HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

D.B. Civil Miscellaneous Appeal No. 783/2019
URN: CMA / 1241U / 2019

M/s Navbharat Buildcon Private Limited, Having Its Registered Office At Luhadia Sadan Jaipur Road Madanganj-Kishangarh District Ajmer (Raj).

----Appellant

Versus

M/s Suzlon Energy Limited, I[st] Floor, Neelkanth, Bhawani Singh Road, Opposite Sahakar Bhawan, C-Scheme, Jaipur. Also At 201, IInd Floor, Geetanjali Tower, Ajmer Road, Jaipur.

----Respondent

For Appellant(s)	:	Mr. Sudhir Gupta, Sr. Adv. Assisted by Ms. Sukriti Kasliwal, Ms. Shweta Chouhan, Mr. Rachit Somani & Mr. Sundaram Sharma
For Respondent(s)	:	Mr. Mahendra Singh Mr. Adhiraj Shekhawat Ms. Shruti Jain for Mr. Sunil Nath

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HON'BLE MR. JUSTICE ARUN MONGA
HON'BLE MR. JUSTICE SANDEEP TANEJA

Judgment

Date of Conclusion of Arguments	**03.07.2026**
Date on which judgment was reserved	**03.07.2026**
Whether the full judgment or only operative part is pronounced	**Full Judgment**
Date of Pronouncement	**17.08.2026**

REPORTABLE

Per: Sandeep Taneja, J.

1. The present appeal has been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (for short, 'the Act of 1996'), assailing the order dated 03.01.2019 passed by the learned Commercial Court No.4, Jaipur (for short, 'Commercial Court'), whereby the objection petition filed by the respondent

under Section 34 of the Act of 1996 was allowed and the arbitral award dated 20.04.2018 passed by the learned arbitrator was set aside.

2. The brief facts, as pleaded, giving rise to the present appeal are that the Energy Department, Government of Rajasthan, issued the Policy for Promotion of Electricity Generation from Wind, 2003. The said policy envisaged the development and maintenance of wind farms by developers through investment on a long-term basis for a period of at least 20 years. For the said purpose, the respondent, being the developer, took land on lease after preparing a feasibility report for the wind farm and started looking for investors.

2.1. In this background, sometime in June/July 2004, the respondent, acting as the developer, approached the appellant with a proposal to invest in a wind farm project on a turnkey basis for a period of 20 years. On the basis of the project report prepared by the respondent, which projected that one S-66 make Wind Turbine Generator having a capacity of 1.25 MW, would generate a guaranteed minimum of 28 lakh units of electricity annually at the proposed site, subject to 100% grid availability, the appellant, after several rounds of discussions between the parties, issued a purchase order dated 14.07.2004 to the respondent for the supply of one SUZLON S-66 – 1.25 MW Wind Turbine Generator (for short, 'WTG') to be installed at Soda Mada, Jaisalmer.

2.2 The said purchase order included five annexures, containing the following documents:

(i) **Annexure – I** : Price Schedule for 1 (One) No. of SUZLON S 66 – 1.25 MW WTG;

(ii) **Annexure – II** : Terms and Conditions;

(iii) **Annexure – III** : Generation and Performance Guarantee;

(iv) **Annexure – IV** : Scope of Supply of Electrical Works; and

(v) **Annexure – V** : Technical Data Sheet.

2.3 The respondent accepted the aforesaid purchase order, thereby culminating in a binding contract between the parties. Apart from the aforesaid purchase order, the appellant also issued a work order of even date in respect of the services required for the erection and installation of the WTG.

2.4 On 16.07.2004, i.e., two days after the issuance of the aforesaid purchase order, a Memorandum of Understanding (for short, 'MOU') was executed between the appellant and the respondent, modifying the purchase order in terms thereof.

2.5 In addition to the aforesaid documents, the parties also executed agreements relating to Operation & Management, as well as Maintenance. A Power Purchase Agreement was also executed amongst the appellant, the respondent and Jaipur Vidyut Vitran Nigam Limited.

2.6 In pursuance of the aforesaid binding contract, the respondent supplied, installed and successfully commissioned the WTG on 29.12.2004 at its wind farm situated at Soda Mada, Jaisalmer.

2.7 Owing to the shortfall in the generation of electricity from the WTG, disputes arose between the parties, leading to the invocation of the arbitration clause by the appellant.

