the contractual stipulations including with regard to the estimate, no guarantee, limitation of liability, consequential losses etc. The acts of the Respondent would squarely fall to the definition of "fraud" under section 17 of the Indian Contract Act, 1872. The consequences thereof is stipulated in section 19 of the Indian Contract Act, 1872. The contentions of the Respondent if accepted, would amount to contracting out of statue i.e. sections 17 to 19 of the

Indian Contract Act, 1872 which cannot be permitted in law.

121. Learned Senior Counsel for the Claimant placed reliance on the judgment of the Court of Common Pleas in Schneider & Anr. vs. Health (1803) - 13 All England Report 473 which judgment has been considered by the arbitral tribunal in ppn 57 arbp-1088.15 wt 599.15dt.01.04.19.doc paragraph 48.2 of the majority award. He submits that if the faults were known to the seller, but such faults were not disclosed to the buyer and if it was found that the ship had defects and was not sea worthy, the seller cannot avail of stipulation that ship was sold on as is where is basis. He submits that the arbitral tribunal rightly placed reliance on the said judgment as the same was clearly applicable to the facts of this case. He submits that the learned Senior Counsel for the Respondent could not distinguish the said judgment which was relied upon by the Claimant and was considered by the arbitral tribunal.

122. Learned Senior Counsel for the Claimant placed reliance on the judgment of the Chancery Division in case of Carlish vs. Salt (1906) Ch 335 at 340 in which it was held that the fraud apart, even where there was only concealment of a known fact by the defendant, it would be unconscientious for the defendant to insist upon availing themselves of any legal advantage they may have obtained by the contract. He submits that since the Respondent has committed fraud upon the Claimant at the time of entering into a contract, it cannot be allowed to exclude its liability arising out of such fraud by relying upon the terms of the contract to exonerate itself from the fraud including the clauses excluding pre-contractual documents and other provisions of the contract.

123. Insofar as the submission of the learned Senior Counsel for the Respondent that the arbitral tribunal could not have relied ppn 58 arbp-1088.15 wt 599.15dt.01.04.19.doc upon pre-contractual documents to conclude that there was a fraud though such contractual documents were expressly excluded by the contract is concerned, learned Senior Counsel for the Claimant submits that the arbitral tribunal has rightly rejected the said issue raised by the Respondent and held that in case of conflict, earlier clause would prevail over latter and latter clause could be read down. Learned Senior Counsel strongly placed reliance on the findings of the arbitral tribunal in paragraphs 46.5.1 to 46.6.2 and also in paragraph 47 in this regard. The arbitral tribunal rightly held that the contract must be construed with the business efficacy to further the intendment of the parties and that the contract entered into between the parties contained a co-lateral warranty by the Respondent to the Claimant on the actual quantity of power to be generated from WEGs.

124. Insofar as the reliance placed on clause 9.1 of the contract by the Respondent which refers to "estimate" is concerned, it is submitted by the learned Senior Counsel for the Claimant that the contract must be construed with business efficacy to further the intendment of the parties. He submits that the number stated in clause 9.1 was not real estimate without anything more. After the parties act on the said figure 49.71 lakhs and had entered into the contract, it would not be open for the Respondent to contend that the same had no meaning as it was only an estimate or that it was not a guarantee. He submits that clause 9.1 had stipulated a specific figure of 49.71, and not a rounded figure and thus the said odd ppn 59 arbp-1088.15 wt 599.15dt.01.04.19.doc figure must be given some significance.

125. Learned Senior Counsel for the Claimant strongly placed reliance on the judgment of the Supreme Court in case of Nabha Power Limited (NPL) vs. Punjab State Power Corporation Limited (PSPCL) & Anr., (2018) 11 SCC 508 and more particularly paragraphs 33, 34, 38, 44 and 49. It is submitted that implied term can be contemplated if considered necessary to lend efficacy to the term of a contract, having regard to main purpose of the contract. It is necessary to give business efficacy to the contract. It is submitted that when clause 9.1 gives a number, the same cannot be discarded by placing reliance upon clause 9.3 or use of word "estimate". Clause 9.1 cannot be rendered entirely meaningless. The Respondent had clearly assured generation of 49.71, the Respondent cannot be allowed to contend that they would not be liable for generation of 49.71 or that the same was not a guaranteed generation. It is submitted by the learned Senior Counsel that though the figure of 49.71 may not be guarantee, it is definitely a warranty.

126. Learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Transmission Corporation of Andhra Pradesh Limited & Ors. vs. GMR Vemagiri Power Generation Limited & Anr. (2018) 3 SCC 716 and in particular paragraph 26 and would submit that a commercial document cannot be interpreted in a manner to arrive at a result which is at a complete variance with what may originally have been ppn 60 arbp-1088.15 wt 599.15dt.01.04.19.doc the intendment of the parties. He submits that the submission of the Respondent that in view of clause 9.3, there was no guarantee furnished by the Respondent is concerned, this contention is clearly contrary to the intendment of parties as evident from clause 9.1. He submits that if the argument of the Respondent that the figure of 49.71 was only an estimate then there could be no liability for anything else than 49.71 is accepted, that would mean that even if generation was nil it would be insignificant and the Respondent would still not be liable to pay any compensation to the claimant.

127. It is submitted that in this case, gross figure was stated to be 49.71, whereas in the final offer, net figure after deductions was stated to be 44.86. As against the said gross figure 49.71 and final figure after deductions was as 44.86, the offer of four years average actually received was only 28.48 KWh/WTG/annum. The Claimant had made the claim for difference between two figures. The arbitral tribunal however has reduced the figure of 44.86 to 31 and has given the Claimant difference between 31 and 24.48 KWh/WTG/annum. Reliance is placed on the evidence of RW - 2, examined by the respondent, who admitted in his evidence that the gross figure could only be 43.40 KWh/WTG/annum outstanding of net figure of 29.73 KWh/WTG/annum.

128. It is submitted by the learned Senior Counsel that the contract entered into between the parties contained a co-lateral warranty by the Respondent to the Claimant on actual quantity of ppn 61 arbp-1088.15 wt 599.15dt.01.04.19.doc actual power to be generated from WEGs. Learned Senior Counsel strongly placed reliance on the judgment of the Court of Appeal in case of Esso Petroleum Company Limited vs. Mardon, (1976) 1 QB (Court of Appeal) and would submit that even where the estimate or forecast was given by a party to another party and if however, already entered into a contract with such party which had given such estimate / forecast of estimated annual consumption, although it was not a guarantee but it was forecast by other party, who had special knowledge and skill and such representation which inducing the person to enter into a contract constituted a warranty sounding in damages that thus judgment was rightly relied by the arbitral tribunal in the

majority award while accepting the plea of the Claimant that the representation made by the Respondent to the Claimant was constituted a warranty and thus the Claimant was entitled to claim damages for the breach of such warranty by the respondent.

129. Reliance is strongly placed on the relevant paragraph at page 818 of the said judgment delivered by Lord Denning with regard to "collateral warranty". It is submitted that the Claimant had made its investment based on such collateral warranty furnished by the respondent. In this case, it was the case of deliberate misrepresentation to the knowledge of the Respondent made to the claimant. The Respondent was fully aware that the figure 49.71 was not achievable.

130. It is submitted by the learned Senior Counsel that

Section 19 gives option to a party to either rescind or to perform the contract on the basis of representation made. The provisions of sections 17, 18 and 19 of the Indian Contract Act, 1872 are strongly relied upon by the learned Senior Counsel for the claimant. Insofar as the judgment in case of Oscar Chess Limited (supra) relied upon by the learned Senior Counsel for the Respondent is concerned, it is submitted by the learned Senior Counsel for the Claimant that the said judgment would assist the case of the Claimant and not the respondent. He placed reliance on a paragraph at page 375 of the said judgment. He submits that in the said judgment it is clearly held that when the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant intending that the buyer should act on it and he does so, it is easy to infer a warranty.

131. It is submitted that in this case, the Respondent had stated the fact that energy generation would be 49.71 lakhs KWh/WTG/annum which fact was within the knowledge of the Respondent and of which the Claimant was ignorant, the fact was stated by the Respondent intending that the Claimant would act on it. He submits that by concealing material information made by the Respondent who was world leader in the field of wind power generation, the Claimant was induced to execute the contract with the respondent. He submits that the arbitral tribunal recorded the finding of fact on this issue in paragraph 49.12 of the majority award ppn 63 arbp-1088.15 wt 599.15dt.01.04.19.doc which cannot be interfered by this Court.

132. Learned Senior Counsel for the Claimant placed reliance on the judgment of the Gujarat High Court in case of M/s.R.C. Thakkar vs. The Bombay Housing Board by its successors) now The Gujarat Housing Board, AIR 1973 Guj. 34 (DB) and more particularly paragraphs 15, 39, 50 to 55, 77, 84, 85, 90, 94, 97 and 100. He submits that Gujarat High Court in the said judgment had awarded the claim for damages in favour of the plaintiff in view of the estimated cost suggested by other side having been found to be inaccurate. The Gujarat High Court has held that the documents clearly established that the Respondent though knew that the representation made with regard to the cost estimated for the work was false and misleading had given such estimate. It is submitted that under section 19 of the Indian Contract Act, 1872, the plaintiff is entitled to insist upon carrying out the contract and to claim loss or damages in terms of that section.

133. Learned Senior Counsel for the Claimant distinguished the judgment of the Kerala High Court in case of M. Alavi & Anr. (supra) on the ground that the said judgment is not applicable to the facts of this case since in this case the plea of misrepresentation put forth by the plaintiff was given up and change to one of "mistake". The said judgment is also distinguished on the ground that the notice to tender expressly provided that the buyer had " duty to inspect"

> quality and quantity roughly estimated by the state. He submits that ppn 64 arbp-1088.15 wt 599.15dt.01.04.19.doc in this case though the Claimant had asked the Respondent to furnish missing page no.9, the Respondent blatantly refused to share the said document which was found crucial for the purpose of taking any decision by the Claimant whether to enter into any such contract with the Respondent or not. He submits that the arbitral tribunal has rightly distinguished the said judgment in case of M/s.Alavi & Anr. (supra) in paragraph 49.11 of the majority award.

134. Insofar as the submission of the learned Senior Counsel for the Respondent that though the Respondent had cited the judgment in case of Riaffeisen Zentralbank Osterreich AG (supra) the same, been cited, has not been considered by the arbitral tribunal is concerned, it is submitted by the learned Senior Counsel for the Claimant that the arbitral tribunal rightly did not refer to the said judgment since the said judgment only contained general proposition with regard to misrepresentation and not with regard to estimate. He submits that in any event the said judgment even otherwise would not assist the case of the respondent.

135. Insofar as the submission of the learned Senior Counsel for the Respondent that the arbitral tribunal could not have considered the earlier clause prevailing over latter clause is concerned, learned Senior Counsel for the Claimant submits that the contractual provision of no guarantee, limitation of liability and consequential losses in the supply agreement completely defeats the purpose and object of the supply agreement These clauses are in ppn 65 arbp-1088.15 wt 599.15dt.01.04.19.doc contravention with the earlier part of the agreement i.e. clause 9.1 which contains the warranty that estimated energy generation was 49.71 lakhs KWh/WTG/annum. The arbitral tribunal has rightly applied the principles of interpretation of contract that if an earlier clause is followed by a latter clause is destroyed the object created by the earlier clause, the earlier clause would prevail. He submits that the arbitral tribunal rightly placed reliance on the judgment of the Privy Council in case of Forbes vs. GIT, AIR 1921, PC 209 and the judgment of the Hon'ble Supreme Court in case of Radha Sundar Dutta vs. Mohd.Jahadur Rahim, AIR 1959 SC 24 while holding that the earlier clause 9.1 would prevail over the provisions of the latter clause stating that there would be no guarantee, stating about the limitation of liability and consequential losses. In support of this submission, learned Senior Counsel placed reliance on paragraphs 46.5.1 to 46.6.2 of the majority award.

136. It is submitted by the learned Senior Counsel that an opportunity has been granted to a party in an earlier part of the contract cannot be taken away by latter part of the contract. The numbering of the clause is therefore, irrelevant. He submits that there is no repugnancy since clauses 9.1 to 9.3 can be read harmoniously.

137. Insofar as the submission of the learned Senior Counsel for the Respondent that the arbitral tribunal does not have power to hold that an earlier clause is repugnant to latter is concerned, it is ppn 66 arbp-1088.15 wt 599.15dt.01.04.19.doc submitted by the learned Senior Counsel for the Claimant that the repugnancy as referred to in the arbitral award is not in the nature of as is referred to by the constitutional courts but is in the nature of construction of contract which is within the sole domain of the arbitral tribunal. It is submitted that it is the duty of the arbitral tribunal to interpret the terms of the contract by applying established principles with regard to the interpretation of the contract or evidence. In support of this submission, the learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court reported in case of National Highway Authority of India Vs ITD Cementation India Ltd. (2015) 14 SCC 21 and more particularly paragraphs 21 to 25 and the judgment reported in case of Swan Gold Mining Ltd Vs. Hindustan Copper Ltd. (2015) 5 SCC 739 and in particular paragraph 19.

138. It is submitted by the learned Senior Counsel that even if the clauses of the contract cannot be rejected for conflict, they were liable to be read down so as to give effect to the object and purpose of clauses 9.1, 9.2 and 9.3 of the supply agreement. In support of this submission, learned Senior Counsel placed reliance on the judgment of the Hon'ble Supreme Court in case of Skandia Insurance Company Limited vs. Kokilaben Chandravardan, AIR 1987 SC 1184 and in case of B.V. Nagaraju vs. Oriental Insurance Company, (1996) 4 SCC 647 which are dealt with by the arbitral tribunal in paragraph 47 of the majority award.

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139. Insofar as the submission of the learned Senior Counsel for the Respondent that the arbitral tribunal has no power to read down any provisions of the contract is concerned, it is submitted by the learned Senior Counsel for the Claimant that the doctrine of reading down is also rule of construction of contract with an object of giving effect to the main purpose of the contract and thus within the jurisdiction of the arbitral tribunal. Reliance is placed on the judgment of the Delhi High Court in case of HUDCO Limited vs. Leela Hotels Limited, MANU/DE/1134/2004 and in particular paragraphs 63 to 54 to demonstrate that the arbitral tribunal has such power to read down the contract clause.

140. Learned Senior Counsel for the Claimant contended that the contention of the Respondent that doctrine of reading down can only be applied in the insurance cases and not in the commercial contracts has no basis. It is not limited to the insurance cases but are also applied to the commercial cases. Learned Senior Counsel submits that the Respondent itself had cited the judgment of the Supreme Court in case of B.V. Nagaraju (supra) which supports the case of the Claimant and not the respondent. On this issue, reliance is also placed on the judgment delivered by the Delhi High Court in case of HUDCO Limited (supra). He submits that the view taken by the arbitral tribunal in the majority award being plausable view and not perverse, no interference is warranted in the petition filed under section 34 of the Arbitration & Conciliation Act, 1996.

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141. Insofar as the submission of the learned Senior Counsel for the Respondent that the impugned award is in violation of the principles of natural justice contending that there being no arguments on the basis of which the claim could be awarded by the arbitral tribunal, no sufficient pleading or opportunity was given to the Respondent to adduce evidence and the arguments is concerned, it is submitted by the learned Senior Counsel for the Claimant that the purpose of the pleadings is to enable the defendant to know the case that it is required to meet. He submits that the pleadings have to be construed liberally. The Respondent had clearly understood the case of the Claimant viz. that it had made to an alternate claim for damages based on the second part of section 19 of the Indian Contract Act, 1872. The Respondent had clearly understood that the case was contractual in nature and not tortuous.

142. Insofar as the pleading on the issue of misrepresentation amounting to fraud is concerned, the Claimant had specifically pleaded about the fraudulent misrepresentation of 49.71 KWh/WTG/annum and the difference between the estimate and the actual generation. In support of this submission, learned Senior Counsel placed reliance on paragraphs 13, 22, 24, 25, 28 to 32, 35 and 38 to 41 of the statement of claim filed by the claimant. He submits that the difference between the estimate and actual generation is a point that is common to both i.e. fact as to whether there was misrepresentation amounting to fraud as well as with regard to the quantum of damages under the second part of section ppn 69 arbp-1088.15 wt 599.15dt.01.04.19.doc 19 of the Indian Contract Act, 1872. It is submitted that the pleadings filed by the Claimant made it clear that the case of the Claimant was that of fraud under section 17 of the Indian Contract Act, 1872.

