

(2019) 06 BOM CK 0068

In the Bombay High Court

Case No : Commercial Appeal No. 314, 315, 316 Of 2019, Commercial Arbitration Petition No. 196, 205 Of 2016, 16 Of 2017

Ajay Mehra

APPELLANT

Vs

Ebercon Gmbh And 3 Ors

RESPONDENT

Date of Decision : 24-06-2019

Acts Referred:

Arbitration And Conciliation Act, 1996 — Section 2(1)(h), 8, 7(1), 7(3), 7(4), 12, 13, 13(2), 16(2), 16(3), 17, 19(1), 23, 23(3), 24, 24(1), 31A, 31(7)(b), 34, 34(2)(b)(iv), 37, 37(1)(c), 45
Companies Act, 1956 — Section 10F, 397, 398
Indian Contract Act, 1872 — Section 29
Indian Trusts Act, 1882 — Section 88
Evidence Act, 1872 — Section 91, 92

Citation : (2019) 06 BOM CK 0068

Hon'ble Judges : Pradeep Nandrajog, CJ; N.M. Jamdar, J

Bench : Division Bench

Advocate : Shyam Mehta, Bimal Rajasekhar, Birendra Saraf, Ranjeev Carvalho, Sachin Chandrana, Sanaya Dadachanji, Rohit Lalwani, S. J. Kakadia, Manilal Kher Ambalal, Zal Andhyarujina, Karan Bhide, Kartikeya Desai, Asadali Mazgaonwala, Devashree Maniar, S. U. Kamdar, Sarosh Bharucha, Jehangir Jeejeebhoy, Vivek Vashi, Kanika Sharma Goenka, Shaheda Madraswala, Swati Khinvasara, Cyrus Jal, Vashi, Aspi Chinoy, Karl Tamboly, Kanika Sharma Goenka, Shaheda Madrawala, Swati Khinvasara, Janak Dwarkadas

Judgement

Pradeep Nandrajog, CJ

1. Vide this common judgment we propose to decide a batch of Commercial Arbitration Appeals preferred under Section 37(1)(c) of the Arbitration and Conciliation Act, 1996 (Commercial Appeal No.314 of 2019 arising out of Commercial Arbitration Petition No. 205 of 2016, Commercial Appeal No. 315 of 2019 arising out of Commercial Arbitration Petition No. 196 of 2016 and Commercial Appeal No. 316 of 2019 arising out of Commercial Arbitration Petition No. 16 of 2017) that are directed against the common Judgment dated

14.12.2018 passed by a learned Single Judge of the Commercial Division of this Court upholding the majority Award passed by the Arbitral Tribunal. We may note that vide Orders dated 21.01.2019 and 29.01.2019 certain corrections have been incorporated to the Judgment by the learned Single Judge upon a request in this regard having been made by the Petitioners/Appellants-herein.

2. The Appellant before us in Commercial Appeal No. 316 of 2019 is Wind World (India) Pvt. Ltd. (WWIL). It is an unlisted public limited company incorporated under Indian Companies Act, 1956 as a joint venture between Enercon GmbH and members of the Mehra family (the Mehra's). Enercon is the registered holder of 56% of the issued share capital, and the Mehra's are the registered holders of the residual 44%.

3. The Appellant in Commercial Appeal No. 315 of 2019 is Mr. Yogesh Mehra; who is described as the Managing Director of WWIL and its shareholder.

4. The Appellant in Commercial Appeal No. 314 of 2019 is Mr. Ajay Mehra; who is the Director of WWIL and its shareholder.

The Appellants- Mr. Yogesh Mehra and Mr. Ajay Mehra are brothers; who may conveniently be referred by us as the 'Mehra brothers'.

5. The contesting Respondents before us are body corporates incorporated under the laws of Germany. Enercon GmbH (Enercon) is a company incorporated in the year 1984 and carrying on the business of engineering manufacturing and marketing Wind Turbine Generators (WTGs) and components. Wobben Properties GmbH (WPG) is a company incorporated in the year 2004 to hold the intellectual property acquired by Dr. Alloys Wobben, the founder of Enercon.

EVOLUTION OF BUSINESS RELATIONSHIP BETWEEN THE PARTIES AND GENESIS OF THE DISPUTE

6. Before proceeding to analyse the Award passed by the Arbitral Tribunal and examining the impugned Judgment affirming the majority Award, we embark upon the exercise of tracing the evolution of the relationship between the parties and the genesis of the dispute.