2.8 In the statement of claim filed before the learned arbitrator, the appellant set up its claim stating that the respondent had guaranteed an annual generation of 28 lakh units of electricity for the entire contractual period of 20 years and, consequently, sought compensation for the shortfall in actual generation. The appellant also claimed compensation on account of the availability of the WTG remaining below the guaranteed level of 95% from the fourth year onwards until the filing of the claim petition. It was further stated that the WTG supplied by the respondent was defective and, therefore, incapable of generating the assured 28 lakh units of electricity annually at the project site with 100% grid availability. It was also stated that the machine availability fell below the guaranteed level of 95% during the financial years 2012-13, 2013-14 and 2016-17. Besides the aforesaid claims, the appellant also sought damages towards the financial burden allegedly incurred in repaying the loan obtained from the State Bank of Bikaner and Jaipur (now 'State Bank of India').

2.9 The respondent filed its reply to the statement of claim, denying the contentions raised by the appellant. It was stated that the generation guarantee was applicable only for a period of four years and not for the entire tenure of the agreement. According to the respondent, the guarantee was contractually restricted to a period of four years, for which the requisite bank guarantee/corporate guarantee had also been furnished. It was further stated that the respondent had duly honoured its contractual obligations by paying compensation amounting to Rs.1,36,93,149/-, along with interest for delayed payment, thereby fully discharging the generation guarantee. It was also contended that, upon expiry of the four-year guarantee period, no contractual obligation survived requiring the respondent to compensate the appellant for any subsequent shortfall in generation. The respondent further stated that the generation of electricity depended upon three factors, namely, machine availability, wind availability and grid availability. Of these, only machine availability was within the respondent's control, whereas wind conditions and grid availability were natural and external factors beyond its control and, therefore, incapable of being guaranteed by the respondent. On the aforesaid premises, the respondent asserted that all its contractual obligations had been duly performed and discharged and that the claims raised by the appellant were liable to be dismissed.

2.10 The appellant filed a rejoinder to the reply filed by the respondent, reiterating the averments made in the statement of claim. It was stated that, although compensation for the first four years was secured through bank/corporate guarantees, the respondent's contractual obligation to ensure the guaranteed performance of the WTG continued throughout the contractual period of 20 years. It was further pleaded that the respondent's payment of compensation for low generation and the subsequent settlements amounted to an admission that the WTG had failed to perform in accordance with the contractual assurances. According to the appellant, the shortfall in generation was attributable to defects in the WTG and not to wind or grid conditions, as similarly situated WTGs installed at the same site generated substantially higher quantities of electricity. It was also contended that the respondent could not rely upon wind or grid availability since the assured generation was never made conditional upon those factors.

2.11 The learned arbitrator, on the basis of the rival pleadings, framed the following issues:

> *"Issue No. 1. Whether or not respondent gave a guarantee that the machines supplied by it to the claimant is capable of generating 28 Lakh units of electricity every year?*
>
> *Issue No. 2. Whether or not claimant is entitled to replacement of the WTG S66 make supplied by the respondent with any other WTG Manufactured by the respondent which is capable of generating the assured 28,00,000 units of electricity every year?*
>
> *Issue No.3. Whether or not claimant is entitled to compensation on account of Non-availability of Machine below the guaranteed 95% for the Financial Year 2012-13, 2013-14 to the tune of Rs. 12,01,356/-?*
>
> *Issue No.4. Whether or not claimant is entitled to interest @ 24% p.a., compounded quarterly a period of delay beyond 31st October of each year towards the amount payable on account of Non-Availability of machine amounting to Rs. 10,00,709/-?*
>
> *Issue No.5. Whether or not claimant is entitled to receive damages on account of additional cost incurred by the Claimant for repaying the loan taken from State Bank of Bikaner & Jaipur (now SBI) on the basis of projections given by the respondent i.e., a sum of Rs. 45,90,463/- alongwith interest @12% p.a.?*

Issue No.6. Whether or not claimant is entitled to receive of sum of Rs. 2,88,24,740/- towards short generation of electricity from 01.02.2009 to 31.01.2017 alongwith interest @ 12% p.a., till actual realization?

Issue No.7. Whether or not claimant is entitled to sum of Rs. 1,88,167/- for short payment against guaranteed generation for the second year which was wrongly withheld by the respondent, alongwith interest @ 12% p.a. w.e.f. 24.07.2007?

Issue No.8. Whether or not claimant is entitled to pendent lite interest as well as future interest till realization @ 18% p.a. on the afore-stated claims?

Issue No.9. Whether or not claimant is entitled to cost incurred by it in filing Section 11 Application seeking appointment of Arbitrator as well as cost of the present proceedings form the respondent.