143. Insofar as the quantum of damages is concerned, learned Senior Counsel for the Claimant placed reliance on paragraph 42 of the statement of claim in support of his submission that the said paragraph makes it clear that the Claimant was seeking damages for fraud in terms of section 17 of the Indian Contract Act, 1872 in lieu of fraudulent misrepresentation. He refers to " head of claim - A" on page 83 "reference to head of Claim - B". He submits that head of claim - A was under the first part of section 19. The computation in respect of head of claim - A was given on pages 80-81 on the basis that the Claimant was entitled to rescind the contract. The pleading after sub-clause (c) of paragraph 42 of the statement of claim though not numbered was the submission for the claim - A and not alternate claim - B.

144. Insofar as head of claim - B is concerned, it is submitted by the learned Senior Counsel that the said claim was a claim under second part of section 19 of the Indian Contract Act, 1872 i.e. on the basis of performance. He submits that it is not necessary that the section itself should be expressly pleaded in the statement of claim. Claim - B is titled as "alternate claim". Therefore, claim - B from the title, it is clear that it was an alternate to the entitlement of ppn 70 arbp-1088.15 wt 599.15dt.01.04.19.doc rescission i.e. enforcement of the contract of the second part of section 19 of the Indian Contract Act, 1872.

145. It is submitted by the learned Senior Counsel that the argument of the Respondent before the arbitral tribunal that the Claimant was not entitled to make an alternate claim on the basis of performance clearly indicated that the Respondent had all times understood that the claim - B of the Claimant to be on the basis of performance i.e. under the second part of section 19 of the Indian

Contract Act, 1872. There was no question of performance in case of the claim for damages for the tort of deceit. He submits that the claim - B refers to "fraudulent misrepresentation". It expressly states that based on "alternate claim of damages".

146. It is submitted that the said alternate claim - B makes it explicitly clear that the said claim was on the basis that the contract was on going. It was clearly pleaded by the Claimant that actual generation of the project, during the first year of operations, was far lower than the projected estimated generation and had resulted in and is likely to keep resulting in colossal recurring loss of revenue to the Claimant even in the future. It was specifically pleaded that the Respondent is liable to compensate the Claimant for the loss suffered by it due to performance of wind farm project set up by the Respondent and the huge capital investment being locked up for 20 years.

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147. It is submitted by the learned Senior Counsel that the alternate claim - B was thus on the basis that the contract was on going i.e. on the basis of performance and thus it was not the claim in Tort nor was it a claim on the basis of rescission of contract as sought to be canvassed by the respondent. He submits that the said paragraph further refers to "loss" suffered by it due to the under performance of wind farm project set up by the Respondent and thus the said claim was under section 19 of the Indian Contract Act, 1872 being the difference between the estimate and actual generation. It is submitted by the learned Senior Counsel that though the quantum of such damages had not particularised in figures in the statement of claim while claiming damages, the amount is not required to be quantified as the quantification of claim is merely a matter of proof. In support of this submission, learned Senior Counsel placed reliance on paragraph 100 of the judgment of the Hon'ble Supreme Court in case of McDermott International Inc. vs. Burn Standard Company Limited, (2006) 11 SCC 181.

148. It is submitted that the computation of quantum of damages is nothing but a matter of mathematical subtraction. The Claimant had specifically pleaded that they are entitled to the difference between the actual and projected generation and at all time set out a table comparing the actual and projected generation at paragraph 25 of the statement of claim. He submits that term "damages" is apt also for compensation under section 19 of the Indian Contract Act, 1872. In support of this submission, learned ppn 72 arbp-1088.15 wt 599.15dt.01.04.19.doc Senior Counsel placed reliance on the judgment of the Gujarat High Court M/s.R.C. Thakkar (supra) and more particularly paragraphs 15, 39, 50 to 55, 77, 84, 85, 90, 94, 97 and 100.

149. Learned Senior Counsel for the Claimant invited my attention to some of the paragraphs of the statement of defence and would submit that the Respondent had disputed their alleged liability in the state of defence. However, the difference between the actual and estimated generation and the correction factor to be applied were extensively adverted to in the statement of defence and more particularly paragraphs 9, 15, 16, 28 of the statement of defence. It was specifically pleaded by he Respondent that the said estimate provided in the contract was genuine and proper.

150. Insofar as the claim - B made by the Claimant in the statement of claim is concerned, the Respondent in the statement of defence had simplicitor vaguely denied the said claim stating that the Claimant was not entitled to any of the reliefs either under the heads of the claim indicated or delivered. Rest of its pleadings adverted only to claim - A. It is submitted that the Respondent thus cannot be allowed to urge that he did not have any opportunity to lead evidence in this regard. Learned Senior Counsel submits that it was no where pleaded by the Respondent in the statement of defence that there was any lack of clarity as to the basis of claim - or that the claim - B was not maintainable in an alternate to claim -

A.

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151. Insofar as the submission of the learned Senior Counsel for the Respondent that the Respondent did not have sufficient opportunity to lead evidence on claim - B is concerned, it is submitted by the learned Senior Counsel for the Claimant that in the arbitration proceedings, it is no where alleged by the Respondent that it did not have sufficient opportunity to lead evidence insofar as claim - B is concerned. He submits that the Claimant had not only led documentary evidence but had also led oral evidence to show that 49.71 repeatedly mentioned by the Respondent in the correspondence as well as in the supply contract was fraudulent representation made by the Respondent to the claimant.

152. Learned Senior Counsel submits that in the affidavit of evidence of CW -1 i.e. Mr.Deepak Asher, Director and Group Head (Corporate Finance) of the Claimant and more particularly paragraph 22-30 had clearly set out the proof of difference between actual and estimated generation. The said affidavit and more particularly paragraph 37 thereof had made the basis of claim - explicitly and clearly. It was stated that in the alternate, the Claimant was entitled for damages that was suffered by it due to fraudulent, reckless / negligent misrepresentations and that the same was of recurring in nature. He submits that it was thus beyond the reasonable doubt hat the claim - B was made on the basis that the contract was on going and not on the basis of rescission.

153. Learned Senior Counsel submits that the said witness ppn 74 arbp-1088.15 wt 599.15dt.01.04.19.doc (CW - 1) examined by the Claimant was extensively cross- examined on all aspects by the respondent, including the difference between the actual and estimated generation, correction factor to be applied that would reduce the difference between the estimate and actual generated and which according to the Respondent would leave no difference at all. Reliance is placed on the reply given by the witness examined by the Respondent i.e. Mr.Arvind Prasad, Director Sales of the Respondent (RW- 1), who was personally involved in the said contract and more particularly paragraph 16 of the affidavit and is reply to questions 54, 79, 81, 99, 100, 101, 104, 227 - 242 in his cross-examination and would submit that the said witness examined by the

Respondent admitted in his cross- examination that the Respondent had not taken into account all the deductions that were mentioned in the affidavit of witness (RW - 1) examined by the respondent, while preparing the estimate given to the Claimant by the respondent.

154. Learned Senior Counsel for the Claimant also invited my attention to the evidence of an independent expert i.e. Sven Eric, SeniorScientists at RISOE National Laboratory for Sustainable Energy, Technical, University of Denmark, (RW - 2). It is submitted that with regard to the production estimate, the said witness examined by the Respondent had carried out the calculation before the arbitral tribunal which clearly showed that with regard to 14 (WTGs) of the claimant's gross annual generation, after applying the wind direction shift was only 43.40 KWh/WTG/annum. He ppn 75 arbp-1088.15 wt 599.15dt.01.04.19.doc submits that the said evidence of the Respondent was rightly considered by the arbitral tribunal on pages 257 to 343 of the majority award annexed to the arbitration petition.

155. It is submitted that after tabulating various items with regard to the gross and annual general figures in a chart prepared by the arbitral tribunal at page 418 of the arbitration petition, the arbitral tribunal held that the Claimant was entitled to rely upon all the lowest admission made by the Respondent in its Exhibit C-35 of 43.40 gross which worked out to 29.73 net as referred to in the 9 th item in the said chart. The arbitral award had earlier evaluated and considered Exhibit C- 35 of the RW - 2 at pages 291 to 295. The arbitral tribunal thereafter took average of the figures in the said chart and reduced the figure to 31 which was detrimental to the Claimant and not the respondent.

156. In so far as the question as to whether any evidence of actual generation was produced by the Claimant or not is concerned, it is submitted by the learned Senior Counsel for the Claimant that the actual generation was known to both the parties. The Respondent had full control over the actual metering by the Respondent and Maharashtra State Electricity Board. The witness examined by the Claimant i.e. CW - 1, at paragraph 16 of his affidavit in lieu of examination in chief had produced various documents evidencing actual metering of generation as Exhibit CW -1/9 collectively. Those documents included joint meter readings which were signed by the ppn 76 arbp-1088.15 wt 599.15dt.01.04.19.doc Respondent and also the Maharashtra State Electricity Board. The invoices were raised by the Claimant on the basis of the meter reading, the documents from the Respondent forwarding invoices of the Claimant to the Maharashtra State Electricity Board etc.

157. It is submitted that the samples of such joint meter reading reports, meter readings and energy break up, statement of MSEDCL, invoices of the claimant, letters of the Respondent forwarding invoices of the Claimant to the MSEDCL, receipts for payment to the Claimant etc. were produced before the arbitral tribunal. Learned Senior Counsel referred to and relied upon the answers of RW - 1 to the questions 99, 100 and 104 who admitted that the Respondent had knowledge as to actual energy generation each year by 14 WEGs of the Claimant since the date of commissioning. The chart showing actual generation figures had also been submitted to the arbitral tribunal during the hearing. A copy was annexed by the Claimant at Appendix - F to the written submissions of the claimant.

158. Learned Senior Counsel submits that his client had led extensive evidence with regard to difference between the actual and estimate of the energy generated to which correction factors were to be applied. He submits that there is thus no substance in the submissions made by the learned Senior Counsel for the Respondent that there was no evidence produced by the Claimant at all or that the Respondent did not have opportunity to lead evidence ppn 77 arbp-1088.15 wt 599.15dt.01.04.19.doc with regard to claim - B.

159. Insofar as the submission of the learned Counsel for the Respondent that claim - B made by the Claimant was not under the second part of section 19 of the Indian Contract Act, 1872 is concerned, it is submitted by the learned Senior Counsel for the Claimant that paragraph 45 of the majority award clearly indicates that the Respondent had understood that claim - B was under the second part of section 19 of the Indian Contract Act, 1872. The arbitral tribunal itself had recorded the case of the Respondent that the claimants were not entitled to claim - B on the basis of the performance, once the contract was rescinded. He submits that the Respondent had thus clearly understood that claim - B of the Claimant was on the basis of performance i.e. under the second part of section 19 of the Indian Contract Act, 1872.

160. Learned Senior Counsel for the Claimant submits that the submission of the learned Senior Counsel for the Respondent that claim - A was dropped by the Claimant only in the rejoinder is concerned, there is no substance in this submission of the learned Senior Counsel for the respondent. He submits that the Respondent was obliged to deal with and in fact had dealt with claim - A well as claim - B even before stage of rejoinder and the same was not dependent on the Claimant dropping claim - A. He submits that even after claim - A was dropped by the claimant, the Respondent had availed off an opportunity and had dealt with claim - B. In support ppn 78 arbp-1088.15 wt 599.15dt.01.04.19.doc of this submission, learned Senior Counsel placed reliance on the minutes of hearing before the arbitral tribunal held on 17th to 19th December, 2011 to show that at paragraph 2 that during the course of argument on 17th and 18th December, 2011, the Counsel for the Claimant had submitted that the Claimant was not pressing the relief under claim - A.

161. Learned Senior Counsel placed reliance on paragraph 3 of the minutes of hearing and would submit that the said paragraph would clearly show that thereafter the Counsel for the Respondent made his arguments in response and had completed the same on 19 th December, 2011. He submits that thus even after claim - A was dropped, the Respondent had an opportunity and in fact did avail of the said opportunity to advance the arguments to oppose claim - B. Learned Senior Counsel placed reliance on paragraph 4 of the minutes of hearing and would submit that even the said paragraph would clearly show that at the end of day on 19 th December 2011, the Counsel for the Respondent submitted that he had concluded his arguments. Both the Counsel thereafter made a request for time before the arbitral tribunal to file the written submissions which request was granted by the arbitral tribunal. The Respondent thus cannot be allowed to urge that it did not have an opportunity to advance the arguments in support of claim - B of the claimant.

162. Learned Senior Counsel for the Claimant placed ppn 79 arbp-1088.15 wt 599.15dt.01.04.19.doc reliance on paragraphs 67 to 75 of the written submissions filed by the Claimant dated 7th March,

2012 and would submit that the said written statements had clearly set out the basis of claim - B. In view of the actual energy figures available to the parties, the Claimant was entitled to damages as a difference between the estimate and actual generation. He submits that the Claimant had computed the total revenue from the sale of power at 225.25 crores for the period of 20 years based on net estimated average generation and HT tariff for the period of 20 years. However, based on actual average generation for the past four years, average annual generation figure was applied for the entire duration of 20 years of the contract. It is submitted that the Claimant had applied HT tariff and accordingly computed the total actual revenue from the sale of power at Rs.128.09 crores for a period of 20 years. The Claimant claimed the difference / loss in revenue at Rs.97.17 crores i.e. the difference between Rs.225.25 crores and Rs.128.09 crores.

163. Learned Senior Counsel for the Claimant placed reliance on various paragraphs of the written submissions filed by the Respondent before the arbitral tribunal and would submit that the Respondent had dealt with claim - B under various heads comprising of not only the preliminary objections but also on merits of the case. The Respondent thus had fill opportunity to deal with claim - B and had in fact dealt with claim - B also in the written submissions. It is submitted that the Claimant had led evidence on all the issues. Insofar as claim - B is concerned, the evidence was ppn 80 arbp-1088.15 wt 599.15dt.01.04.19.doc common on claims - A and B. Claim - B was on the basis of contractual damages. No arguments were advanced by the Respondent before the arbitral tribunal contending that the Respondent did not have an opportunity to lead evidence on the claim for damages under second part of section 19 of the Indian Contract Act, 1872.

164. It is submitted that it was not the case of the Respondent even in the written submissions filed before the arbitral tribunal that the claim - B made by the Claimant was on the basis of Tort of deceit only and not for the contractual damages. The Respondent also had clearly understood that claim - B was for the contractual damages and did not plead that claim - B was not clear and thus could not be dealt with by the Respondent on that ground. Learned Senior Counsel for the Claimant invited my attention to paragraph 53 of the majority award and also paragraphs 45.2 and 45.3 and would submit that paragraph 53 of the majority award cannot be read in isolation but also has to be read with paragraphs 45.2 and 45.3 of the majority award holding that the Claimant had pleaded the case under second part of section 19 of the Indian Contract Act, 1872 and that the Respondent had sufficient opportunity to put forth its defence and lead evidence.

165. In so far as the quantification of the claim is concerned, it is submitted by the learned Senior Counsel that the basis of determination of damages under second part of section 19 of the ppn 81 arbp-1088.15 wt 599.15dt.01.04.19.doc Indian Contract Act, 1872 was nothing but a computation of difference between the estimate and the actual generation which was the matter of simple arithmetic. The Claimant had proceeded on that basis and was entitled to proceed on the basis that determination of damages under second part of section 19 was a matter of simple arithmetic. He submits that the claim made by the Claimant was absolutely clear with sufficient pleading and evidence. Both the parties had been given sufficient opportunity by the arbitral tribunal to lead documentary as well as oral evidence. The arbitral tribunal has considered the evidence on record and has awarded the difference between the actual and estimated generation on the basis of the proof produced by both the parties. This Court cannot re- appreciate the evidence led by the parties

before the arbitral tribunal.

166. In so far as the submission of the learned Senior Counsel for the Respondent on the issue as to whether the principles under the Specific Relief Act will apply to section 19 of the Indian Contract Act, 1872 or not is concerned, it is submitted by the learned Senior Counsel that two options are provided to a party under section 19 of the Indian Contract Act, 1872 i.e. either to rescind the contract or to perform the contract on the basis of the representations made. Making a claim under second part of Section 19 of the Indian Contract Act, 1872 is not a suit or claim for specific performance under the provisions of the Specific Relief Act, 1963. He submits that section 19 of the Indian Contract Act, 1872 is self- contained which clearly provides that (a) a party avoids a contract ppn 82 arbp-1088.15 wt 599.15dt.01.04.19.doc i.e. rescind the contract which in this case was claim - A and (b) under the second part - party can insist that contract be performed on the basis that the contract is on going i.e. in this case claim - B. Substantive rights are conferred under section 19 of the Indian Contract Act, 1872 where there is a fraud or misrepresentation or coercion.