7. On 10.05.1993, the Mehra's incorporated Wind World Power Ltd. as they were desirous of entering the business of wind energy in India. In September 1993, meetings took place between Mr. Yogesh Mehra and Dr. Wobben and other representatives of Enercon. Since the meetings were fruitful and a prospective commercial relationship was under contemplation, requisite permission was sought from the Reserve Bank of India (RBI).

8. Vide communications/letters dated 14.10.1993 and 20.11.1993, the RBI accorded its "in principle" approval for financial collaborations. On 23.11.1993 Wind World Power Ltd. was renamed as Enercon (India) Ltd.

9. On 12.01.1994, Enercon GmbH and Mr. Yogesh Mehra, acting for himself and on behalf of his family members (Mehra Group), entered into a Shareholding

Agreement (SHA). At the relevant time, Enercon GmbH was holding 51% of issued share capital and Mehra's held the residual 49%. A Technical Know-How Agreement (TKHA) of the even date was also entered between Enercon GmbH and Enercon (India) Ltd. which granted Enercon (India) Ltd. the right and licence to use certain defined technical know-how for manufacturing a specified class of WTGs (E-26) and agreed to supply it with certain of essential components for manufacturing them. The Technical Know-How Agreement was expressed to continue in force for 10 years. On 19.06.1998, a Supplementary Share Holding Agreement (SSHA) was entered between the parties. Further on 19.05.2000, a Second Supplementary Share Holding Agreement (SSSHA) was entered between the parties, which resulted in an increase of Enercon GmbH's shareholding to the tune of 56%. On the same date, a Supplementary Technical Know-How Agreement (STKHA) was executed by which the grant of Technology was enlarged to include additional classes of WTGs (E-30, E-40 and at least two other ranges/models). Enercon GmbH claims that the obligation to supply the Technical Know-How of two other ranges/models stood satisfied upon supply of know-how of E- 40/644/E2, E-40/644/E3B and E-40/644/E2B to Enercon (India) Ltd. However, Enercon (India) Ltd. disputes such assertion.

10. Upon the expiry of the ten-year term on 12.01.2004, the parties initiated negotiations to enter into a new TKHA. Exchange of correspondence reveals that during negotiations Mr. Yogesh Mehra pitched a proposal that Enercon (India) Ltd. may not be required to pay royalties accruing from the sale of Wind Turbine Generators manufactured from the new technology to be received from Enercon GmbH. However, Enercon GmbH did not relent, and the Mehra's had to ultimately accept the condition of payment of royalties. It would be pertinent to highlight that Enercon GmbH claims that Enercon (India) Ltd. was supplied confidential technology for manufacturing further models of WTGs (E-33, E-48 and E-53) in anticipation of a new agreement which would be shortly formalised and executed between the parties.

11. On 23.05.2006, the parties signed non-binding Heads of Agreement on a Proposed Intellectual Property License Agreement (HoA) at Aurich, Germany. The said document was expressed to represent the final views of the parties on the terms of a new agreement. A draft of the Intellectual Property License Agreement (IPLA) was attached to the same.

12. During the months to follow, there was an exchange of drafts of the proposed Intellectual Property License Agreement (IPLA). One of the primary bone of contentions during these protracted negotiations was the basis/formula for calculation of royalty. As a matter of fact, the HoA recorded that the services of Mr. N. P. Sarda, Partner of Deloitte Haskins and Sells (DHS) be commissioned to seek their views on a formula for calculating royalties that would be in consonance with the requirements of Indian law.

13. A meeting was scheduled in Germany for 17-20th September, 2006 for finalising the IPLA. On 15.09.2006, a final version of IPLA was sent by electronic

mail by Ms. Fritsch Nehring to Mr. Yogesh Mehra for his perusal. Since the finalised draft of the IPLA was only sent at the last moment, Mr. Yogesh Mehra postponed his trip to Germany to read the draft.

14. Ultimately, Mr. Yogesh Mehra arrived in Bremen (Germany) on the morning of 29.09.2006. Discussions on the proposed IPLA ensued. However, it is common ground that no document was signed on this date.

15. The controversy stems from the events that transpired on 30.09.2006. There is marked divergence of claims of rival litigants in this regard. It is the case of Enercon GmbH that after intensive discussions, Mr. Yogesh Mehra and Dr. Alloys Wobben finally executed the IPLA in the presence of Mr. Kettwig, though he did not append his signatures thereon as a witness. Another document titled "Agreed Principles" was also executed which comprised the agreed principles that were binding and would form the basis of four agreements that would be executed between the parties, namely (1) IPLA "Draft enclosed" (2) Successive Technology Transfer Agreement (3) Name Use License Agreement (4) Amendment to the existing Shareholder Agreement. A note received from DHS comprising of the proposed formula for the computation of royalties was also initialled by the parties. Per contra, the Mehra's contend that only the Agreed Principles were executed between the parties and the IPLA in question was a mere draft attached to the Agreed Principles. The same was initialled on each page by the parties merely for identification.