Issue No. 10. Whether the claimant was aware of the fact that generation was based on availability of wind and availability of grid?

Issue No.11. Whether that compensation for loss of generation was not agreed under the operation and maintenance agreements executed between the Claimant and Suzlon Global Services Limited?

Issue No.12. Whether the non-availability of WTG is to be compensated in accordance with the Machine Availability formulas provided under the operations and maintenance agreement?

Issue No.13. Whether or non-claimant is liable for payment of compensation for loss of generation after expiry of the generation guarantee period of 3 years from the date of Commissioning of the WTG (i.e. whether generation guarantee clause can be extended beyond the generation guarantee period of 3 years.).

Issue No.14. Whether after expiry of the 3 years period (i.e. from the 4th year after the date of Commissioning of the WTG) the respondent is liable for compensation for non-availability of the WTG in accordance with the operations and maintenance.

Issue No.15. Whether as per the purchase order the respondent has paid the compensation to the claimant, whether claimant have accepted it.

Issue No.16. Whether the claimant raised any objection regarding deficiency in WTG at initial or after initialization of operation and management. Whether at the present stage claimant can raise this issue and WTG being deficient and claim for replacement?

Issue No.17. Relief?"

2.12 After hearing the parties and evaluating the documentary evidence, the learned arbitrator, vide arbitral award dated 20.04.2018, decided Issue Nos.1, 3, 4, 6, 7, 8, 11, 12, 13, 14 and 15 in favour of the appellant. Issue No.10 was partly decided in favour of the appellant, whereas Issue Nos.2, 5, 9 and 16 were decided against the appellant. The learned arbitrator, *inter alia*, held that, since the project was a turnkey project, the generation guarantee furnished by the respondent extended to the entire contractual period of 20 years. Consequently, the respondent was held liable to compensate the appellant for the shortfall in the generation of electricity.

2.13 Being aggrieved by the aforesaid arbitral award, the respondent filed an objection petition under Section 34 of the Act of 1996 before the learned Commercial Court. Vide the impugned order, the learned Commercial Court allowed the said objection petition, holding that a conjoint reading of the terms and conditions of the purchase order dated 14.07.2004 and the MOU dated 16.07.2004 established that the generation guarantee was restricted to a period of four years and did not extend to the entire contractual period of 20 years. The learned Commercial Court concluded that the learned arbitrator had travelled beyond the scope of the contract and, consequently, set aside the arbitral award.

3. Being aggrieved by the aforesaid order passed by the learned Commercial Court setting aside the arbitral award, the appellant has preferred the present appeal.

4. Learned senior counsel for the appellant submitted that the learned Commercial Court exceeded the limited scope of interference available under Section 34 of the Act of 1996 by re-appreciating the terms of the contract and substituting its own interpretation for that adopted by the learned arbitrator, thereby misdirected itself in setting aside a well-reasoned and detailed arbitral award.

4.1 It was further submitted that, once the interpretation adopted by the learned arbitrator constituted a possible view of the contractual clauses, the learned Commercial Court could not substitute its own interpretation merely because another view was also possible.

4.2 Learned senior counsel also submitted that the contract executed between the parties was a turnkey contract, under which the respondent had guaranteed an annual generation of 28 lakh units of electricity throughout the contractual period of 20 years.

It was further submitted that the bank guarantee furnished for the first three years and the corporate guarantee furnished for the fourth year were merely additional guarantees intended to secure the respondent’s contractual obligations and were not intended to limit the generation guarantee to a period of four years, as they were over and above the generation guarantee of 28 lakh units per annum.

4.3 Learned senior counsel also contended that the learned Commercial Court misread Clause 3 of the MOU while interpreting the generation guarantee and, in doing so, travelled beyond the permissible limits of judicial interference. On the basis of the aforesaid submissions, it was prayed that the impugned order passed by the learned Commercial Court be set aside and the arbitral award be restored.

4.4 In the alternative, learned senior counsel submitted that the learned Commercial Court interfered only with the findings recorded on Issue Nos. 1, 6, 11 and 13, all of which related to the respondent’s guarantee regarding annual generation of electricity. In continuation thereof, it was further submitted that the findings recorded by the learned arbitrator on the remaining issues, which were independent of and severable from the aforesaid issues, had not been set aside by the learned Commercial Court. It was, therefore, prayed that the order passed by the learned Commercial Court be modified and that the arbitral award in respect of Issue Nos.3, 4, 7, 8, 12 and 14 be sustained. Learned senior counsel relied upon the following judgments of the Hon’ble Supreme Court:

(i) **National Highways Authority of India Vs. Hindustan Construction Co. Ltd.**, reported in **(2024) 6 SCC 809**.