167. It is submitted that the principles to sections 27 and 29 of the Specific Relief Act, 1963 will not be attracted. Bar imposed in Specific Relief Act cannot operate against the specific substantive rights under section 19 of the Indian Contract Act, 1872. It is submitted by the learned Senior Counsel that section 73 of the Indian Contract Act, 1872 cannot be invoked, once such contract has been rescinded. Section 73 of the Indian Contract Act, 1872 has no application to the second part of section 19 of the Indian Contract Act, 1872. He submits that there is no substance in the submissions made by the learned Senior Counsel for the Respondent that the second part of section 19 of the Indian Contract Act, 1872 is also based on the breach of contract / rescission of contract or that the principles of section 73 of the Indian Contract Act, 1872 are attracted to section 19 of the Indian Contract Act, 1872. He submits that second part of section 19 is based on the performance of the contract and not on rescission of a contract.

168. Learned Senior Counsel for the Claimant invited my attention to various paragraphs of the statement of claim filed by his ppn 83 arbp-1088.15 wt 599.15dt.01.04.19.doc client and would submit that the Claimant had not rescinded the contract. It was only the averment in the statement of claim that the Claimant was entitled to rescission of contract. Till the arbitral tribunal would have decided to be rescinded, the contract remained in force. For a rescission of a contract to operate, there has to be express and unequivocal act of rescission. In this case, there was no rescission of contract. The contract was all through out on going contract. The Claimant had made an alternate claim on the basis of the on going contract. He submits that election must be clear, categorical and communicated. Until the same is done, the contract continues. .

169. Insofar as the judgment of the High Court of Australia in case of Sargent (supra) relied upon by the Respondent is concerned, it is submitted by the learned Senior Counsel for the Claimant that in the said judgment, it was categorically held that for applicability of the doctrine of election, there must be conduct sufficient to amount of election. The word conduct to constitute an election must be unequivocal and consistent. He submits that judgment of the High Court of Australia in case of Sargent (supra) thus would assist the case of the Claimant and not the respondent.

170. It is submitted by the learned Senior Counsel for the Claimant that the Respondent was fully aware of the false representation made by the Respondent to the Claimant and even while refusing to furnish a copy of page 9 of the contract entered ppn 84 arbp-1088.15 wt 599.15dt.01.04.19.doc into between the parties, the Respondent reasserted the average of 49.71 lakh KWh per WTG. Learned Senior Counsel placed reliance on paragraph 16 of the statement of claim filed by his client and paragraph 16 of the written statement filed by the Respondent and would submit that the averments made in paragraph 16 of the statement of claim were admitted by the Respondent in the written statement. The arbitral tribunal in the majority award had given a categorical finding of fact that the Respondent had made a false statement and had suppressed various material information. The intendment of the parties should be considered by the Court.

171. It is submitted that the true intention of the parties in this case was that the estimate given to the Claimant by the Respondent clearly induced the Claimant to enter into the contract with the respondent. He submits that interpretation sought to be advanced by the Respondent is contrary to the business efficacy.

172. It is submitted that it is exclusively within the domain of the arbitral tribunal to interpret and construe the terms of the contract. Interpretation of the contract by the arbitral tribunal is the correct interpretation of the contract. Even if the interpretation of the contract by the arbitral tribunal is a possible interpretation, such interpretation of contract by the arbitral tribunal cannot be substituted by this Court by another possible interpretation.

173. It is submitted by the learned Senior Counsel that when ppn 85 arbp-1088.15 wt 599.15dt.01.04.19.doc the Claimant did not press claim A before the arbitral tribunal, the Respondent did not raise any objection or even did not apply or seek any opportunity to lead evidence in so far as the claim B is concerned. The Respondent cannot be allowed to contend that the evidence on claim A cannot be relied upon by the Claimant in support of claim B.

174. In so far as the judgment in the case of Lakshmijit Bhai Suchit Vs.Faiz Mohammed Khan Sherani (supra) relied upon by the Respondent is concerned, the said judgment is distinguished by the learned Senior Counsel for the Claimant on the ground that since the Claimant had not exercised right to elect till such rejoinder, the Respondent cannot be allowed to contend that the Claimant having prayed for claims A and B, the Claimant could not have been permitted to give up claim A at the belated stage.

175. In so far as the judgment of the Hon'ble Supreme Court in the case of Pt. Prem Raj Vs. DLF Housing and Construction Ltd. (supra) relied by the learned Senior Counsel for the Respondent is concerned, learned Senior Counsel for the Claimant distinguishes the said judgment on the ground that the said decision cannot be applied to the case under Section 19 of the Indian Contract Act, 1872. The Claimant had not rescinded the contract but had only prayed before the arbitral tribunal to rescind the contract. He submits that the contract entered into between the ppn 86 arbp-1088.15 wt 599.15dt.01.04.19.doc parties continued to be in force until it was rescinded. The Claimant had given up the relief of rescission of the contract before completion of the hearing and had pressed for relief in terms of prayer clause (B). He submits that the said judgment of the Hon'ble Supreme Court

thus would not assist the case of the respondent.

176. It is submitted that the arguments of the Respondent is contrary to the judgment of this Court in the case of Karsondas Kalidas Vs. Chhotalal Motichand (supra) in which it was held that if the alternative reliefs are claimed, a party can choose at the hearing which relief he would ask for. The option to elect can be kept alive until the date of hearing which right was exercised by the Claimant. He submits that conduct of both the parties clearly indicated that the Claimant had not rescinded the contract and the said contract was on going. Joint Meter Reading Reports continued to be signed by the Respondent and MSEDCL. The MSEDCL continued to issue its Meter Reading in respect of the entire farm along with the Energy Breakup in respect of the Claimant and others in the farm. The Respondent continued to issue its Monthly Summary Generation Report and continued to raise invoices. The Respondent continued to forward the invoices of the Claimant to MSEDCL. The Claimant continued to make payment. Learned Senior Counsel placed reliance on various receipts and payments.

177. Learned Senior Counsel for the Claimant distinguishes ppn 87 arbp-1088.15 wt 599.15dt.01.04.19.doc the judgments in the cases of (i) Johnson Vs. Angew (1980) A.C. 367, (ii)Hanumant Bhimrao Kalghatgi Vs. Gururao Swamirao Kulkarni & Anr. (1942) 44 Bom LR 880, (iii)R. Samudra Vijayam Chettiar Vs. Srinivasa Alwar & Ors., 1955 SCC Online Mad 186 and (iv)Umabai & Anr. Vs.Nilkanth Dhondiba Chavan (Dead) by Lrs. & Anr. (2005) 6 SCC 243 on the ground that none of these judgments would be applicable to the facts of this case. The facts before various Courts in those matters were totally different.

178. In so far as the submission of the learned Senior Counsel for the Respondent that in view of explanation to Section 17 of the Contract Act, the Respondent had no duty to speak in a commercial contract which arises only in insurance or indemnity contracts is concerned, it is submitted by the learned Senior Counsel for the Claimant that explanation to Section 17 of the Contract Act refers to "silence" as to the facts likely to affect the willingness of a person, which may not be fraud, unless the circumstances of the case is such that there was a duty to speak or where his silence is itself equivalent to speech. He submits that where there is a mere silence and there is no duty to speak, it could be said that there is no fraud. However, in the facts of this case, the Respondent categorically and clearly stated that the estimated generation is 49.71 lakh KWH/WTG/annum and that the said estimate was fair, genuine and reasonable thereby inducing the Claimant to execute the agreement with the respondent.

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179. It is submitted that the Respondent could not establish before the arbitral tribunal that the estimate of the Respondent was fair. These submissions have been dealt with by the arbitral tribunal in paragraphs 39.11(xiii) (a) to (f) and has rightly held that this case was a case of active misrepresentation by the Respondent and thus the explanation to Section 17 was not applicable. He submits that the Claimant was a new entrant in the business of wind energy and had no knowledge about the wind data pertaining to the site. Both the parties were not equals in the field of green energy and, thus it was a duty on the part of the Respondent to disclose all the necessary

information. Its silence amounted to suppression of facts and commission of fraud. The Claimant had proved that it had completely relied upon the reputation, expertise and experience of the Respondent and had entered into the contract. The Claimant had no access to expert advice with regard to wind analysis. The Respondent took advantage of the ignorance of the claimant.

180. In so far as the judgment of the Queen's Bench in the case of Smith Vs. Hughes (1867-71) 6 QB 597 relied upon by the Respondent is concerned, learned Senior Counsel for the Claimant submits that the said judgment was a case of caveat emptor. In this case, the Respondent had induced the Claimant to enter into the contract based upon a fraudulent misrepresentation. He submits that the said judgment is not at all applicable to the facts of this case. since the facts in the said matter were totally different.

181. Reliance is placed on the Judgment of Chancery

Division in the case of Carlish Vs. Salt (supra) by the Claimant on the ground that in that case, the contract for sale of land was having latent defect, and accordingly it was held that there was a duty to speak. He also relied upon the judgment in the case of Horsfall Vs. Thomas wherein the case of a sale of a chattel, it was held that if there be a defect known to the manufacturer and which cannot be discovered on inspection, he was bound to point out such defect to the either party.

182. In so far as the submission of the Respondent that the Claimant had the advantage of expert advice engaged by it is concerned, learned Senior Counsel for the Claimant submits that M/s.Power and Energy Consultants and M/s.McKinsey & Company Inc. had not been engaged by the Claimant to enable it to judge the merits and demerits of the proposals made by the Respondent nor the said consultants were engaged to evaluate the wind data and wind energy production pertaining to the said Wind Farm Project. He submits that the Respondent also failed to prove in its evidence that Mr.C.M. Jain had undergone any training to qualify himself in analysing wind data and tender advice. He submits that the arbitral tribunal in paragraph 13(d) of the impugned award has recorded a finding that there was no evidence to prove that the Claimant had the benefit of experience in renewable energy and as such it had full knowledge and knowhow of wind energy.

183. In so far as the submission of the Respondent on the issue of mitigation of damages is concerned, it is submitted by the learned Senior Counsel for the Claimant that there was no question of mitigation of damages in this case. The second part of Section 19 of the Contract Act is based on performance of contract and not rescission of the contract and thus the principles of Sections 73 and 74 of the Indian Contract Act, 1872 have no application. The arbitral tribunal has only awarded the difference between the actual generation and estimated generation which benefit even otherwise the Claimant was entitled to.

184. In so far as the submission of the Respondent that the arbitral tribunal could not have relied upon the evidence of RW.2 and CW.2 which evidence had been rejected by the arbitral tribunal is concerned, it is submitted by the learned Senior Counsel for the Claimant that in paragraph 34.11.3 of the majority award, the arbitral tribunal has held that the tribunal was left with no definite conclusion from the reports made by the experts to come to any definite conclusion. The said reference was to the pre- arbitration "reports" and not to the "evidence" of the experts led during the course of the proceedings. He submits that the arbitral tribunal rightly referred to and relied upon those reports while allowing the part of the claim made by the claimant.

185. Learned Senior Counsel placed reliance on the evidence of RW-2 who had produced the production estimates for ppn 91 arbp-1088.15 wt 599.15dt.01.04.19.doc the wind farm (exhibit C 35) which admitted that applying a 35° wind direction shift, the energy production for all the turbines in the farm was 45.30 lakh KWH/WTG whereas the Claimant has 14 turbines was 43.40 lakh KWH/WTG per annum. He submits that these figures set out in paragraph 36.8 to 36.10 of the arbitral petition constituted admissions that the Claimant was entitled to rely upon. He submits that the arbitral tribunal thereafter took average of those figures in the said tabulation which was to the detriment of the claimant.

186. Learned Senior Counsel placed reliance on ground 'Z' and ground 'AA' of the arbitration petition filed by the Respondent and would submit that the contention of the Respondent that the evidence of RW-2 was rejected by the arbitral tribunal is contrary to the grounds raised in those two paragraphs and asserting that the evidence of RW-2 was accepted by the arbitral tribunal and the evidence of CW-2 had been rejected.

187. In so far as the contention of the Respondent that there was delay of over 3 years in making the award after conclusion of the arguments on 19th December 2011 which constituted misconduct on the part of the arbitral tribunal is concerned, learned Senior Counsel for the Claimant disputed the statement made by the Respondent that the arguments were concluded on 19 th November 2011. He submits that after the hearing on 19 th November 2011, the proceedings were thereafter held on 20/12/11, ppn 92 arbp-1088.15 wt 599.15dt.01.04.19.doc 5/1/2012, 6/2/2012, 12/2/2012, 14/2/2012, 1/9/2012, 12/9/2012, 19/10/2012, 16/11/2012, 31/12/2012, 1/1/2013, 3/1/2013, 10/1/2013, 2/2/2013, 30/4/2013, 3/12/2014 and 4/12/2014, including for the purpose of (i) correction of the earlier minutes, (ii) proceedings in respect of exhibit C 24, (iii) for extension of time for filing the written submissions, (iv) for substituting Inox as the Claimant since the erstwhile Claimant (GFL) had sold, transferred, assigned and conveyed its wind energy business to Inox, and (iv) for discussing and the finalising the arbitral award.

188. It is submitted by the learned Senior Counsel that the Respondent in fact opposed the application of the Claimant for substitution of its name as the claimant. The order for substitution of the claim of the Claimant was ultimately passed only on 1 st July 2014 whereas the arbitral award came to be passed in little over one month thereafter. There was delay in publication of the award in view of the Respondent opposing the application of the Claimant for substitution of its name as the claimant. The Respondent did not raise any such objection during the course of the arguments of the proceedings. He submits that it was the Claimant which requested the arbitral tribunal to

expedite the matter from time to time. He relied upon various documents in Volume 2 in support of this submission. The Respondent however, took chance to see whether the award was in its favour and after having found that the majority award was against the respondent, has raised such frivolous objection.

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189. In so far as the fees of the arbitral tribunal is concerned, it is submitted by the learned Senior Counsel for the Claimant that the Respondent never objected to the arbitrator's fees during the course of the proceedings. The Claimant had raised an objection regarding fees demanded by the arbitral tribunal. The Respondent took chance to see whether the arbitral award was rendered in its favour and thus did not raise any objection at any point of time earlier. The Respondent thus cannot be allowed to raise this objection for the first time in the arbitration petition.

190. It is submitted by the learned Senior Counsel that the arbitral tribunal has, after appreciating the evidence and the law, has rightly rendered its findings with regard to the fraud committed by the respondent. The arbitral Award is also based on the admissions made by the respondent. The arbitral tribunal is the final judge of the evidence before it and such evidence cannot be re-appreciated by this Court under Section 34 of the Arbitration and Conciliation Act, 1996.

191. Learned Senior Counsel for the Claimant distinguished the judgment of Kerala High Court in the case of M.Alavi & Anr. Vs. State, AIR 1960 Ker 94 on the ground that the facts before the Kerala High Court were totally different. He invited my attention to paragraphs 4, 5, 7, 9, 11 and 13 of the said judgment and would submit that the specific figures were mentioned in the contract in this case.

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192. Learned Senior Counsel for the Claimant distinguished the judgment in the case of Oscar Chess Ltd. Vs. Williams, (1956) Weekly Law Reports 370. He invited my attention to 3rd paragraph thereof and would submit that the said judgment was on the issue of warranty and would assist the case of the Claimant and not the respondent. Learned Senior Counsel for the Claimant strongly placed reliance on the judgment in the case of Esso Petroleum Co. Ltd. Vs. Mardon (supra) and more particularly on pages 814 and 817 thereof and would submit that the said judgment would squarely apply to the facts of this case.

193. In so far as the judgment of Queen's Bench Division Commercial Court in the case of Raiffeisen Zentralbank Osterreich AG Vs. The Royal Bank of Scotland Plc., 2010 EWHC 1392 (Comm) relied upon by the learned Senior Counsel for the Respondent is concerned, it is submitted by the learned Senior Counsel for the Claimant that the said judgment has dealt with a case of misrepresentation and not the case of warranty and would not apply to the facts of this case.