16. The relations between the parties seem to have embittered in view of the fact that Dr. Wobben was not in favour of permitting an Initial Public Offering (IPO) for Enercon (India) Ltd. as intently canvased by Mr. Yogesh Mehra; who wanted to raise additional money for his family. Floating of an IPO was subject matter of discussion between parties for some time, however, the said proposal of Mr. Mehra was perhaps conclusively rejected by Dr. Wobben in the meetings dated 29-30 September 2006 in Germany. Subsequent thereto, the negotiations between Dr. Wobben and Mr. Yogesh Mehra with regard to purchase of additional shareholding by Enercon GmbH in Enercon (India) Ltd. also failed. Mr. Yogesh Mehra intended to monetise his shareholding.

17. Significantly, Mr. Yogesh Mehra through an electronic mail dated 03.11.2006 addressed to Ms. Fritsch-Nehring expressed his understanding that the draft of IPLA contained certain inconsistencies, thereby implying that it was still a draft. Further correspondence was exchanged between the parties in this regard, which we shall advert to in greater detail a little later. Suffice would it be to state that Enercon GmbH ultimately refuted the claim of Mr. Mehra that IPLA had not been executed as a concluded contract.

18. Enercon GmbH claimed that it was illegally ousted by the Mehra's from the management of affairs of Enercon (India) Ltd. and no information was shared with regard to the activities of the company. The issue precipitated, and Appellants claim that supplies of equipment were abruptly stopped by Enercon

GmbH in the month of February, 2007. The said events resulted in a spate of unsavoury litigations between parties before various forums including the Company Law Board, Civil Court at Daman, Bombay High Court, the Hon'ble Supreme Court and certain Foreign Courts.

19. The Mehra's instituted a derivative suit in this Court bearing Suit No. 2667 of 2007, *inter alia*, seeking directions to ensure continuous and uninterrupted supply of parts and specific performance of certain contracts. Certain interim arrangements were made under the Orders of the Court to ensure supplies.

20. Enercon GmbH, on the other hand, invoked the jurisdiction of the Company Law Board (CLB) in terms of Section 397/398 of the Companies Act, 1956 and preferred Company Petition No. 121 of 2007 alleging oppression and mismanagement. The Mehra's filed an application under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference to arbitration, however, the same was dismissed by the CLB vide Order dated 29.10.2007. Shortly thereafter, the Mehra's followed the suit and filed Company Petition No. 74 of 2008 also casting allegations of oppression and mismanagement against Enercon GmbH. We may note that both the petitions were disposed by the CLB in terms of its common Judgment dated 14.12.2012. The CLB dismissed the petition filed by Enercon GmbH opining the same to be not maintainable and allowed the petition preferred by the Mehra's holding that they had succeeded in making out a case of oppression at the hands of Enercon GmbH. The said decision of the CLB was assailed before this Court in Company Appeal No.s 42-43 of 2013 and vide Judgment dated 20.08.2015 the Company Petitions were remanded to CLB for fresh consideration. We are informed that the said proceedings are pending before the CLB.

21. It would be pertinent to highlight that Enercon GmbH demanded royalties payable in its favour as mandated under the IPLA. On 22.08.2007, Enercon (India) Ltd. belatedly transmitted royalties to the tune of 986,399.88 pounds for the period 01.10.2006 to 31.12.2006. Similarly, further royalties to the tune of 1.64 million pounds were transmitted to Enercon GmbH on 16.10.2008 in respect of the period 01.01.2007 to 31.03.2007, and 570,000 pounds were remitted in respect of the period from 01.04.2007 to 31.12.2007. On 14.11.2009, Enercon (India) Ltd. made a last payment of royalties in the sum of 2,114,852 pounds. It is the claim of the Appellants that the said royalties were not payable and were transmitted under bonafide mistaken belief. They attempt to explain that the said payments were not made pursuant to the IPLA, which was never executed to bind the parties. The Appellants contend that the monies were transmitted pursuant to the obligations perceived by Enercon (India) Ltd. under the Agreed Principles.

22. On 13.03.2008, Enercon GmbH addressed a communication to the Mehra brothers invoking the arbitral agreement as comprised in Clause 18.1 of the IPLA. Mr. V.V Veeder, QC was nominated as an Arbitrator on their behalf.

23. Consequent thereto, on 27.03.2008 'Arbitration Claim Form' was issued by Enercon GmbH seeking several declaratory reliefs in relation to the IPLA from the High Court of Justice, Queens Bench Division, Commercial Court- United Kingdom.