(ii) **Gayatri Balasamy Vs. ISG Novasoft Technologies Ltd.**, reported in **2025 SCC OnLine SC 986**.

(iii) **Jan De Nul Dredging India Pvt. Ltd. Vs. Tuticorin Port Trust**, reported in **2026 SCC OnLine SC 33**.

5. *Per contra*, learned counsel for the respondent, while supporting the impugned order passed by the learned Commercial Court, submitted that the terms and conditions of the contract governing the generation guarantee were clear, specific and unambiguous. It was further submitted that the guarantee regarding annual generation was limited to the first four years of the project, which was secured by a bank guarantee for the initial three years and a corporate guarantee for the fourth year. It was also submitted that the contract was not on a turnkey basis and that the agreements executed between the parties were independent of each other.

5.1 Learned counsel further submitted that the arbitral award was patently illegal and perverse, inasmuch as the learned arbitrator failed to properly consider the pleadings and contentions raised by the respondent. It was also submitted that several issues were decided in favour of the appellant without assigning any cogent reasons or discussing the relevant documentary evidence available on record. It was, therefore, prayed that the appeal be dismissed *in toto*.

5.2 Learned counsel placed reliance upon the following judgments of the Hon'ble Supreme Court:-

(i) **OPG Power Generation Pvt. Ltd. Vs. Enexio Power Cooling Solutions India Pvt. Ltd. and Anr.**, reported in **(2025) 2 SCC 417**.

(ii) **Delhi Metro Rail Corporation Ltd. Vs. Delhi Airport Metro Express Pvt. Ltd.**, reported in **(2024) 6 SCC 357**.

(iii) **Maxim India Integrated Circuit Design Pvt. Ltd. Vs. Andappa (D) By Legal Representatives and Ors.**, reported in **(2025) 3 SCC 84**.

6. Heard learned counsels for the parties and perused the material available on record.

7. In the present appeal, the primary issue that arises for consideration is whether, as per the terms and conditions of the purchase order dated 14.07.2004, as modified by the MOU dated 16.07.2004, the respondent had guaranteed the annual generation of electricity throughout the contractual period of 20 years, as contended by the appellant, or whether such generation guarantee was confined to a period of four years, as asserted by the respondent.

8. Before adverting to the merits of the case, it is, however, apposite to refer to the legal position governing the scope of interference under Section 34 of the Act of 1996, particularly in matters relating to contractual interpretation.

8.1 The Hon'ble Supreme Court, in the case of **State of Rajasthan Vs. Nav Bharat Construction Co.,** reported in **(2006) 1 SCC 86,** held that, where the interpretation of a contractual term is involved, the interpretation adopted by the arbitrator must ordinarily be accepted unless it is one which no reasonable person could have adopted. It was further held that an arbitrator would misconduct himself if he travelled beyond the terms of the contract. The relevant extract of the judgment reads as under:

> *"27. There can be no dispute to the well-established principle set out in these cases. However, these cases do not detract from the law laid down in Bharat Coking Coal Ltd. case (2001) 4 SCC 86 or Continental Construction Co. Ltd. case (1988) 3 SCC 82. An arbitrator cannot go beyond the terms of the contract between the parties. In the guise of doing justice he cannot award contrary to the terms of the contract. If he does so, he will have misconducted himself. Of course if an interpretation of a term of the contract is involved then the interpretation of the arbitrator must be accepted unless it is one which could not be reasonably possible. However, where the term of the contract is clear and unambiguous the arbitrator cannot ignore it."*

8.2 The aforesaid principle has consistently been reiterated by the Hon'ble Supreme Court to the effect that although an arbitrator is the final arbiter of the interpretation of contractual terms, such interpretation must remain within the four corners of the contract and cannot rewrite or modify its express stipulations.

8.3 Further, in the case of **Associate Builders v. Delhi Development Authority**, reported in **(2015) 3 SCC 49**, the Hon'ble Supreme Court observed as under:

> *"…….*
>
> *42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*

> *"28.Rules applicable to substance of dispute.—(1)-(2) * * **
>
> *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."*

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do."