194. Mr.Sarkar, learned Senior Counsel for the Respondent in his rejoinder arguments would submit that the supply of contract, erection, maintenance and operation contract has already been

worked out. The subsequent maintenance contract is still in operation. He submits that the contract is kept alive since the ppn 95 arbp-1088.15 wt 599.15dt.01.04.19.doc Respondent has agreed to keep the contract alive. He placed reliance on the Anglo Indian Course and would submit that Section 19 of the Indian Contract Act, 1872 is identical and is pari materia with the case of the Anglo Indian Course. He submits that it was the duty of the claimant, let the Respondent must know that the payment was insisting for performance of contract which the Claimant is failed in this case. He placed reliance on pages 81 to 84 of the statement of claim and would submit that it was the alternate claim of the Claimant that the Claimant was not exercised the right to perform the contract. He reiterated some of his submissions already made earlier and would submit that there was complete lack of opportunity granted to the Respondent by the arbitral tribunal. Learned Senior Counsel for the Respondent placed reliance on written argument of the Respondent before the arbitral tribunal and more particularly at page 65 thereof. He submits that the Claimant had abandoned the first relief claimed and at the same time did not seek the second relief.

195. Learned Senior Counsel placed reliance on paragraphs 49.7, 49.9, 51.1, 52, 53 and 54 of the majority award in support of his submission that at no point of time, the Claimant had placed reliance on Section 19 of the Indian Contract Act, 1872. The Claimant had intended that the arbitral tribunal shall assess damages on the basis of the evidence on record. He submits that the arbitral tribunal having already rejected the evidence on the first claim could not have allowed the second alternate claim. He submits ppn 96 arbp-1088.15 wt 599.15dt.01.04.19.doc that the Claimant did not advance any arguments on the second part of Section 19 of the Indian Contract Act, 1872 before the arbitral tribunal at all. The entire award allowing the alternate claim by the arbitral tribunal is thus in violation of the principles of natural justice. The award is also overlooking the Section 73 of the Indian Contract Act, 1872.

196. Learned Senior Counsel placed reliance on Section 29 of the Specific Reliefs Act, 1963 and would submit that the party cannot claim rescission and also at the same time seek performance of the same contract. He placed reliance on the judgment of the Supreme Court in the case of Prem Raj Vs. D.L.F. Housing and Construction Private Limited (supra) and in particular paragraph 1 in support of this submission.

197. Learned Senior Counsel placed reliance on the judgment in the case of 23 Cawley Vs. Poole, 1863 Westlaw India 71 E.R.23 in support of the submission that the claim for damages is limb of performance. Since the Claimant had already claimed rescission of contract, there was no question of simultaneously claiming the performance of contract. Learned Senior Counsel placed reliance on the judgment of the Andhra Pradesh High Court at Hyderabad in the case of Kilaru Venkatasubbayya Vs. Kalluri Padmalayamba and Anr., 1968 SCC OnLine AP 290 and in particular paragraph 15 thereof. He submits that since the Claimant had affirmed the contract, the Claimant could not ask for rescission ppn 97 arbp-1088.15 wt 599.15dt.01.04.19.doc of contract.

198. Learned Senior Counsel for the Respondent distinguishes the judgment of Privy Council in the case of Forbes Vs. Git and Ors., AIR 1921 PC 209 relied upon by the learned Senior Counsel before the arbitral tribunal. Reliance is placed on paragraph 8 thereof in support of the submission that in the said judgment, later clause has qualified the earlier clause and thus the earlier clause would not

prevail over the later clause.

199. Learned Senior Counsel for the Claimant distinguishes the judgment of the Hon'ble Supreme Court in the case of Nabha Power Limited (NPL) Vs.Punjab State Power Corporation Limited (PSPCL) & Anr. (supra). He invited my attention to paragraph 49(5) in support of the submission that if the terms and conditions of the contract are expressed and clear, no other interpretation by the Court or arbitral tribunal is permissible.

200. Learned Senior Counsel for the Respondent distinguishes the judgment of the Hon'ble Supreme Cort in the case of Transmission Corporation of Andhra Pradesh Limited & Ors., (2018) 3 SCC 716 in support of the submission that the terms and conditions of contract has to be read together. He placed reliance on paragraphs 18, 19 and 21 of the said judgment.

201. In so far as the submission of the learned Senior ppn 98 arbp-1088.15 wt 599.15dt.01.04.19.doc Counsel for the Claimant that the Respondent had not supplied a copy of missing page 9 of the contract to the Claimant for substantial period of time is concerned, it is submitted by the learned Senior Counsel that the Respondent had specifically refused to supply page 9 initially which was sought by the claimant. The Claimant however, executed the contract with the Respondent and acted upon the said contract even in absence of missing page 9. There was thus no question of any fraud or misrepresentation committed by the Respondent upon the claimant.

202. Learned Senior Counsel for the Respondent placed reliance on paragraph 34.11.2 and 36.13 of the majority award and would submit that the findings rendered by the arbitral tribunal on one hand, rejecting the evidence of expert and on the other hand, taking those figures from expert opinion while allowing the alternate claim made by the Claimant shows absolute perversity.

203. Learned Senior Counsel for the Respondent distinguishes the judgment of the Gujarat High Court in the case of R.C.Thakkar (supra) relied upon by the learned Senior Counsel for the Claimant and submits that there was no propositions of law in the said judgment of the Gujarat High Court. He distinguishes the judgment of the Hon'ble Supreme Court in the case of Mcdermott International INC. Vs. Burn Standard Co. Ltd. (supra) on the ground that in the statement of claim filed by the claimant, the ppn 99 arbp-1088.15 wt 599.15dt.01.04.19.doc Claimant had specifically stated that quantification of claim of the damages has to be quantified. He placed reliance on paragraphs 9, 14, 96 and 100 of the said judgment in the case of Mcdermott International INC. Vs. Burn Standard Co. Ltd. (supra).

204. Learned Senior Counsel for the Respondent distinguishes the judgment of this Court in the case of Karsondas Kalidas Ghia Vs. Chhotalal Motichand (supra) on the ground that the arbitral tribunal could not have permitted the rescission and thereafter performance of the contract. Learned Senior Counsel placed reliance on Law Lexicon, 15th Edn.

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Submissions              of the learned Senior Counsel
Arbitration Petition No.599          of 2015 filed by M/s.Inox
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Renewables Ltd. & Ors. against Vestas Technology India Pvt. Ltd. :-

205. The original Claimant has filed this petition impugning the findings of the arbitral tribunal in paragraphs 55.7 and 55.8 of the majority award to the extent they restrict the period for which the Claimant was entitled to compensation in terms of Section 19(2) of the Indian Contract Act, 1872 till the date of the award.

206. Ms.Arora, learned Senior Counsel for the Claimant invited my attention to some of the paragraphs in the statement of claim and findings rendered by the arbitral tribunal in the impugned majority award. She placed reliance on the final offer letter dated ppn 100 arbp-1088.15 wt 599.15dt.01.04.19.doc 24th November 2006 issued by the Predecssor-in-Interest of the Respondent in support of the submission that the estimated average annual generation (gross) at the Local Control System would be 49.71 lakh per WEG corrected to Park Efficiency and Air Density. She submits that according to the said representation, the correction factors to be applied was 44.86 lakhs per WEG per annum.

207. Learned Senior Counsel placed reliance on the final offer letter which included the Technical Specifications and Cash Flow Statements and would submit that the said technical specifications categorically noted that the calculated lifetime of the WEG would be "20 years." The Cash Flow Statement represented the proposed income of the Claimant from the project for the period of "20 years." Based on such representation made by the Respondent in the final offer dated 24 th November 2006, the Claimant entered into the Supply Agreement dated 4 th January 2007. She placed reliance on clause 1.1 of the Supply Agreement and would submit that the said clause also clearly specified as part of Operational Conditions that the "Calculated lifetime" of the WEGs is "20 years." Clause 9.1 provided that the estimated average annual generation (gross) at Local Control System (LCS) would be "49.71 lakhs per WEG corrected to Park Efficiency and Air Density."

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208. It is submitted by the learned Senior Counsel that the Claimant had also entered into a Energy Purchase Agreement dated 18th June 2007 with the MSEDCL and in terms thereof, the entire generation from the WEGs was to be sold and delivered to MSEDCL to the knowledge of the respondent. It is submitted that the Respondent was operating WTGs on behalf of the Claimant pursuant to the O & M Agreement, the Joint Metering Report was signed by the respondent, acting as the authorised representative of the Claimant and by the authorised representative of MSEDCL. Based on the said joint metering report, the Claimant was raising its invoices upon MSEDCL in terms of Power Purchase Agreement. There was concealment and suppression of the facts by the Respondent knowing that they were not true with an intention to induce the Claimant to enter into Supply Agreement. The arbitral tribunal in the majority award rejected the claims made by the Claimant for a period of 20 years on erroneous grounds.

209. It is submitted that though the basis of claim for 20 years was proved, the arbitral tribunal rejected the claim on the ground that the Claimant could not provide a basis for predicting long term energy estimate for 20 years. Learned Senior Counsel for the Claimant placed reliance on page 55 of the majority award and would submit that the arbitral tribunal has rendered a finding that the deficit of energy flows from the misrepresentation or fraud practiced by the Respondent on the

Claimant as per second part of Section 19 of the Contract Act, 1872 and that it would be just and ppn 102 arbp-1088.15 wt 599.15dt.01.04.19.doc appropriate to make the aforesaid determination effective from 1 st April 2008 onwards. However, the arbitral tribunal, without citing any reasons or justification at paragraphs 55.7 and 55.8 has curtailed the period for awarding the compensation only upto the date of the award i.e. 28th January 2015.

210. It is submitted by the learned Senior Counsel that the arbitral tribunal ought to have granted compensation to the Claimant for a period of 20 years as a natural corollary to various findings rendered by the arbitral tribunal. It is submitted that the conclusion drawn by the arbitral tribunal is contrary to the findings rendered by the arbitral tribunal in so far as the rejection of claim for compensation for a period of 20 years is concerned. The arbitral tribunal has restricted the claim for compensation only for a period of approximately 6.5 years though the Claimant had suffered losses and would operate and incur the loss for the entire period of 20 years. The impugned award to that extent is grossly unfair and unreasonable.

211. Learned Senior Counsel for the Claimant submits that the impugned findings rendered by the arbitral tribunal while rejecting the claim for compensation for a period of 20 years deserves to be modified to this extent and the claim for compensation of balance period deserves to be granted.

212. In response to the query raised by this Court as to ppn 103 arbp-1088.15 wt 599.15dt.01.04.19.doc whether this Court while entertaining the petition under Section 34 of the Arbitration and Conciliation Act, 1996 can make an award and allow the claims rejected by the arbitral tribunal or not, the learned Senior Counsel for the Claimant placed reliance on the judgment of the Hon'ble Supreme Court in the case of Tata Hydro- Electric Power Supply Co. Ltd. Vs. Union of India, (2003) 4 SCC 172 and in particular paragraph 21 and also in the case of Krishna Bhagya Jala Nigam Ltd. Vs. G.Harischandra Reddy & Anr., (2007) 2 SCC 720 and in particular paragraphs 11 and 12 in support of the submission that the Hon'ble Supreme Court had modified the arbitral award rendered by the arbitral tribunal and had granted larger reliefs.

213. Learned Senior Counsel also placed reliance on the judgment of the Supreme Court in the case of Oil and Natural Gas Corporation Ltd. Vs. Western Geco International Ltd., (2014) 9 SCC 263 and in particular paragraph 40 thereof and in the case of M.P. Power Generation Co. Ltd. & Anr. Vs. Ansaldo Engeria SPA & Anr., 2018 SCC OnLine SC 385 and in particular paragraphs 24 and 39 thereof and would submit that even in those judgments, the Hon'ble Supreme Court had categorically held that the Court has power to modify the offending part of the award in case it is severable from the balance part of the award. Learned Senior Counsel invited my attention to the findings rendered by the arbitral tribunal in paragraphs 37.12, 39.2, 39.6, 39.7, 39.10, 39.11, 55.3, 55.4, 55.5, 55.6, 55.8 in respect of the submission that ppn 104 arbp-1088.15 wt 599.15dt.01.04.19.doc the conclusion drawn by the arbitral tribunal in the majority award is contrary to the findings rendered by the arbitral tribunal.

214. It is submitted that the part of the award rejecting the claim for compensation for a period of 20 years is clearly severable from the other part of the award and can be thus modified by this Court and can be granted for balance period. She submits that the agreement entered into between the

parties is still in force till 2020. The Respondent has been maintaining plant of the claimant. The Respondent is bound to make defence to the Claimant between average 31 lakh KWH/WEG/ annum and the average actual energy production. The invoices are already forwarded by the Respondent to MSEDCL.

215. Mr.Sarkar, learned Senior Counsel for the respondent, on the other hand, would submit that the agreement between the parties had been discharged by performance in its entirety by the time disputes arose between the parties as supply of all WEGs under the contract has been completed and consideration for the same has been paid. The question of terminating the agreement thus does not arise. It is submitted that the other agreements between the parties i.e. Erection, Installation and Commissioning Agreement dated 6th January 2007 and the Service and Availability Agreement dated 8th January 2007 which expired 60 months from the date of commissioning i.e.25 th March 2006 have all expired/been discharged event at the time the impugned award ppn 105 arbp-1088.15 wt 599.15dt.01.04.19.doc rendered by the arbitral tribunal.

216. It is submitted by the learned Senior Counsel for the Respondent that claim of compensation made by the Claimant was only the one claim and was not sevarable. He submits that all the judgments relied upon by the learned Senior Counsel for the Claimant in support of the submission that the Court has power to modify the part of the award rejecting the claim made by the arbitral tribunal and to allow those claims are clearly distinguishable. He submits that in none of those matters, the Hon'ble Supreme Court had allowed the claims rejected by the arbitral tribunal. The Hon'ble Supreme Court had exercised the powers under Article 142 of the Constitution of India in few cases and more particularly in case of interest. Those judgments would not assist the case of the claimant. It is submitted that the Court has no power to make an award under Section 34 of the Arbitration and Conciliation Act, 1996. The Claimant was not seeking any declaratory award in the statement of claim.

217. Learned Senior Counsel for the claimant, in rejoinder, submits that the arbitral tribunal has allowed the claim of compensation only upto the date of the award and has not rejected the balance claim of compensation, if any, derived by the claimant. She strongly placed reliance on the findings rendered by the arbitral tribunal on paragraph 56.2 and would submit that the benefits were available to both the parties. Statutory benefits cannot be computed.

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REASONS AND CONCLUSION

218. By consent of the parties, Arbitration Petitions No.1088/2015 and 599/2015 were heard together and are being disposed of by a common Judgment.

219. The Respondents before the Arbitral Tribunal challenged part of the majority Award, along with part of the claims made by the Claimant which is the subject-matter of Arbitration Petition No.1088/2015. The Claimant has also filed Arbitration Petition No. 599/2015 inter alia, impugning part of the majority Award thereby rejecting part of the claim made by the Claimant before the Arbitral Tribunal. The Arbitral Tribunal framed eight issues in the proceedings held on 11 October 2008. The Arbitral Tribunal subsequently framed two additional issues, which are extracted as under :

> (a) Whether the Claimant proves that as per the data furnished to them by the Respondent the energy output from each WEG/annum could not be more than 37.12 lakhs KWH/WEG/annum and can never be 49.71 lakhs KHW/WEG/annum as represented and stated in the agreement dated 04.01.2007 ?
>
> (b) Whether the Respondent proves that the estimated generation of 49.71 lakhs KWH/WEG/annum made by it, is fair and genuine in terms of Clause 9 of the agreement ppn 107 arbp-1088.15 wt 599.15dt.01.04.19.doc dated 04.01.2007 ?

220. Both the parties led documentary and also oral evidence before the Arbitral Tribunal. Clause 9 of the Supply Agreement, which is the main clause on which both the parties had made their submissions, in great detail, before the Arbitral Tribunal and before this Court, and had bearing on the claims made by the Claimant, are extracted as under :

> " Clause 9: General Estimate:
>
> 9.1 The estimated average annual generation (Gross) at Local Control System (LCS) is 49.71 Lakhs KWh per WEG corrected to Park Efficiency and air Density.
>
> 9.2 The generation estimate has been carried out using WAsP and Wind Pro Software. The calculations are based on wind data (for the period from September 2005 to August 2006) from applicable reference mast installed by the SUPPLIER in close proximity to the Site and the Site Specific Power Curve of the wind turbine. Long term data has not been available. Therefore, the seasonal variations between different years have not been taken into account. Accordingly, there could be variations in generation from year to year. Further, the annual generation of each individual WEG might vary within the wind farm.
>
> 9.3 The estimated annual average generation of the park ppn 108 arbp-1088.15 wt 599.15dt.01.04.19.doc is arrived at by applying following correction factors to the estimated gross generation referred to in Clause 9.1 above:
>
> (a) Machine Availability - 95% (Guaranteed as per Clause/Annexure J of Maintenance, Service and Availability Agreement)

(b) Grid availability - 93% to 98% (Assuming 2% to 7% grid drop and not guaranteed by SUPPLIER)

(c) Corrections for losses due to long term uncertainty of wind - 5% to 10% (Assumed and not guaranteed by the SUPPLIER)

(d) Uncertainty in the modeling (wind resource analysis) - 5% (Assumed and not guaranteed by the SUPPLIER).