24. The claim form was enclosed along with a communication dated 02.04.2008 and was sent to the Appellants- herein. The form was served upon Enercon (India) Ltd. on 04.04.2008 at Daman.

25. On 08.04.2008, the Appellants-herein instituted Regular Suit No. 9 of 2008 before the Court of the Civil Judge, Senior Division-Daman seeking, inter alia, a declaration to the effect that the draft IPLA was not a concluded contract capable of binding parties and consequently, there was no arbitration agreement. The learned Trial Court at Daman directed the Respondents to maintain status quo with regard to the proceedings initiated by them before the English High Court.

26. In the interregnum, Enercon (India) Ltd., without prejudice to its rights, nominated Mr. Justice B.P Jeevan Reddy, Former Judge-Supreme Court of India, as Arbitrator.

27. That on 05.08.2008 both the nominated Arbitrators addressed a joint-letter to the effect that there were inherent defects in the arbitration clause and they were unable to proceed further to appoint the third/Presiding Arbitrator.

28. During the course of proceedings in the Civil Suit instituted at Daman, an application in terms of Section 45 of the Arbitration & Conciliation Act, 1996 was filed by Enercon GmbH seeking to invoke the arbitration clause as comprised under the IPLA. The Mehra's resisted to submitting themselves to arbitration by inter alia, contending that the IPLA executed between the parties was a mere draft and not a concluded contract. Vide Order dated 05.01.2009 the Daman Court dismissed this application and subsequently vide Order dated 09.01.2009 it proceeded to allow the application preferred by the Appellants seeking interim reliefs in the form of anti-arbitration injunction.

29. The Orders passed by the Trial Court at Daman were assailed before the Daman Appellate Court. Vide Order dated 27.08.2009 the Court allowed the appeals. The anti-arbitration injunction was vacated, and the application under Section 45 of the Arbitration and Conciliation Act, 1996 was allowed.

30. The aforesaid Order of the Appellate Court was challenged by the Appellants before this Court by preferring Writ Petition No. 7636 of 2009 and Writ Petition No. 7804 of 2009.

Ultimately the said petitions came up to be dismissed by the Bombay High Court vide Order dated 05.10.2012.

We do not propose to delineate in detail the chequered history of litigation that ensued between the parties before the English Courts as the same remains a mere historical event and has no bearing upon the issues involved for our

consideration.

31. The decision of this Court was carried by the Appellants to the Supreme Court by preferring Special Leave Petitions. The Supreme Court in its decision dated 14.02.2014 while referring the parties to arbitration authoritatively held that the seat of arbitration would be India, however the venue of arbitration would be London as stipulated by the parties in the agreement. As stated in the agreement, the applicable law governing the dispute would be the Indian Law. In paragraph 153 of the report of the Judgment the Court directed -

"...All the disputes arising between the parties in relation to the following agreements viz. SHA, TKHA, SSHA, STKHA, Agreed Principles and IPLA including the controversy as to whether IPLA is a concluded contract are referred to the Arbitral Tribunal."

32. Further, the Court was pleased to appoint Lord Hoffmann as the third Arbitrator, and it was held that he would act as the Chairman of the Arbitral Tribunal. The conclusion arrived by the Bombay High Court that English Courts would enjoy concurrent jurisdiction was set aside. Consequently, the Respondents were restrained from further prosecuting the proceedings instituted by them before the English Courts. The proceedings pending before the Trial Court at Daman and the Civil Suit No. 2667 of 2007 before the Bombay High Court along with the Contempt Petition filed in relation thereof were directed to be stayed during the pendency of arbitration.

33. It is pertinent to note for the purpose of lending clarity to our factual narrative that the name of Enercon (India) Ltd. was changed to Wind World (India) Ltd. (WWIL) with effect from 01.01.2013.

34. The Arbitration proceedings were finally set into motion in terms of directions passed by the Supreme Court. Since many years had lapsed since the invocation of arbitral clause and the same had come to a grinding halt, Mr. Justice B.P Jeevan Reddy expressed his inability to undertake the assignment any further. Consequently, the Appellants nominated Mr. Justice R.V Raveendran, Former Judge- Supreme Court of India as an Arbitrator.

35. With a view to avoid prolixity, we eschew unnecessary reference to the itinerary of the proceedings, save and except to deal with the submissions of the parties at the relevant stage. The chronology of proceedings has been exhaustively catalogued in paragraphs 25 to 83 of the Final Award as passed by the majority - Lord Hoffmann (Presiding Arbitrator) and Mr. VV Veeder, QC.