8.4 Also, in the case of **Ssangyong Engg. & Construction Co. Ltd. v. NHAI**, reported in **(2019) 15 SCC 131**, while endorsing the principles laid down in **Associate Builders** (supra), regarding the scope of interference with domestic awards, even after the Arbitration and Conciliation (Amendment) Act, 2015, the Hon'ble Supreme Court observed as under:

"40. The change made in Section 28(3) by the Amendment Act really follows what is stated in paras 42.3 to 45 in Associate Builders v. DDA, (2015) 3 SCC 49, namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, <u>unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of</u>

jurisdiction. This ground of challenge will now fall within the new ground added under Section 34 (2-A).

41. …… Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse."

(emphasis supplied)

8.5 The aforesaid view was further reiterated in the case of **Delhi Metro Rail Corporation Ltd.** (supra), wherein the Hon'ble Supreme Court observed as under:

"34. The contours of the power of the competent court to set aside an award under Section 34 has been explored in several decisions of this Court. In addition to the grounds on which an arbitral award can be assailed laid down in Section 34(2), there is another ground for challenge against domestic awards, such as the award in the present case. Under Section 34(2-A) of the Arbitration Act, a domestic award may be set aside if the Court finds that it is vitiated by "patent illegality" appearing on the face of the award.

35. In Associate Builders v. DDA, (2015) 3 SCC 49, a two-Judge Bench of this Court held that although the interpretation of a contract is exclusively within the domain of the arbitrator, construction of a contract in a manner that no fair-minded or reasonable person would take, is impermissible. A patent illegality arises where the arbitrator adopts a view which is not a possible view. A view can be regarded as not even a possible view where no reasonable body of *persons could possibly have taken it. This Court held with reference to Sections 28(1)(a) and 28(3), that the arbitrator must take into account the terms of the contract and the usages of trade applicable to the transaction. The decision or award should not be perverse or irrational. An award is rendered perverse or irrational where the findings are:*

(i) based on no evidence;
(ii) based on irrelevant material; or
(iii) ignores vital evidence.

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39. <u>In essence, the ground of patent illegality is available for setting aside a domestic award, if the decision of the arbitrator is found to be perverse, or so irrational that no reasonable person would have arrived at it; or the construction of the contract is such that no fair or reasonable person would take; or, that the view of the arbitrator is not even a possible view.</u> [Patel Engg. Ltd. v. North Eastern Electric Power Corpn. Ltd., (2020) 7 SCC 167. A "finding" based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside under the head of "patent illegality". An award without reasons would suffer from patent illegality. The arbitrator commits a patent illegality by deciding a matter not within his jurisdiction or violating a fundamental principle of natural justice.

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46. Interference with an arbitral award cannot frustrate the "commercial wisdom behind opting for alternate dispute resolution", merely because an alternate view exists. [Dyna Technologies (P) Ltd. v. Crompton Greaves Ltd., (2019) 20 SCC 1]. <u>However, the interpretation of a contract cannot be unreasonable, such that no person of ordinary</u>

prudence would take it. The contract, which is a culmination of the parties' agency, should be given full effect. If the interpretation of the terms of the contract as adopted by the Tribunal was not even a possible view, the award is perverse. [Konkan Railway Corpn. Ltd. v. Chenab Bridge Project Undertaking, (2023) 9 SCC 85]."

(emphasis supplied)

8.6 From the aforesaid judicial pronouncements, it is clear that the scope of interference with an arbitral award is limited. An arbitral award can be interfered with only on the grounds specifically enumerated under Section 34 of the Act of 1996, viz., when the arbitral award is in conflict with the public policy of India, or is contrary to the fundamental policy of Indian law, or is against the most basic notions of morality or justice, or suffers from patent illegality.

8.7 Further, it is settled that the jurisdiction to interpret the contract primarily lies with the arbitrator. If the view adopted by the arbitrator is a plausible and possible one, no interference is warranted under Section 34 of the Act of 1996. It is, however, also equally well settled that where the arbitrator has travelled beyond the terms of the contract and/or where the interpretation of the contract is such that no person of ordinary prudence would accept it, or is contrary to the plain language and intent of the contract, the arbitral award can be interfered with.

9. In view of the above, we now proceed to examine the impugned order passed by the learned Commercial Court. The dispute between the parties pertains to the tenure of the annual generation guarantee furnished by the respondent to the

appellant. The case of the appellant is that the respondent guaranteed the annual generation of electricity for the entire contractual period of 20 years, whereas the case of the respondent is that the guarantee was confined to the initial period of four years. In this regard, it is relevant to refer to the relevant clauses of the purchase order and the MOU.

9.1 Clause 10 of Annexure-II to the purchase order, which deals with the annual generation guarantee, reads as under:-

"ANNEXURE - II

TERMS AND CONDITIONS

....