Line losses (generally varying from 2% to 4%) from WTC to the metring point have not been taken into account under above correction factors.

There could be other factors influencing the generation and resulting in lower generation at the metring point, which have not been considered. The above mentioned estimated annual average gross generation or the generation figure obtained after applying the correction factors does not constitute any grantee on the generation by the SUPPLIER".

221. Both the parties invited our attention to various ppn 109 arbp-1088.15 wt 599.15dt.01.04.19.doc correspondence, provisions of contract and the oral and documentary evidence led before the Arbitral Tribunal in respect of the precontractual communication and the meetings between the parties before the execution of the agreements entered into by and between them, in support of their rival contentions about the applicability of the clauses 9.1 to 9.3 of the Supply Agreement and on the issue whether the Respondent had issued any guarantee on generation of energy during the contractual period or not. It was the case of the Respondent before the Arbitral Tribunal and also it was urged before this Court, that in view of the Clause 9.3, there was no guarantee given by the Respondent on generation of the energy by the Respondent to the Claimant at any point of time before execution of the Supply Agreement or otherwise. It was the case of the Respondent that the Respondent was not responsible, as alleged, for the shortfall in generation of the energy under various clauses of the agreement entered into between the parties.

222. A perusal of the majority Award on this issue indicates that after considering the pleadings, oral and documentary evidence led by both the parties and on interpretation of Clause 9 of the Supply Agreement, the Arbitral Tribunal, in the majority Award, has rendered various findings which are highlighted in the later part of this Judgment. The Arbitral Tribunal also considered various correspondence on this issue and also various proposal exchanged between the parties. In the beginning, a short profile of NEG-Micon was given. It was claimed in the profile that the Respondent was a ppn 110 arbp-1088.15 wt 599.15dt.01.04.19.doc 100 % subsidiary of MEG-Micon A/S Denmark, world leaders in wind turbine generators and installed more than 14,000 WTGs, totalling to 7000 MW across 42 countries worldwide, and one out of 5 turbines in the world is a NEG-Micon.

223. The Respondent further stated its achievements and range of turbines etc. In the proposal, estimated average annual generation at Local Control System (LCS) was shown at 49.71 lakhs per WEG, corrected to Park Efficiency and Air Density. The Arbitral Tribunal further highlighted that

the Estimated Annual Generation for the park was arrived at after applying the correction factors at 44.86 lakhs per WEG per annum. The Arbitral Tribunal also considered the Minutes of the Meetings held between the parties which were held by various authorised representatives of both the parties, in paragraph 23.2 and 23.4. The parties, thereafter, entered into Supply Agreement on 4/1/2007; Agreement for Erection and Commissioning on 6.1.2007 and Maintenance, Service and Availability Agreement dated 8.1.2007. The entire dispute and claim, however, pertains only to Supply Agreement dated 4.1.2007.

224. It was the case of the Claimant that the Claimant called upon the Respondent to furnish various informations which were not supplied by the Respondent deliberately to the Claimant, and however, proceeded to enter into the Supply Agreement dated 4.1.2007. Relying upon the Respondent's representations as claimed by the Respondent, the Claimant depended on the long standing ppn 111 arbp-1088.15 wt 599.15dt.01.04.19.doc experience, expertise, research and experience in the field of wind energy, world leadership in supplying WTGs, the estimate and cash flow statement of the Respondent and believed the representations made by the Respondent true and correct. The representations and calculations, relating to estimate of energy production by individual WTGs and in totality the wind park production of 14 WTGs was, however, far below the estimated power generation as represented by the Respondent. The Arbitral Tribunal also considered Clause 10 of the Supply Agreement. In paragraphs 31.3 and 31.4 of the majority Award, the Arbitral Tribunal noticed material difference in the final offer dated 24.11.2006 and the Supply Agreement dated 4.1.2007. The Arbitral Tribunal held that a close analysis of the Clause 9.3 of the Supply Agreement shows that the various corrections were to be applied to/or to be deduced from the gross general of 49.71 lakh KWh/WEG/annum.

225. It is held by the Arbitral Tribunal that as a deduction thereof, the resultant figure of generation would be 37.04 lakh/KWh/WEG/annum. The Arbitral Tribunal, also considered the oral evidence led by both the parties. In paragraph 32.3.1, and 32.3.2 , it is held by the Arbitral Tribunal that on a comparison of the estimated energy generated in the final offer, with Clauses 9, 9.1, 9.2 and 9.3, the picture that emerges is that actual energy generated per WEG per annum would be far less than 44.86 lakh KWh per WEG per annum as per the estimated general clause in CW.1/3. The Arbitral Tribunal further held that as per the analysis made in ppn 112 arbp-1088.15 wt 599.15dt.01.04.19.doc paragraph 32 of Clause 9.3 and further quantification of the loss in generation of energy due to other factors, resulting in lower generation, total put together it had been concluded in paragraphs 32 and 32.2 that 31.5% had to be deduced from 49.71 lakh KWH/WEG/annum. As a result, the generation figure obtained under Clause 9.3 of CW.1/6 is 34:06 lakh KWH/WEG/annum and, as such, there was vast variation between the final offer and the Supply Agreement.

226. The Arbitral Tribunal, thereafter, considered the effect of the missing page 9 of the Supply Agreement, which was admittedly not furnished to the Claimant by the Respondent at the stage of execution of the said Supply Agreement. The Arbitral Tribunal, after considering the contents of the missing page no.9, held that the energy result of the 14 WEGs is 66.95 GWH/Annum. The average production of energy by each WEG sold to the Claimant was arrived at dividing 66.95 by 14 = 4.78 GWH/WEG/Annum which, on conversion into KWH, would become 47.80 Lakh KWH/

WEG/annum; where as the offer document made by NEG Micon stated 49.71 lakh KWH/WEG/annum - gross at Local Control System. The Arbitral Tribunal, accordingly rendered a finding that knowing fully well that the average gross production at the LCS from each of the 14 WTGs was 47.80 Lakh KWH/WEG/annum, and the Respondent mentioned it as 49.71 lakh KWH/WEG/annum, which was a clear misrepresentation, knowing that it was not true.

227. The Arbitral Tribunal, thereafter, adjusted several factors against the said figure 47.80 lakh KWh/WEG/annum and held that the total quantity of loss in generation would come to 25.5% plus 6% = 31.5% per WEG/Annum and 31.5% of 47.80 lakh Kwh/WEG/ Annum would be 15.05 lakh KWh/WEG/Annum. The Arbitral Tribunal, accordingly, arrived at resultant general figure at 32.75 lakh KWh/WEG/Annum. The Arbitral Tribunal considered the examination-in-chief of Mr. Richard Whiting examined by the Claimant and more particularly in paragraph 19 thereof. It also considered various other paragraphs of the affidavit-in-evidence and also his cross examination. The Arbitral Tribunal considered the evidence of RW.2 examined by the Respondent and in paragraph 34.4 of the majority Award, set out various figures stated by the witnesses examined by the parties in their evidence.

228. In paragraph 34.5.5 of the majority Award, the Arbitral Tribunal, considered the effect of missing page 9 which contained the turbinewise production. It is observed by the Arbitral Tribunal that the reason for missing of page 9 in the Supply Agreement was not far to see, and that individual energy was shown for 14 turbines. Out of 24 turbines, it was not in dispute that turbines at serial numbers 2 to 8, 11, 13, 15, 17, 20, 22 and 23 formed part of the wind farm sold to the Claimant. The Arbitral Tribunal rendered finding in paragraph 34.5.7 that the energy result of the 14 WEGs was 66.95 GWH/Annum. The average production of energy by each WEG sold to the Claimant was arrived at by dividing 66.95 GWH/Annum by ppn 114 arbp-1088.15 wt 599.15dt.01.04.19.doc 14 = 4.78 GWH/WEG/Annum; whereas the offer document of NEG Micon stated 49.71 lakh KWH/WEG/Annum - gross at Local Control System. The average gross production of each WTG was only 47.80 lakh KWh/WEG/Annum; where as the Offer document of NEG Micon stated 49.71 lakh KWh/WEG/Annum. The Arbitral Tribunal held that it was fully known to the Respondent that the estimated energy generation of 49.71 lakh KWH/WEG/Annum (Gross) was not true and correct statement. The Respondent had misrepresented the Claimant knowing that it was not true and correct with a view to induce the Claimant to enter into Supply Agreement.

229. In so far as evidence of Mr. Richard Whiting is concerned, the Arbitral Tribunal while dealing with his evidence, held that he cannot be considered to be an independent expert witness. In paragraph 34.11.2, the Arbitral Tribunal held that Mr. Richard Whiting (CW.2) and Mr. Sven Eric (RW.1) expert witnesses examined by the Claimant and the Respondent respectively, each one in their reports and also in the evidence, had tried to support the case of the Claimant and the Respondent, respectively, as a result, the Tribunal was left with no definite conclusion from the reports made by the experts to come to a definite conclusion.

230. In so far as evidence of Mr. Sven Erik (RW.2) is concerned, the Arbitral Tribunal considered such evidence in paragraph 36.13. It is held by the Arbitral Tribunal that 31.5% of ppn 115 arbp-1088.15 wt 599.15dt.01.04.19.doc 44.80 lakh KWH/WEG/Annum would have to be deducted. In paragraph 36.9.3, the Arbitral Tribunal considered the Gross Average Annual Generation of 14 turbines of the Claimant. From the evidence of the witnesses examined by both the parties, as per Exhibit 35 and also energy generation after deducting the several factors in the said chart, as per Clause 9.3 of the Supply Agreement, the Arbitral Tribunal took average of all 9 figures mentioned in the said paragraphs and held that the Gross Average Annual Generation Lakh KHW/WEG/Annum was 45.06; whereas generation after deducting the several factors stated in the said paragraph production of Net Energy was 30.87. The Arbitral Tribunal, accordingly, held that it could be inferred from the evidence of RW.2 that the Respondent being the world leader in wind energy production, was not expected to forecast or predict 20 years energy prediction on the basis of one year estimate, that too, the period of one year i.e. September 2005 to August 2006. It is held that the evidence of RW.2 did not, in any way, help the Respondent. The Arbitral Tribunal rejected the contention of the Claimant that the evidence given by RW.2 could not be relied upon.

231. In paragraph 37.12, the Arbitral Tribunal held that on the whole, from the evidence of Deepk Asher, it was clear that the Claimant had relied upon the representation made by the Respondent and its reputation and claim made by it that it was a world leader in the field of wind energy, with vast experience and presence in many countries having installed thousands of WEGs.

ppn 116 arbp-1088.15 wt 599.15dt.01.04.19.doc Since the Claimant had no benefit of any expert advice, the Claimant requested for further information on wind data which was not supplied and the Respondent specifically stated that it could not supply any further information. The Respondent misrepresented the Claimant on essential factors, affecting the generation of wind energy. The Claimant became aware only when the production of energy started as it was nowhere near the estimated generation made in the Exhibit CW.1/3 and the Cash Flow statement. After considering the evidence of Mr. Deepek Asher, the Arbitral Tribunal held that the inference was unavoidable that the Claimant agreed to the Supply Agreement on the faith in the Respondent and on the representation made by it.

232. After considering the evidence of Mr. Arvind Prasad, (RW.1) who was examined by the Respondent, in paragraphs 38 to 38.9, the Arbitral Tribunal rendered findings that the Respondent had withheld or suppressed the material records and information, and thereby kept the Claimant in dark on these aspects which were very material for the Claimant to decide upon about the viability of the project. The Arbitral Tribunal considered the Cash Flow Statement and the evidence of RW.1 on that aspect and rendered findings that the said witness had admitted that the Claimant was not informed that the Cash Flow Statement was only a sample cash flow and thus, it was clear that the Respondent was fully aware that the Cash Flow contained several assumptions which were not communicated ppn 117 arbp-1088.15 wt 599.15dt.01.04.19.doc to the Claimant.

233. In paragraph 39.2 of the majority Award, the Arbitral Tribunal recorded a finding that the Cash Flow Statement did not take into consideration various crucial aspects which would have bearing on the decision to be taken by the Claimant, whether the project proposed was profitable to go ahead

with it or not. The Arbitral Tribunal considered various admissions on the part of the Witness RW.1 examined by the Respondent on this issue. The Arbitral Tribunal has rendered a finding that the Supply Agreement and the Cash Flow Statement had not given true and correct picture to the Claimant though the same was within the knowledge of the Respondent.

234. In paragraph 39.3, it was held by the Arbitral Tribunal that it could be stated that there was not only misrepresentation, but also suppression of true and correct facts as were revealed from Clauses 9.1 to 9.3 of the Supply Agreement. In paragraph 39.6 of the majority Award, the Arbitral Tribunal held that various documents mentioned therein were vital documents for the Claimant to make up its mind to go ahead with the project. All these factors, which were contributing to the loss in generation of wind energy, had been categorically mentioned in Clause 9.3 of the Supply Agreement. However, in the Final Offer only the loss occurring in generation under Machine Availability and Grid Availability were shown as 5% under each head and line loss at 4%.

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235. The Arbitral Tribunal, accordingly, rendered a finding that the Cash Flow Statement and the Revenue Calculations could not be taken as representing true and correct situation/facts or representing a probability of generation, if not actual generation. Such misrepresentation was purposely made by the Respondent knowing that such representation was not true, only with a view to induce the Claimant to enter into the Supply Agreement. It is also held by the Arbitral Tribunal that such misrepresentation, concealment and suppression of facts were made by the Respondent knowing that they were not true, with an intention to induce the Claimant to enter into the Supply Agreement.

236. The Arbitral Tribunal summarised the reasons for arriving at the conclusions that the Respondent had not made negligent misrepresentations, but also committed fraud on the Claimant. It is proved that the misrepresentation made by the Respondent was fraudulent. The Arbitral Tribunal also rendered findings in 39.11(xii) that various necessary information and documents required for the purpose of wind energy generation were purposely not made available by the Respondent to the Claimant.

237. The Arbitral Tribunal also considered the submissions made by the parties based on Explanation to Section 17 of the Indian Contract Act and rejected the contention of the Respondent that the Respondent was not duty bound to disclose every thing to the Claimant and held that the present case was one of active ppn 119 arbp-1088.15 wt 599.15dt.01.04.19.doc representations by the Respondent and thus would clearly fall under Section 17 i.e. "Fraud" as defined under the said provision. The Arbitral Tribunal interpreted Clause 9.2 also, which provided that the generation estimate had been carried out using Wasp and Windpro Software and the calculations were based on the wind data for the period September 2005 to August 2006 within the applicable reference mast installed by the Supplier in close proximity to the site and the site specific power curve of the wind turbine. It is held that the Respondent was bound to disclose necessary facts as stated by it in the "Estimated Generation" contained in the Supply Agreement.

238. The Arbitral Tribunal held that the contract is a commercial contract. The Respondent was an experienced expert and claimed to be the world leader in the field of wind energy and had full knowledge of the wind data of Gude Panchgani; whereas the Claimant was entering the wind energy business and had no knowledge about the wind data pertaining to the Gude Panchgani site which was very very necessary. Both the parties were not equals in the field of wind energy. It was the duty of the Respondent to bring to the notice of the Claimant all the facts that went in determining the proposed estimation of energy. The Claimant was vocal and was demanding the necessary information; whereas the Respondent declined to furnish the same deliberately.

239. The Arbitral Tribunal interpreted Clause 9.2 of the ppn 120 arbp-1088.15 wt 599.15dt.01.04.19.doc Supply Agreement and held that the said provision casts duty on the Respondent to furnish all the details of wind data for the period September 2005 to August 2006, which naturally included high wind period also. The Respondent, in any event, could not have maintained silence and was required to speak and furnish all the information to show that the estimation was carried out as stated in Clauses 9.1, 9.2 and 9.3 of the Supply Agreement and results of such exercise stated therein.

240. The Arbitral Tribunal, after considering the evidence of both the parties, also held that the transactions as evidenced by the Supply Agreement was not something which could be understood on inspection of the site as it was based upon wind data of the past period as represented by the Respondent. The Arbitral Tribunal, accordingly, held that Illustration (a) to Explanation to Section 17 of the Indian Contract Act had no application to the instant case, as the Respondent was bound to explain all the facts relevant to the subject- matter of the contract

241. In paragraph 40 of the majority Award, the Arbitral Tribunal recorded a finding that after considering the oral and documentary evidence discussed in the Award, the Arbitral Tribunal was left with no doubt that the Respondent was knowing fully well that estimated Average Annual Generation (gross) at LCS was 47.80 lakh KWH/WEG/Annum, nevertheless represented without any ppn 121 arbp-1088.15 wt 599.15dt.01.04.19.doc qualification that it was 49.71 lakh KWH/WEG/Annum in the final offer and the Supply Agreement. The representation made by the Respondent was not qualified in any manner. Nothing prevented the Respondent to state the estimated Average Annual Generation (Gross) at LCS at 47.80 lakh KWH/WEG/Annum or at least 49.71 lakh KWH/WEG/Annum; whereas it was specifically stated that it was 49.71 lakh KWH/WEG/Annum. The Respondent thus could not have urged that there was no guarantee given by the Respondent for the Average Annual General (Gross) at 49.71 lakh KWH/WEG/ Annum.

242. In paragraph 42 of the majority Award, the Arbitral Tribunal held that the Supply Agreement was vitiated by fraud and misrepresentation committed by the Respondent on the Claimant with an intent to induce the Claimant to enter into the Supply Agreement. The case of the Claimant thus falls under Sections 17, 18 and 19 of the Indian Contract Act. The effect of fraud was not absolutely to avoid a contract induced by it, but to render it voidable at the option of the party defrauded and had selected to avoid it.

243. In so far as the submission of the learned Senior Counsel for the Petitioner (original Respondent) that the parties had discussed each and every clause of the Supply Agreement threadbare before entering into the Supply Agreement with equal bargaining power as a bilateral document with full knowledge of all consequences is concerned, in my view the Arbitral Tribunal, after considering the ppn 122 arbp-1088.15 wt 599.15dt.01.04.19.doc pleadings, documents and the oral evidence of the parties, has rightly come to the conclusion that the Claimant was new in the business of generation of energy and was totally dependent upon the expertise of the Respondent. The Respondent was bound to provide all requisite information and data to the Claimant before execution of the Supply Agreement.

244. Admittedly, in this case, the Respondent had not furnished all the requisite information to the Claimant when the Supply Agreement was executed. The Claimant had repeatedly called upon the Respondent to furnish copy of the said missing page, however, the Respondent refused to supply the said missing page. The learned Senior Counsel for the Respondent categorically urged before this Court during the course of argument that though the said page was missing in the Supply Agreement entered into between the parties, the Respondent had rightly refused to comply with the request of the Claimant for furnishing copy of the page No.9 of the Supply Agreement. It was the case of the Respondent that the Claimant ought to have made an independent inquiry about the project and about the expected energy generation before entering into the agreement with the Respondent. It was urged that the Respondent was not at all responsible for not providing the data called upon by the Claimant.

245. In my view, the Arbitral Tribunal has rightly rendered a finding that the said page 9 of the Supply Agreement, which was ppn 123 arbp-1088.15 wt 599.15dt.01.04.19.doc admittedly missing from the said Agreement on the date of execution of the said Agreement was very crucial for the purpose of taking a decision by the Claimant whether to go ahead with the execution of the agreement or not. Obviously, when such page No.9 was missing in the Supply Agreement, the Claimant could have asked for a copy thereof only after execution of the agreement. The Arbitral Tribunal has already rendered a finding in great detail that it was the duty of the Respondent to furnish the relevant data and material available with it to the Claimant before execution of the agreement and, more particularly, in view of the fact that the Claimant was fully dependent on the expertise of the Respondent, the Claimant being new in the field and the Respondent being renowned and expert in the field as already represented by the Respondent to the Claimant.

246. There is, thus, no substance in the submission of the learned Senior Counsel for the Respondent that the Claimant was well informed about the surrounding circumstances and pros and cons of the terms of the contract. The Respondent not having given the material data and the information to the Claimant deliberately, though called upon, which were crucial and material for the purpose of taking decision by the Claimant to enter into the contract or not, cannot be allowed to urge that it was for the Claimant to have found out such data itself or that the Claimant having entered into the Supply Agreement with open eyes, cannot be allowed to seek the data after execution of the Agreement.

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247. In my view, the material information and the data which had bearing on the decision of the Claimant to enter into the agreement, and which was within the knowledge of the Respondent, the Respondent was bound and had a duty to disclose such information and data to the Claimant before execution of the agreement. I do not find any infirmity with the findings rendered by the Arbitral Tribunal that it was the duty of the Respondent to disclose all these material, data, information and the extent of the energy to be generated in future and deliberately having suppressed this data with an intention to induce the Claimant to enter into the agreement with the Respondent, amounted to frustrate the contract under Section 17 of the Indian Contract Act, 1982.

248. In so far as the submission of the learned Senior Counsel for the Respondent that the Claimant could not have depended upon the Cash Flow Statement offered by the Respondent is concerned, in my view, the Arbitral Tribunal has rightly rendered a finding that the Cash Flow Statement relied upon by the Respondent was a crucial factor for the Claimant to determine the commercial viability of the project. The witness examined by the Respondent (RW.1) also admitted during the course of his cross examination that the anticipated rate of return was one of the important factors to be taken into consideration by the Claimant to decide as to whether to go ahead with the project with the Respondent or not. The said Cash Flow Statement disclosed by the Respondent was also thus misleading and was deliberately furnished with incorrect ppn 125 arbp-1088.15 wt 599.15dt.01.04.19.doc information. In my view, Mr. Chagla, learned Senior Counsel for the Claimant is right in his submission that the role of the Claimant was only that of an investor and based on such Cash Flow Statement also the Claimant was induced to enter into the agreement with the Respondent.

249. In so far as the submission of the learned Senior Counsel for the Respondent that the Arbitral Tribunal could not have used the reports of both the Experts to arrive at any definite conclusion, after having rendered a finding that the expert examined by the Claimant was not an independent expert witness is concerned, a perusal of the Award indicates that the Arbitral Tribunal, while considering the quantum of the claims awarded in favour of the Claimant, had prepared a comparative chart indicating the amount reflected in the oral evidence of both the witnesses examined by the Claimant and also the admissions made by those witnesses in their cross examination. Be that as it may, the findings based on the evidence of the two witnesses, including the expert witnesses being not perverse, cannot be reappreciated by this court under Section 34 of the Arbitration and Conciliation Act, 1996.

250. In so far as the submission of the learned Senior Counsel for the Respondent that though the Respondent had not executed any guarantee in favour of the Claimant, the Arbitral Tribunal has rendered a finding in respect of the guarantee by the Respondent in favour of the Respondent is concerned, this submission of the ppn 126 arbp-1088.15 wt 599.15dt.01.04.19.doc learned Senior Counsel is devoid of any merit and contrary to the record. The Arbitral Tribunal has interpreted Clauses 9.1 to 9.3 of the Supply Agreement and has rightly held that all the three provisions had to be read together and the effect of the earlier clauses cannot be allowed to be taken away by the subsequent clauses. There is no substance in the submission of the learned Senior Counsel for the Respondent that the Arbitral Tribunal has read estimate energy as guaranteed energy. There is also no substance in the submission of the learned Senior Counsel for the Respondent that the

exemption clause would not operate in case of damages, fraud, etc.

251. In so far as the submission of the learned Senior Counsel for the Respondent that the Arbitral Tribunal could not have considered the report of Mr. Richard Whiting, who had allegedly checked the report submitted by M/s. Garrage Hassain, is concerned, there is no merit in this submission of the learned Senior Counsel . The Arbitral Tribunal has interpreted Clause 18 and also Clause 19 of the Supply Agreement, which interpretation of the Arbitral Tribunal is not only a possible interpretation, but a correct interpretation and thus cannot be substituted by another interpretation by this Court under Section 34 of the Act. The reliance placed by the learned Senior Counsel for the Respondent on the Judgment in the case of Rainy Sky S.A. & ors. vs. Kookmin Bank, (supra) is clearly distinguishable in the facts of this case and would not assist the case of the Respondent.

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252. Similarly, the Judgment in the case of Raiffeisen Zentralbank Osterreich AG (Supra) and the Judgment of the Court of Appeal in case of Oscar Chess Ltd. (supra) are also clearly distinguishable in the facts of this case and will not assist the case of the Respondent.

253. There is no merit in the submission of the learned Senior Counsel for the Respondent that the Arbitral Tribunal has excluded the portion of Clause 9.3 of the Supply Agreement in the impugned Award or has nullified any part of Clause 9.3 in the impugned Award. The Arbitral Tribunal has rightly interpreted the Clause 9.3 which was to be read with Clauses 9.1 and 9.2 of the Supply Agreement, which interpretation cannot be substituted by this Court. In my view, the Judgment of Chancery Division in the case of Mills vs. United Counties Bank Limited (supra) is also clearly distinguishable. There is no substance in the submission of the learned Senior Counsel for the Respondent that the Arbitral Tribunal has disregarded any terms of the reference or terms of contract or has acted arbitrarily, irrationally, capriciously or independently of the contract. The Judgment of the Hon'ble Supreme Court in the case of Rajasthan State Mines & Minerals Ltd. (supra) thus, would not assist the case of the Respondent.

254. In my view, since the Arbitral Tribunal has rendered a finding that there was misrepresentation, suppression, concealment of material facts and fraud committed by the Respondent upon the ppn 128 arbp-1088.15 wt 599.15dt.01.04.19.doc Claimant, the Judgment of the Hon'ble Supreme Court in the case of Security Printing & Minting Corporation of India Ltd. (supra) would not assist the case of the Respondent. Similarly, the Judgment of the House of Lords in the case of Photo Production Ltd. (supra) also would not assist the case of the Respondent in view of the Respondent having committed a fraud upon the Claimant and had deliberately not furnished the crucial material data and information, which would have bearing upon the decision of the Claimant whether to enter into the agreement with the Respondent or not.

255. I am not inclined to accept the submission of the learned Senior Counsel for the Respondent that the findings rendered by the Arbitral Tribunal in paragraph 39.11 of the majority Award on the issue of misrepresentation, concealment and suppression of facts against the Respondent are contrary to the evidence on record, or that the Arbitral Tribunal has erroneously considered the

letter of offer and not the concluded contract between the parties. In my view, the Arbitral Tribunal has considered the entire pleadings, documents, oral evidence and the provisions of the contract while rendering such findings of fact. The provisions of Section 18 of the Indian Contract Act, 1872 were clearly applicable to the facts of this case. The Claimant has made out a case for invoking the said provisions by satisfying the conditions provided therein.

256. In my view, the Arbitral Tribunal has rightly held that ppn 129 arbp-1088.15 wt 599.15dt.01.04.19.doc the material information and the data which ought to have been furnished by the Respondent to the Claimant, were suppressed and fraud was committed by the Respondent upon the Claimant. The reliance placed on the Judgment of the Court of Queen's Bench in the case of Smith vs Hughes (supra) would be of no assistance to the Respondent. A perusal of Clause 9.1 of the Supply Agreement indicates that the said clause clearly reflected specific representation of the Respondent that the estimated average annual general (gross) at Local Control System (LCS) was 49.71 lakhs KWh per WEG per annum. Clause 9.2 clearly provided that the generation estimate had been carried out using WAsP and Wind Pro Software. The calculations were based on wind data for the period from September 2005 to August 2006.

257. In my view, Mr. Chagla, the learned Senior Counsel for the Claimant is right in placing reliance on paragraph 16 of the Statement of Defence in support of his submission that the Respondent had clearly admitted in the said paragraph that the projected cash flow and the energy generation estimate was the most crucial and decisive factor for the Claimant to assess and determine the commercial viability of the Wind Farm Project in terms of returns on investment. RW.2 in his evidence had clearly admitted that the period must be 4 to 5 years to make long term estimates; whereas the Respondent had considered the period only from 1 September 2005 to 31 August 2006. The Respondent No.2 ppn 130 arbp-1088.15 wt 599.15dt.01.04.19.doc had also admitted in response to question No.68 in his cross examination that there would be a difference between the energy estimates about specified 14 turbines sold to the Claimant and the entire wind farm. In my view, Mr. Chagla, learned Senior Counsel for the Claimant may be right in his submission that the estimate of 49.71 Lakh Kwh/WTC/annum given by the Respondent in Clause 9 of the Supply Agreement was a warranty.

258. The Hon'ble Supreme Court in the case of Nabha Power Limited (supra) has held that the implied term can be contemplated if considered necessary to lend efficacy to the term of a contract. Mr. Chagla in his submission submitted that Clause 9.1 gives a specific percentage and the same cannot be discarded by placing reliance upon Clause 9.3 or use of the word "estimate'. Clause 9 cannot be rendered entirely meaningless. The witness examined by the Respondent clearly admitted in the cross examination that the Respondent had clearly assured generation of 49.71 and thus cannot be allowed to urge that the said amount was not a guaranteed generation.

259. The Hon'ble Supreme Court in the case of Transmission Corporation of Andhra Pradesh Limited and ors. (supra) has held that a commercial document cannot be interpreted in a manner to arrive at a result which is at a complete variance with what may originally have been the intendment of the parties. The intention of the parties has to be ascertained by conjoint reading of Clause 9.1, ppn 131 arbp-1088.15 wt 599.15dt.01.04.19.doc 9.2 and 9.3 of the Supply Agreement and not by

reading each clause in isolation. The RW.2, examined by the Respondent, admitted in his evidence that the gross figure could only be 43.40 Kwh/WTC/ annum; whereas the outstanding of net figure was 29.73 Kwh/WTC/annum. The learned Senior Counsel for the Claimant has rightly relied upon the Judgment of the Court of Appeal in Esso Petroleum Co. Ltd. (supra) which would be clearly applicable to the facts of this case, in view of the fact that though the Respondent had special knowledge and skill about the project and also about the energy generation, such material information has been suppressed by the Respondent from the Claimant.

260. In my view the learned Senior Counsel for the Claimant rightly placed reliance upon the relevant portion of the Judgment in the case of Oscar Chess Limited (supra) which was also relied upon by the Respondent. In the said Judgment, it was clearly held that when the seller states a fact which is or should be within his own knowledge and of which the buyer is ignorant and the buyer acts upon such fact alleged by the seller, it is easy to infer warranty on the part of the seller.

261. Gujarat High Court in the case of M/s. R.C. Thakkar (supra) had awarded claim for damages in favour of the Plaintiff in view of the estimated cost suggested by other side having been found to be inaccurate and false. The Gujarat High Court in the said Judgment, the facts of which were identical to the facts of this case, ppn 132 arbp-1088.15 wt 599.15dt.01.04.19.doc considered the documents, which included the representation made with regard to the cost estimated for the work, held as false and misleading and accordingly awarded damages in favour of the other party. The said Judgment of the Gujarat High Court would clearly assist the case of the Claimant. I am in respectful agreement with the views expressed by the Gujarat High Court in the said Judgment.

262. In my view, Mr. Chagla, learned Senior Counsel for the Claimant is right in his submission that the Arbitral Tribunal did not refer to the Judgment in the case of Riaffeisen Zentralbank Osterreich AG (supra) since the said Judgment only contained general proposition with regard to misrepresentation and not with regard to warranty. In my view, even, otherwise, the said Judgment would not assist the case of the Respondent and thus rightly not referred by the learned Arbitral Tribunal.

263. In my view, the Arbitral Tribunal has rightly placed reliance on the Judgment of Privy Council in the case of Forbes vs. GIT (supra) and the Judgment of the Hon'ble Supreme Court in the case of Radha Sundar Dutta (supra) while rendering a finding that Clause 9.1 would prevail over the provisions of the latter clause stating that there would be no guarantee, stating about the limitation of liability and consequential losses. These Judgments would clearly assist the case of the Claimant. In my view, the opportunity granted to the Claimant in earlier part of Clause 9.1 could not be taken away by latter part of the agreement i.e. by Clause 9.3.