10. GUARANTEE FOR ANNUAL GENERATION AND PERFORMANCE OF THE PROJECT:

As per Annexure – III"

9.2 Evidently, it was agreed that the guarantee for annual generation shall be governed by the provisions contained in Annexure-III. The relevant part of the said Annexure is reproduced hereunder for ready reference:-

" ANNEXURE - III

GUARANTEE FOR ANNUAL GENERATION AND PERFORMANCE OF THE PROJECT:

SEL shall give generation guarantee for Three Years commencing from 01.11.04. The guarantee will be given in the following manner:-

(a) SEL shall guarantee a generation of 28,00,000 (Twenty eight lacs only) units per year at 100% grid availability at RSEB meter, for wind farm S66 of 1250 KW WTG installed a Soda Mada at

Jaiselmer in Rajasthan with a comulative generation of <u>84 Lacs (Eighty four lacs only) units for the first three years of the operation</u>. This generation guarantee will be of net electric power (KWH) supplied to the grid as reduced by auxiliary consumption and reactive power for which a bill will be raised to RVPN as per the power purchase agreement (PPA) and shall be backed by an irrevocable bank guarantee of First Class Bank, for Rs. 10.00 Lacs valid for a period of 12 months, with 3 months claim period, from date of commercial operation of the WTG to be further renewed for next two more years, with respective claim period. The bank guarantee shall be given before release of Loan amount under this agreement.

The compensation of any short generation for each year (1ST October to 30Th September) for the <u>entire period of three years</u> shall be computed in the 1st fortnight of November of the subsequent year. If the generation fall short than guaranteed, an amount arrived at by multiplying the short fall in unit with prevailing selling price to RVPN/DISCOM, becomes payable by SEL to NBPL. The payment so determined shall be settled by SEL on or before 31St November of subsequent year. In case there is any delay in payment beyond this date SEL will pay interest @ 12% p.a. compounded quarterly. We will have a right to enforced without recourse the bank guarantee/corporate guarantee after 31St November if the payment is not received. NBPL will also have right to adjust any such unpaid amount from the half yearly advance payment of operation & maintenance charges payable to SEL.

In the <u>event of block period of 3 years</u> the cumulative generation achieved by the wind farm is more than or equal to <u>cumulative generation of 84</u>

lacs units, we shall refund the amount recovered from SEL, if any, on account of short fall in generation during the 1ST three years by 31ST November of 4th year of operation.

(b) SEL together with it's associate concerns further undertake that during the period of operation starting from 4th year till the term of this agreement, that the overall availability of the WTG shall not be less then 95% in any year. In the event that in any particular year wind farm availability is less than 95% than SEL will compensate NBPL for the loss of generation due to reduction in availability calculated as under:-

Compensation = { (95% / Actual availability of WTG in %) - 1 } X prevailing selling price (Tarrif) X Actual generation in units of WTG of that year.

The payment above compensation shall be settled, in the same manner as explained in para (a) above for generation guarantee, for each year and the same bill also carry interest @ 24% p.a. compounded quarterly for the period of delay beyond 31St October of each subsequent year. This will not be set off with excess availability of more than 95% of WTG for other years.

……….."

(emphasis supplied)

10. A bare perusal of the aforesaid clauses reveals that, under the purchase order, the respondent furnished a generation guarantee of 28 lakh units per annum for a period of three years, commencing from 01.11.2004. The said generation guarantee was backed by an irrevocable bank guarantee. The clause further

prescribes the manner in which compensation was to be computed in the event that the actual generation falls below the guaranteed level. It provides that the compensation shall be calculated by multiplying the shortfall in generation by the prevailing selling price of electricity, subject to the discount stipulated therein. The clause also refers to a cumulative generation of 84 lakh units, which further supports the conclusion that the generation guarantee was confined to a period of three years at the rate of 28 lakh units per annum. It further stipulates that if, during the said block period of three years, the cumulative generation is equal to or exceeds 84 lakh units, the appellant would refund to the respondent any amount earlier recovered on account of the shortfall in generation during the first three years.

11. It is also noteworthy that Clause (a) of Annexure-III deals specifically with the annual generation guarantee. In contrast, Clause (b) governs the period commencing from the fourth year until the expiry of the contractual term, which is admittedly 20 years, and provides that the overall availability of the WTG shall not be less than 95% in any year. Meaning thereby, the respondent's obligation during the said period was confined to ensuring that the machine availability did not fall below the stipulated level of 95%.

12. Clause (b) further provides for payment of compensation in the event of any loss in generation attributable to a reduction in machine availability below the guaranteed level. The language employed in Clause (b) is plain and unambiguous and cannot be construed as extending the annual generation guarantee beyond

the initial three-year period. The guarantee provided therein relates exclusively to machine availability and not to the annual generation of electricity. Consequently, any compensation payable under Clause (b) is required to be computed only in accordance with the formula prescribed therein for the loss of generation arising from reduced machine availability.

13. As a result of the above discussion, it is clear that, as per the Annexure-III to the purchase order, the agreed terms with regard to the guarantee for annual generation of 28 lakh units were only for a period of three years.

14. Moreover, the aforesaid terms of the purchase order were subsequently modified by the MOU dated 16.07.2004. The relevant clause of the MOU relating to the generation guarantee is reproduced hereunder:

" *Date : 16.07.2004*

MOU

…………

3. GENERATION GUARANTEE:

Over and above the generation guarantee of three years backed by bank guarantee as per Annexure-lll of purchase order, SEL also undertake to cover the generation guarantee for 4th year by a corporate guarantee. This 4th year guarantee will be considered as a block of four years beginning from 1St year to 4th year and if there is any short fall in the generation from 112.00 Lacs units, SEL will make the payment to NBPL for the short fall as reduced by compensation already paid while settlement of block of first three years, if any, *in the same manner as mentioned in clause (a) of Annexure-III.*

Generation guarantee for 1st four years of the WTG is to be measured at 99% grid availability in place of 100% as mentioned in annexure-III."

15. Since the MOU admittedly modified certain terms of the purchase order, it becomes necessary to examine whether it altered or extended the duration of the generation guarantee originally contained in Annexure-III.

16. A close reading of the above clause makes it apparent that Clause (a) of Annexure-III was modified to the extent that the guarantee for annual generation of 28 lakh units of electricity was extended to cover the fourth year as well. To secure the said obligation, the respondent also furnished a corporate guarantee in favour of the appellant for the fourth year. Resultantly, the block period of three years, provided under Annexure-III, stood substituted by a block period of four years. This is further evident from the fact that the cumulative generation guarantee of 84 lakh units provided under Annexure-III was correspondingly enhanced to 112 lakh units, representing annual generation of 28 lakh units for a period of four years.

17. The language of the aforesaid contractual clauses is plain, clear and unambiguous, and holds only one reasonable interpretation, namely, that the generation guarantee was for the initial period of four years. The present case is not one where two equally plausible interpretations of the contractual clauses are available. Rather, the contractual documents admit of only one

reasonable construction, and the interpretation adopted by the learned arbitrator is inconsistent with their express stipulations contained therein. It can, thus, be easily construed that compensation for any shortfall in annual generation was guaranteed only for the initial period of four years and not for the entire contractual period of 20 years, as claimed by the appellant.

18. In that view of the matter, we are of the considered opinion that the learned arbitrator grossly failed to appreciate the effect of Annexure-III to the purchase order, read in conjunction with Clause 3 of the MOU dated 16.07.2004, while concluding that the generation guarantee extended to the entire contractual period of 20 years. The learned Commercial Court, therefore, committed no error in interfering with the arbitral award under Section 34 of the Act of 1996. Accordingly, the findings recorded by the learned Commercial Court on the issue of generation guarantee are affirmed.

19. Another question that arises for consideration is whether the findings recorded by the learned arbitrator on Issue Nos.3, 4, 7, 8, 12 and 14 are severable and capable of being sustained. Learned senior counsel for the appellant argued that the learned Commercial Court interfered only with the findings recorded by the learned arbitrator on the issues relating to the generation guarantee and that the findings on the remaining issues were not set aside. According to learned senior counsel, the remaining issues are severable from those relating to the generation guarantee and, therefore, deserve to be sustained in view of the law laid down by the Hon’ble Supreme Court in **Gayatri**

Balasamy (supra). It was, therefore, prayed that the arbitral award be modified by sustaining the findings recorded on the remaining issues.

19.1 On the other hand, learned counsel for the respondent, placing reliance upon the cases of **OPG Power Generation Pvt. Ltd.** (supra), **Delhi Metro Rail Corporation Ltd.** (supra) and **Maxim India Integrated Circuit Design Pvt. Ltd.** (supra), argued that the arbitral award suffers from perversity and patent illegality, as the learned arbitrator decided the remaining issues without referring to the respondent’s contentions, without discussing the documentary evidence on record and without assigning any reasons for deciding the same in favour of appellant. Learned counsel, accordingly, prayed that the entire arbitral award be set aside.