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264. Be that as it may, in my view, there was no repugnancy between Clauses 9.1 and 9.3 and, thus, they have been rightly read conjointly by the Arbitral Tribunal for rendering a finding in the Arbitral Award in favour of the Claimant and by interpreting the terms of those Clauses. The Hon'ble Supreme Court in the cases of National Highway Authority of India (supra) and Swan Gold Mining

Ltd. (supra) has held the nature of construction of contract, which is within the sole domain of the Arbitral Tribunal, by applying established principles with regard to interpretation of the contract or evidence, cannot be interfered with by the Court.

265. The Hon'ble Supreme Court in the case of Skandia Insurance Co. Ltd. (supra), has held that even if clauses of the contract cannot be rejected in view of the the conflict, they are liable to be read down so as to give effect to the object and purpose of the clauses of the agreement. The Judgment in the case of B.V. Nagaraju (supra) would clearly apply to the facts of this case and would assist the case of the Claimant. The learned Senior Counsel for the Respondent could not distinguish these Judgments. In my view, reading down any part of an agreement is part of interpretation of a contract, which is within the sole domain of the Arbitral Tribunal, based on the established principles with regard to interpretation of the contract, after considering the purpose and intent of the parties by considering the evidence on record. Similar view has been taken by the Delhi High Court in HUDCO Limited (supra).

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266. In my view, the Respondent having committed a fraud upon the Claimant, which has been established before the Arbitral Tribunal, the Respondent cannot be allowed to urge that Clause 9.3 of the Supply Agreement, was in any manner repugnant to Clause 9.1 in support of the submission that Respondent had not issued any guarantee in favour of the Claimant in respect of the energy generation.

267. In so far as the submission of the learned Senior Counsel for the Respondent that though the Claimant had not pressed the prayer for refund of various amounts originally claimed in the Statement of Claim, the Arbitral Tribunal awarded the claim for damages is concerned, a perusal of the Statement of Claim indicates that the Claimant had prayed for refund of the consideration paid by the Claimant to the Respondent in the sum of Rs. 1544619305/- and also had prayed for interest on the said amount at the rate of 24 % per annum and compensation towards time and expenditure wasted, in the sum of Rs.200,40,09,750/-. All these claims were made under Claim A. The Claimant had also made an alternate claim under Claim B.

268. A perusal of Claim B indicates that it was the case of the Claimant that in the event the Arbitral Tribunal, for any reasons, not inclined to award the relief sought by the Claimant Para (A), the Claimant would nevertheless be entitled for its alternate claim on damages suffered by it due to the fraudulent and reckless/grossly ppn 135 arbp-1088.15 wt 599.15dt.01.04.19.doc negligent misrepresentation made by the Respondent, as may be assessed by the Arbitral Tribunal on the basis of the material on record and the evidence led by the Claimant.

269. In the prayer clause, it was prayed by the Claimant that in case the Arbitral Tribunal was not inclined to allow Claim A, an inquiry may be made into the amount of damages suffered by the Claimant and award the damages of such quantum as may be assessed by the Arbitral Tribunal. The Claimant prayed that the Respondent was liable to compensate the Claimant for the loss suffered by it due to the under performance of the Wind Far Project set up by the Respondent and huge capital

investment being locked up for 20 years.

270. It is thus clear on plain reading of the statement of claim that Claim B was in alternate to Claim A. It is the case of the Respondent that the Claimant had given up Claim A before the Arbitral Tribunal. A perusal of the statement of defence filed by the Respondent indicates that the Respondent had denied the Claim vaguely, stating that the Claimant was not entitled to any of those reliefs under the Heads of Claims. In paragraphs 9, 15, 16, and 20 of the Statement of Defence it was specifically pleaded by the Respondent that the said estimate provided in the contract was genuine and proper.

271. In so far as the submission that the Claimant had dropped ppn 136 arbp-1088.15 wt 599.15dt.01.04.19.doc Claim A only in rejoinder is concerned, a perusal of the Minutes of the Meeting of the Arbitral Tribunal indicates that the Respondent had dealt with both the claims i.e. Claim A and Claim B even before the stage of rejoinder. Even after dropping of the Claim A by the Claimant, the Respondent had availed of an opportunity and had dealt with Claim B. The minutes of meeting of the Arbitral Tribunal held on 17.12.2011 would indicate that during the course of arguments on 17.12.2011, the Counsel for the Respondent had submitted that the Claimant was not pressing relief under Claim A. The Respondent, through its Counsel , thereafter made its arguments in response and had completed the arguments on 19.12.2011. The Respondent had also availed off an opportunity to deal with Claim B.

272. In the minutes of hearing held on 19.12.2011, the Arbitral Tribunal recorded the statement made by the learned Counsel for the Respondent that he had concluded his arguments. Both the parties, thereafter, filed written submissions before the Arbitral Tribunal. Even in the written submissions, both the parties dealt with Claim B made by the Claimant. It was the case of the Claimant that in view of the actual energy figure available to the parties, the Claimant was entitled to damages as a difference between the estimate and the actual generation. The Claimant had computed the total revenue from the sale of power at 225.25 crores for the period of 20 years based on net estimated average generation and HT tariff for the period of 20 years.

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273. It is thus clear that the Respondent had not only full opportunity to deal with Claim B, but had, in fact, dealt with Claim B under various heads not only during the course of arguments, but also by filing written submissions. I am inclined to accept the submission made by Mr. Chagla, learned Senior Counsel for the Claimant that the evidence led by the Claimant on both the Claims i.e. Claim A and Claim B, was common. Claim B was on the basis of contractual damages and not in tort.

274. A perusal of the record further indicates that it was not the submission of the Respondent before the Arbitral Tribunal that the Respondent did not have any opportunity to deal with the evidence on the claim for damages under Claim B. It was also not the case of the Respondent even in the written submission that Claim B made by the Claimant was on the basis of tort of deceit only and not for the contractual damages. It is thus clear that the Respondent had clearly understood that Claim B was for the contractual damages and had not urged before the Arbitral Tribunal that the

said Claim was not clear to the Respondent or that the Respondent could not deal with the said Claim on that ground.

275. In so far as submission of the learned Senior Counsel for the Respondent that the Claim was neither pleaded, nor argued by the Claimant before the Arbitral Tribunal is concerned, a perusal of the record indicates that when the Claimant did not press Claim A ppn 138 arbp-1088.15 wt 599.15dt.01.04.19.doc before the Arbitral Tribunal, the Respondent did not raise any objection or even did not seek any specific opportunity to lead any evidence.

276. In so far as Claim B is concerned, the Claimant relied upon oral as well as documentary evidence already led on both the claims i.e. Claim A and Claim B before the Arbitral Tribunal in respect of Claim B which was pressed by the Claimant. The Claimant has specifically made a claim for damages in prayer for Claim B. The Arbitral Tribunal has considered the documentary, as well as oral evidence. The learned Senior Counsel for the Respondent did not dispute that the joint meter readings were signed by the Respondent and MSEDCL. The MSEDCL continued to issue its meter readings in respect of the entire farm, along with energy break up in respect of the Claimant and others in the Farm. The Respondent continued to issues its Monthly Summary Generation Report and continued to raise invoices which were forwarded by the Respondent to MSEDCL.

277. The Arbitral Tribunal considered the quantification of claim for damages in paragraphs 34.7.4, 34.9, 34.11.2, 34.11.3, 35.7, 35.15, 36 and 55.5 of the impugned Award and has rendered various findings of fact. I am thus not inclined to accept the submission of the learned Senior Counsel for the Respondent that the Claim for damages was neither pleaded, nor argued, nor proved before the Arbitral Tribunal by the Claimant.

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278. In so far as the Judgment of the Hon'ble Supreme Court in the case of Draupadi Devi & Ors. (supra), relied upon by the learned Senior Counsel for the Respondent, in support of the submission that there were neither any pleadings on the claim for damages, nor there was any evidence led by the Claimant to prove the claim for damages is concerned, in my view, there is no substance in this submission of the learned Senior Counsel for Respondent. The Claimant had examined witnesses to prove both the claims. The Respondent had also examined witnesses who made various admissions during the course of cross examination to the extent of discrepancies in case of cash flow statements relied upon by the Respondent and also to the effect that the quantum of the energy which could be generated from the project in question. The learned Arbitral Tribunal, in my view, has considered all this documentary and oral evidence while awarding part of the claims made by the Claimant. The facts before the Hon'ble Supreme Court in the case of Draupadi Devi & Ors. (supra) were totally different . The said Judgment, thus, would not assist the case of the Respondent.

279. In so far as the submission of the learned Senior Counsel for the Respondent that even if the claim of the Claimant was to be considered under the Second Part of Section 19 of the Indian Contract Act, 1872 proof of damages either under Section 73 or Section 74 of the Indian Contract Act could not be dispensed with is concerned, in my view, there is no merit in this submission of the ppn

140 arbp-1088.15 wt 599.15dt.01.04.19.doc learned Senior Counsel . Under Section 19, a party is given an option either to rescind or perform on the basis of the representation made. The claim under Section 19 of the Indian Contract Act, is not a claim for specific performance under the provisions of the Specific Relief Act. The provision of Section 19 of the Indian Contract Act is self contained.

280. A plain reading of Section 19 of the Indian Contract Act clearly indicates that under the first part thereof, when a party avoids a contract i.e. when there is rescission of contract, he can claim compensation under the said provision based on rescission of the contract. Under the second part, the party can insist that the contract be performed on the basis of the contract on going. The party can base its claim on performance of the contract and at the same time, claim compensation. In my view, neither the principles of proof for claim of damages under Section 73, nor under Section 74 of the Indian Contract Act can apply to a claim made under second part of Section 19 of the Indian Contract Act which claim is based on performance of contract and not based on rescission of the contract.

281. Be that as it may, the Claimant in this case had led oral and documentary evidence on Claim A and Claim B which evidence was common to Claim A and Claim B. The Claimant could rely upon that evidence also in respect of Claim B which was ultimately pressed by the Claimant. There is no substance in the submission of ppn 141 arbp-1088.15 wt 599.15dt.01.04.19.doc the learned Senior Counsel for the Respondent that the principles of proof of damages under Section 73 or under Section 74 of the Indian Contract Act were applicable to the claim made under second part of Section 19 of the Indian Contract Act, or that the said claim for damages was not proved by the Claimant.

282. A perusal of the statement of claim indicates that though the Claimant had pleaded that the Claimant was entitled to rescission of the contract, and to be put back in position, before the arguments were concluded, the Claimant did not press the said submission or the prayer. In my view, the Claimant rightly exercised the second option under the second part of Section 19 of the Indian Contract Act on the basis of ongoing contract and claim for the damages suffered by the Claimant on the basis of the performance of the contract. It is not the case of the Respondent that the Claimant had pressed for prayer for rescission of the contract or that the same was granted by the Arbitral Tribunal.

283. Hon'ble Supreme Court in the case of McDermott International Inc. (supra) held that the computation of quantum of damages is nothing but a matter of mathematical subtraction. In this case, the Claimant had specifically pleaded that it was entitled to the difference between the actual and projected generation. The Claimant had produced a table comparing the actual and projected generation at paragraph 25 of the Statement of Claim and had proved the said difference by leading oral as well as documentary evidence ppn 142 arbp-1088.15 wt 599.15dt.01.04.19.doc before the Arbitral Tribunal, which has been considered by the Arbitral Tribunal while allowing part of the claim made by the Claimant under second part of Section 19 of the Indian Contract Act. The principles of law laid down by the Hon'ble Supreme Court in the case of McDermott International Inc. (supra) are applicable to the facts of this case. I am respectfully bound by the said Judgment.

284. The Judgment of the Gujarat High Court in the case of M/s. R.C. Thakkar (supra) will clearly apply to the facts of this case. I am in respectful agreement with the views expressed by the Gujarat High Court in the said Judgment. In my view, there is no substance in the submission of the learned Senior Counsel for the Respondent that Sections 27 and 29 of the Specific Relief Act wold be attracted to the facts of this case. In my view, though the Specific Relief Act imposes certain bar upon the Claimant in a suit for specific performance, such a bar cannot operate in case of the claims made under second part of Section 19 of the Indian Contract Act, which creates a substantive right in favour of a party who seeks to claim compensation under that part.

285. It is an admitted position that and even according to the Respondent, the agreement entered into between the Claimant and the Respondent is in force, at least for the maintenance purposes, even today. In my view, for a rescission to operate, has to be express ppn 143 arbp-1088.15 wt 599.15dt.01.04.19.doc and unequivocal, which is missing in this case. Merely because it was urged by the Claimant in the Statement of Claim that it was entitled to the rescission of the contract, that would not mean that there was rescission of the contract, as sought to be canvassed by the learned Counsel for the Respondent. A perusal of the Statement of Claim clearly indicates that Claim B was made on the basis of on going contract and not on the basis of the rescission of the contract. Since the Claimant had given up Claim A, the submission in the Statement of Claim that the Claimant was entitled to rescission of the contract, would also go along with the prayer A, not having been pressed. The Claimant had clearly exercised the option to press for Claim B on the basis of the ongoing contract, which election was clear, categorical and was conveyed to the Respondent during the course of arbitration proceedings. It is not the case of the Respondent that the Respondent had rescinded or terminated the contract with the Claimant.

286. In so far as the Judgment in the case of Sargent (supra), relied upon by the learned Senior Counsel for the Respondent is concerned, it is held that the words or "conduct" ordinarily required to constitute election must be unequivocal. The conduct of a party to continue the contract will be consisting only with his right under the contract and inconsistent with his right to determine the contract. In this case, neither the Claimant nor the Respondent had determined or rescinded the contract. The conduct of the Claimant was sufficient to indicate that the Claimant had elected to proceed ppn 144 arbp-1088.15 wt 599.15dt.01.04.19.doc with the ongoing contract and to make a claim for compensation under the second part of Section 19 of the Indian Contract Act. The Judgment in the case of Sargant (supra) thus would not assist the case of the Respondent, but would assist the case of the Claimant.

287. Similarly, the Judgment in the case of Lakshmijit s/o. Bhai Suchit (supra), relied upon by the learned Senior Counsel for the Respondent, would also support the case of the Claimant and not the Respondent. If, according to the Respondent, there was any rescission of contract elected by the Claimant, the Respondent would not have continued the said contract with the Claimant.

288. In so far as the Judgment of the Hon'ble Supreme Court in the case of Prem Raj (supra) relied upon by the learned Senior Counsel for the Respondent is concerned, the party had already given a notice of repudiation of the contract. The said Judgment was rendered by the Hon'ble Supreme Court under Section 73 of the Indian Contract Act in view of the notice of repudiation given by a

party to the contract. In this case, it is not the case of the Respondent that any such notice for rescission of contract, or for repudiation of the contract was issued by the Claimant. The said Judgment, thus, would not assist the case of the Respondent or is not an authority on the second part of Section 19 of the Indian Contract Act.

289. In my view, since the Claimant did not exercise the right ppn 145 arbp-1088.15 wt 599.15dt.01.04.19.doc of rescission of the contract, and the contract between the parties continued, the Claimant could make a claim under the second part of Section 19 of the Indian Contract Act. The fact that the Joint Meter Reading Reports are continued to be signed by the Respondent and MSEDCL and various further steps have been taken even today based on such Joint Meter Reading Reports, would clearly indicate that the contract between the parties is ongoing and is not rescinded or determined. The Arbitral Tribunal has considered this issue, at length, in the impugned Award and has rightly allowed the part of the Claim B pressed by the Claimant before the Arbitral Tribunal.

290. A plain reading of the averments made in respect of Claim B, clearly indicates that it was averred by the Claimant that the Claimant would nevertheless be entitled for its alternate claim and damages suffered by it due to fraudulent and reckless/grossly negligent misrepresentation made by the Respondent, as may be assessed by the Arbitral Tribunal. In the said paragraph, the Claimant also strongly placed reliance on the entire cash flow and revenue structure of the Respondent's business on the basis of the generation based on the said misrepresentation. Claim of the Claimant was also on the basis of the difference between the energy generated and the estimated generation represented by the Respondent. The findings of fact rendered by the Arbitral Tribunal on this issue, being not perverse, cannot be interfered with by this Court.