20. Having given thoughtful consideration to the submissions made by learned counsels for the parties, we are unable to accept the submissions made on behalf of the respondent, for the reason that, under Section 37 of the Act of 1996, the appellate jurisdiction of this Court is limited to the extent of examining the legality and validity of the order passed by the learned Commercial Court under Section 34 of the Act of 1996. This Court is only required to examine whether the said order is consistent with the parameters prescribed under Section 34 of the Act of 1996, and cannot independently examine the merits of the arbitral award. In this regard, we derive support from the observation made by the Hon’ble Supreme Court in the case of **MMTC Ltd. Vs.**

Vedanta Ltd., reported in **(2019) 4 SCC 163**, which is reproduced:

> *"14. As far as interference with an order made under Section 34, as per Section 37, is concerned, it cannot be disputed that such interference under Section 37 cannot travel beyond the restrictions laid down under Section 34. <u>In other words, the court cannot undertake an independent assessment of the merits of the award, and must only ascertain that the exercise of power by the court under Section 34 has not exceeded the scope of the provision.</u> Thus, it is evident that in case an arbitral award has been confirmed by the court under Section 34 and by the court in an appeal under Section 37, this Court must be extremely cautious and slow to disturb such concurrent findings."*

(emphasis supplied)

20.1 Moreover, from paragraph 7 of the impugned order, it transpires that the learned Commercial Court dealt with all the objections raised by the respondent under four separate heads. The learned Commercial Court rejected the objections raised by the respondent under the first three heads namely, 'Project Report', 'Opportunity for Cross-Examination Not Provided' and 'Excess Claim Beyond the Invocation Notice of Arbitration Clause'. The learned Commercial Court, however, allowed the objection only under the last head i.e., 'Period of Generation Guarantee', and consequently set aside the entire arbitral award, relying upon the judgment passed by the Hon'ble Supreme Court in the case of Kinnari Mullick and Anr. Vs. Ghanshyam Das, reported in AIR 2017 SC 2785, on the premise that it did not have the power to remand the matter for reconsideration of the claims.

20.2 It is, thus, apparent that the learned Commercial Court did not disturb the findings recorded by the learned arbitrator on any issue except those pertaining to the generation guarantee.

21. The Hon'ble Supreme Court, in **Gayatri Balasamy** (supra), has held that, where an arbitral award is severable, the portion of the arbitral award which is legally sustainable need not be set aside merely because some part thereof is found to be unsustainable. However, before applying the doctrine of severability, it is necessary to determine whether the issues and the findings recorded thereon, which are sought to be preserved, are truly independent of and severable from the findings which have been set aside.

22. In the present case, the learned Commercial Court, while deciding the dispute relating to the period of generation guarantee, specifically noted that the said issue had been dealt with by the learned arbitrator under Issue Nos.1, 11 and 13. Meaning thereby, according to the learned Commercial Court, only these issues relate to the generation guarantee.

23. From a perusal of the issues framed by the learned arbitrator, as extracted in paragraph 2.11 above, we find that apart from Issue Nos.1, 11 and 13, Issue Nos.6 and 10 also relate to the generation guarantee. Consequently, Issue Nos.6 and 10 cannot be said to be independent of and severable from the portion of the arbitral award that has already been set aside.

24. We further find that Issue Nos.3, 4, 12 and 14 pertain to claims arising out of the non-availability of the machine; Issue No.7 and 15 relate to the claim for short payment against the

guaranteed generation for the second year, which falls within the four-year period of the generation guarantee; and Issue No.8 pertains to the claim for *pendente lite* and future interest. In our considered opinion, these issues, are independent of and unrelated to the portion of the arbitral award which has been set aside by the learned Commercial Court. They are, thus, severable and liable to be preserved.

25. Accordingly, relying upon the law laid down by the Hon'ble Supreme Court in **Gayatri Balasamy** (supra), we modify the arbitral award by setting aside the findings only on the Issue Nos.1, 6, 10, 11 and 13. The findings of the learned arbitrator on the remaining issues are sustained.

26. As a result of the above discussion, the impugned order passed by the learned Commercial Court is modified in the above terms and consequently, the present appeal is partly allowed.

27. All pending applications, if any, shall stand disposed of.

28. Registry is directed to send back the record of the case to the learned Commercial Court forthwith.

(SANDEEP TANEJA),J **(ARUN MONGA),J**

9/SAHIL SONI