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291. In so far as the submission of the learned Senior Counsel for the Respondent that there was no foundation laid by the Claimant under Section 18 of the Indian Contract Act is concerned, there is no substance in this submission of the learned Senior Counsel for the Respondent at all. In my view, there was no inconsistent plea raised by the Claimant in the statement of claim. The Claimant was entitled to make an alternate claim in the statement of claim. Reliance thus placed by the learned Senior Counsel for the Respondent on the Judgment of the Hon'ble Supreme Court in the case of Sarva Sangh (supra) is thus misplaced. Similarly, the Judgment of this Court in the case of Hanmant Kalghatgi (supra) and also the Judgment of Madras High Court in R. Samudra Vijayam Chettiar (supra) also would not assist the case of the Respondent and are distinguishable

292. In so far as the Judgment of the Hon'ble Supreme Court in the case of Umabai & anr. (supra), relied upon by the learned Senior Counsel for the Respondent is concerned, in my view, since the contract between the parties was not discharged or rescinded and since the Claimant had pressed the claim under second part of Section 19 of the Indian Contract Act on the basis of on going contract, the said Judgment of the Hon'ble Supreme Court would not assist the case of the Respondent, and is clearly distinguishable.

293. In so far as the submission of the learned Senior Counsel for the Respondent that the Respondent did not have an opportunity ppn 147 arbp-1088.15 wt 599.15dt.01.04.19.doc to deal with Claim B and thus the impugned Award is in violation of the principles of natural justice is concerned, in my view, there is no substance in this submission of the learned Senior Counsel for the Respondent. The Claimant had made Claim B in alternate to Claim A and had led evidence on both the claims before the Arbitral Tribunal. The Respondent had also dealt with both the claims before the Arbitral Tribunal and had also made various admissions in the evidence of the witnesses examined by it before the Arbitral Tribunal.

294. The pleadings and the evidence of the parties, followed by written submissions filed by both the parties before the Arbitral Tribunal, clearly indicated that the Respondent was fully aware of both the claims of the Claimant and had not only dealt with Claim B, but had also availed of the opportunity to deal with the said claim. The purpose of filing pleadings is to make aware of the case of the Claimant to the Opponent which, in this case, clearly suggests that the Respondent had fully understood the case of the Claimant and had dealt with the said claim throughout. The Arbitral Tribunal has rightly rendered a finding that the contract entered into between the parties continued and the collateral warranty by the Respondent to the Claimant was actual quantity of energy to be generated from the WEGs.

295. In Clause 9.1 of the Supply Agreement and various other correspondence, an odd figure of energy generation was mentioned ppn 148 arbp-1088.15 wt 599.15dt.01.04.19.doc and not an estimate. The witnesses examined by the Respondent categorically admitted in their cross examination about the correctness of the said figure mentioned in Clause 9.1 of the Supply Agreement. The Court of Appeal in the case of Esso Petroleum Co. Ltd. (supra), has held that even if forecast is given by a party to another party and if a party has already entered into a contract with such party which had given such estimate or forecast of estate of annual consumption although it was not a guarantee, but it was a forecast by other party who has special knowledge and skill and such representation inducing the person to enter into a contract, constitute a warranty. The principles of law laid down by the Court of Appeal in case of Esso Petroleum Co. Ltd. (supra) would clearly apply to the facts of this case. The Arbitral Tribunal has rightly applied the said principles to the facts of this case. I am in respectful agreement with the view expressed by the Court of Appeal in the said Judgment.

296. In so far as the submission of the learned Senior Counsel for the Respondent that in view of Explanation to Section 17 of the Contract Act the Respondent had no duty to speak in a commercial contract which arises only in insurance or indemnity contracts is concerned, in my view, there is no merit in this submission of the learned Senior Counsel . Explanation to Section 17 of the Contract Act refers to "silence" as to the facts likely to affect the willingness of a person which may not be fraud, unless circumstances of the case is of such that there was a duty to speak ppn 149 arbp-1088.15 wt 599.15dt.01.04.19.doc where his silence is itself equivalent to speech. In this case, the Respondent had categorically stated that the estimated generation was 49.71 lakhs KWh/WEG/annum which estimate was fair, genuine and reasonable, as admitted by the witnesses examined by the Respondent. Such figure was deliberately made by the Respondent so as to induce the Claimant to execute the agreement with the Respondent.

297. Reliance placed on the Explanation to Section 17 of the Indian Contract Act by the learned Senior Counsel for the Respondent is, thus, totally misplaced. The Judgment of the Hon'ble Supreme Court in the case of Smith (supra), relied upon by the learned Senior Counsel for the Respondent is thus clearly distinguishable and would not assist the case of the Respondent. Similarly, the Judgment of Chancery Division in the case of Carlish vs. Salt (supra) would assist the case of the Claimant. In my view, there is no substance in the submission of the learned Senior Counsel for the Respondent that the Claimant had advantage of expert advice engaged by it. In my view, Mr. Chagla, learned Senior Counsel for the Claimant is right in his submission that M/s. Power & Energy Consultants and M/s. McKinsey & Company Inc. had not been engaged by the Claimant so as to enable it to judge the merits and demerits of the proposals made by the Respondent nor the said Consultants were engaged to evaluate the wind data and wind energy projection pertaining to the said wind farm project.

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298. In my view, since the Respondent had committed fraud upon the Claimant, the Respondent could not have even otherwise placed reliance on Clause 9.3 or other provisions of the contract in support of the submission that the claim made by the Claimant was contrary to the said provisions. A party who commits a fraud on another party to the contract, cannot seek reliance on a provision so as to take legal undue advantage of such provision.

299. In so far as the reliance placed on Clause 9.1 of the Supply Agreement by the Respondent which refers "estimate" is concerned, the contract must be construed for more business efficacy to further the intentment of the party. It was established beyond reasonable doubt before the Arbitral Tribunal that percentage with figure of 49.71 which was not a rounded figure mentioned in Clause 9.1 was not a real estimate and was a fraud on the part of the Respondent to induce the Claimant to enter into the agreement with the Respondent. Hon'ble Supreme Court in Nabha Power Limited (NPL) (supra) has held that the implied term can be contemplated if considered necessary to lend efficacy to a term of contract, having regard to the main purpose of the contract. It is necessary to give business efficacy to the contract. The principles laid down by the Hon'ble Supreme Court in the said Judgment would apply to the facts of this case. I am respectfully bound by the said Judgment.

300. In so far as the issue raised by the learned Counsel for the Respondent that the Arbitral Tribunal could not have considered ppn 151 arbp-1088.15 wt 599.15dt.01.04.19.doc the earlier clause prevailing over the later clause is concerned, in my view, the Arbitral Tribunal has rightly applied the principles for interpretation of contract that if earlier clause followed by a latter clause which destroys the object created by earlier clause, the earlier clause would prevail. The principles laid down by the Privy Council in the case of Forbes (supra) and by the Hon'ble Supreme Court in the case of Radha Sundar Dutta (supra) on this issue would clearly support the case of the Claimant. I am respectfully bound by the Judgment of the Hon'ble Supreme Court in the case of Radha Sundar Dutta (supra) which would apply to the facts of this case and also the principles laid down.

301. In so far as the submission of the learned Senior Counsel for the Respondent that the Award was rendered by the Arbitral Tribunal after expiry of 37 months from the date of hearing is

concerned, a perusal of the records indicates that after hearing on 19.12.2011, the arbitral proceedings were held on 20.12.2011. 5.1.2012, 6.2.2012, 12.2.2012, 14.2.2012, 1.9.2012, 12.9.2912, 19.10.2012, 16.11.2012, 31.12.2012, 1.1.2013, 3.1.2013, 10.1.2013, 2.2.2013, 30.4.2013, 3.12.2014. 4.12.2014, including for the purpose of (i) correction of the earlier minutes, (ii) proceedings in respect of exhibit C.24, (iii) for extension of time for filing the written submissions, (iv) for substituting Inox as the Claimant since the erstwhile Claimant (GFL) had sold, transferred, assigned and conveyed its wind energy business to Inox, and (v) for discussing and finalising the Arbitral Award.

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302. The Respondent had also opposed the application of the Claimant for substitution of its name as the Claimant. Order for substitution of the name of Inox Renewables Ltd. as the Claimant could be passed by the Arbitral Tribunal only on 3.12.2014; whereas the Award came to be passed within one month thereafter.

303. In my view, there is, thus, no substance in the submission of the Respondent that the Award was declared by the Arbitral Tribunal after 37 months from the date of closure of the arguments on 19.12.2011. Reliance thus placed by the learned Senior Counsel for the Respondent on the Judgment of this Court in the case of Bhogilal Shah (supra) and the Judgment of the Hon'ble Supreme Court in Anil Rai (supra) is misplaced. Facts in both those matters were totally different and are clearly distinguishable.

304. It is the submission of the learned Senior Counsel for the Respondent that the Arbitral Tribunal has charged very exorbitant amount of fees i.e. Rs.4.35 crores collected from both the parties towards sitting fees; approximately Rs.1.35 crores towards reading, discussion and Award writing; and a sum of Rs.4.05 lacs towards secretarial charges from the parties. He submits that though the Arbitral Tribunal had exorbitantly fixed the fees of Rs.22,50,000/- towards preparing of award, vide proceedings dated 20th April, 2008, the same was unilaterally revised to Rs.97,50,000/- by the Arbitral Tribunal. Thus, the Award deserves to be set aside on this ground also. A perusal of the records indicates that the ppn 153 arbp-1088.15 wt 599.15dt.01.04.19.doc Claimant had opposed the exorbitant fees demanded by the Arbitral Tribunal. The Respondent did not oppose such fees demanded by the Arbitral Tribunal at any point of time and has waited for the outcome of the Arbitral Award, expecting that the same would be in favour of the Respondent and thereafter to raise this ground in the Arbitration Petition. The Respondent cannot be allowed to raise this issue for the first time in this Petition.

305. Be that as it may, considering the factum of exorbitant fees being charged by various Arbitral Tribunals under different heads, sub-Section (14) is inserted in Section 11, to be read with the Fourth Schedule of the Arbitration Conciliation Act, 1996, prescribing ad valorem fees with a ceiling of Rs.30.00 lakhs if the sum in dispute exceeds rupees twenty crores. This Court has, however, not framed any Rules so far, as contemplated under Section 11(14) of the Arbitration and Conciliation Act, 1996. The parties before the Arbitral Tribunal sometimes may not be in a position to bargain with the Arbitral Tribunal about the fees demanded by the Arbitral Tribunal, may be under an

apprehension that the mind of the Arbitral Tribunal may be prejudiced if suggestion to reduce the fees under different heads is made by such party. It is for a party to select a suitable arbitrator in the facts of each case, considering the stakes involved, subject to the conditions in the arbitration agreement.

306. In my view, it would be more appropriate if uniform ppn 154 arbp-1088.15 wt 599.15dt.01.04.19.doc fees can be introduced in the provisions of the Arbitration and Conciliation Act, 1996 in case of arbitral proceedings held without intervention of the Courts, appointment of arbitral Tribunal under Sections 9 or 11 of the Arbitration and Conciliation Act, 1996 or under Section 89 of the Code of Civil Procedure, 1908 or any other proceedings between the parties where an arbitration agreement is arrived at for the first time, or Arbitral Tribunal appointed by Institutions. Unless uniform fees in the aforesaid proceedings are prescribed and the Rules under Section 11(14) are framed, the problem of exorbitant fees and other charges in the arbitration proceedings, would continue. In my view, till arbitration Rules under Section 11(14) are framed by this Court, fee structure provided in Fourth Schedule would not be binding on the Arbitral Tribunal. In view of the Respondent not having raised any issue about the quantum of arbitral fees demanded by the Arbitral Tribunal, at the relevant time, I am not inclined to accept this objection at this stage.

REASONS AND CONCLUSION IN ARBITRATION PETITION NO.599 OF 2015

307. I shall now deal with the submissions made by the parties in Arbitration Petition No.599/2015. The Claimant has impugned part of the Award rejecting part of the Claim made by the Claimant, thereby restricting the part for which it was entitled to compensation in terms of second part of Section 19 of the Indian Contract Act, 1872 till the date of Award. It was the case of the Claimant that the Claimant was entitled to such compensation for ppn 155 arbp-1088.15 wt 599.15dt.01.04.19.doc the entire period of 20 years and, thus, the Arbitral Tribunal having rendered various findings in favour of the Claimant, ought to have allowed the claim for the entire period of 20 years. The Claimant has impugned findings of the Arbitral Tribunal in paragraphs 55.7 and 55.8 of the majority Award.

308. It was the case of the Claimant that the final offer letter which included the technical specifications and the cash flow statement, clearly indicated that the life time of WEGs would be 20 years and based on such representation made by the Respondent, the Claimant entered into the Supply Agreement dated 4.1.2007. The Claimant also placed reliance upon the fact that the Respondent was operating WEGs on behalf of the Claimant pursuant to agreements and had signed various Joint Meter Readings reports, acting as authorised representative of the Claimant, which was also countersigned by the authorised representatives of MSEDCL.

309. It is the case of the Claimant that since the Respondent had committed fraud upon the Claimant and the Arbitral Tribunal has rendered a finding of fraud against the Respondent, the Arbitral Tribunal ought to have allowed compensation for the period of 20 years as a natural corollary to various findings rendered by the Arbitral Tribunal. The Claimant, accordingly, applied for modification of the Award to the extent the same disallows the claim for compensation for a period of 20 years and only allowing the claim upto the date of Award.

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310. With the assistance of the learned Senior Counsel for both the parties, I have perused various findings rendered by the Arbitral Tribunal and more particularly in paragraphs 37.12, 39.2, 39.6, 39.7, 39.10, 39.11, 55.3, 55.4, 55.5, 55.6, 55.8 and various other paragraphs while considering the submissions made by the learned Senior Counsel for the Claimant. The Arbitral Tribunal has rendered various findings of fact and has rightly held that the Claimant had not provided basis for predicting the long term energy estimated for 20 years. In my view, the Arbitral Tribunal rightly considered the claim for compensation under the second part of Section 19 of the Indian Contract only upto the date of Award, based on the pleadings, documentary and oral evidence led by the parties. The Claimant had not applied for any declaratory award, but claimed compensation for the entire period, though such period has not yet expired. In my view, Mr.Sarkar, learned Senior Counsel for the Respondent is right in his submission that the claim for compensation made by the Claimant could not be severed periodwise.

311. In so far as the Judgment of the Hon'ble Supreme Court in the cases of Tata Hydro-Electric Power Supply Co. Ltd. and another (supra), Oil and Natural Gas Corporation Limited (supra), Krishna Bhagya Jala Nigam Ltd, (supra) and M.P. Power Generation Co. Ltd. and anr. (supra), relied upon by the learned Senior Counsel for the Claimant, in support of her submission that ppn 157 arbp-1088.15 wt 599.15dt.01.04.19.doc this Court has ample power to modify part of the award rendered by the Arbitral Tribunal, rejecting part of the claim, to allow those claims based on the evidence already led by the Claimant is concerned, a perusal of those four Judgments clearly indicates that the Hon'ble Supreme Court had reduced the claim already awarded by the Arbitral Tribunal and had not enhanced the claim or did not allow any claim which was rejected by the Arbitral Tribunal.

312. Hon'ble Supreme Court in McDermott International Inc. (supra) has already held that a Court can either set aside or upheld that award or modify, if any part of the Award is severable and cannot make an award by allowing any claim which is already rejected by the Arbitral Tribunal. In my view, reliance placed by the learned Senior Counsel for the Claimant in the cases of Tata Hydro-Electric Power Supply Co. Ltd. and another (supra), Oil and Natural Gas Corporation Limited (supra), Krishna Bhagya Jala Nigam Ltd, (supra) and M.P. Power Generation Co. Ltd. and anr. (supra), is totally misplaced. The principles laid down by the Hon'ble Supreme Court in the case of McDermott International Inc. (supra) would clearly apply to the facts of this case. I am respectfully bound by the said Judgment.

313. A perusal of the impugned Award rendered by the Arbitral Tribunal clearly indicates that the Arbitral Tribunal has rendered various findings of fact, after considering oral and documentary evidence, pleadings and the submissions made by both ppn 158 arbp-1088.15 wt 599.15dt.01.04.19.doc the parties which findings are not perverse. This Court, while deciding a petition under Section 34 of the Arbitration and Conciliation Act, 1996 cannot reappreciate the findings of fact which are not perverse and cannot reappreciate the evidence led by the parties before the Arbitral Tribunal, which are duly considered by the Arbitral Tribunal.

314. In so far as the provisions of the agreement are concerned, the Arbitral Tribunal has interpreted the terms thereof, including Clauses 9.1, 9.2 and 9.3, which interpretation is not only possible interpretation, but is a correct interpretation.

315. I do not find any infirmity with any part of the impugned Award. I, therefore, pass the following Order :

(a) Arbitration Petition No.1088/2015 and Arbitration Petition No. 599/2015 are dismissed.

(b) There shall be no order as to costs.

R.D. DHANUKA, J.