36. The Final Award passed by the Tribunal was a split verdict. The majority comprising of Lord Hoffmann (Presiding Arbitrator) and Mr. VV Veeder, QC substantially upheld the claims of the Claimants (Respondents-herein) and rejected the counterclaims set up by the Respondents (Appellants-herein). The dissenting opinion dated 26.08.2016 was authored by Mr. Justice R.V Raveendran.

37. We now proceed to microscopically analyse the Award delivered by the

Arbitral Tribunal.

ANALYSIS OF THE MAJORITY AWARD

38. The Tribunal concatenated the issues arising for their consideration in paragraphs 84 to 89 of the Final Award authored by the majority Arbitrators (Lord Hoffmann and Mr. VV Veeder, QC).

39. The central issue upon which the rights of parties would have to be adjudicated was naturally whether the Intellectual Property License Agreement (IPLA) could be stated to have been a concluded contract that would bind the signatories. It was also required to be considered if the said Agreement even if executed with the intent to create binding legal relations was liable to be declared void on the ground of uncertainty. The Tribunal also posed and proceeded to answer an alternative issue as to the rights of parties under the Technical Know-How Agreement (TKHA), if the IPLA was held not to be a binding contract.

The next set of issues pertain to the alleged breach of provisions of IPLA by Wind World (India) Ltd. (WWIL) and whether Enercon GmbH was entitled to terminate the agreement for repudiatory breach. The said issue was required to be answered only if it was held by the Tribunal that the IPLA was a binding agreement.

The Tribunal also considered the counter-claim set up by WWIL against Enercon GmbH for damages for breach of contracts to deliver components and other materials in the year 2007-08.

The last group of issues proposed to be dealt by the Tribunal pertain to the alleged breaches of fiduciary and contractual duties owed personally by the Mehra directors to Enercon GmbH under the Share Holder Agreement (SHA).

WHETHER THE IPLA IS A CONCLUDED CONTRACT

40. The Tribunal elaborately considered the events as they unravelled after the expiry of the TKHA on 12.01.2004. The correspondence between the parties for executing a new agreement was noticed wherein an initial stance was adopted by Mr. Yogesh Mehra that royalty may not be charged for new models proposed to be launched in the Indian market. However, Enercon GmbH were categorical that Dr. Wobben was considering the levy of royalty to the tune of 4% or 5%. On 02.11.2004, Drafts of royalty agreements were provided to Mr. Mehra during his visit to Enercon in Germany. Thereafter, it seems that Mr. Mehra had reconciled to the fact the royalties would be payable for the new models of Wind Turbine Generators (WTGs) and the discussions centered upon the issue of computation of royalty. As highlighted earlier, on 23.05.2006 the parties signed non-binding Heads of Agreement on a Proposed Intellectual Property License Agreement (HoA) at Aurich, Germany. The said document was expressed to represent the final views of the parties on the terms of a new agreement. A draft of the IPLA was attached to the same. Clause 5.1 of the draft IPLA contemplated royalty of

5% on the net sales value of products sold by WWIL. The net sales value was elaborately defined to mean -

"the net ex-factory sales price of the Products, exclusive of excise duties, minus the cost of the standard bought out Wind Energy Technology components and the landed costs of imported Wind Energy Technology components, irrespective of the source of procurement, including ocean freight, insurance, custom duties and the like."

As a matter of fact, the HoA recorded that the services of Mr. N. P. Sarda, Partner of Deloitte Haskins and Sells (DHS) be commissioned to seek their views on a formula for calculating royalties that would be in consonance with the requirements of Indian law.

41. In furtherance thereof, Mr. Yogesh Mehra corresponded with Mr. Sarda and elicited his opinion on a formula provided by him in his letter dated 23.06.2006. The formula sent by Mr. Mehra upon which opinion of Mr. Sarda was sought is extracted hereunder :

"Net Ex-Factory Sales Price of the Wind Energy Converters, excluding Excise duty, Taxes, Levies, Cess etc.

LESS:

Landed cost of all imports, other than capital equipment and the cost of standard bought out components and raw material procured locally"

42. The Tribunal noticed that this was not the formula as comprised in the draft IPLA on which it had been agreed that opinion of Mr. Sarda be sought. Rather it was a formula of Mr. Mehra's own devising. It included deductions which did not form part of the RBI formula. On 16.06.2006, Mr. Sarda is stated to have replied by reciting the RBI formula and certifying that the formula proposed by Mr. Mehra fell within it. The Tribunal observed that Enercon GmbH did not notice this discrepancy at this stage and the same caused difficulties later.

43. During the months to follow, there was exchange of drafts of the proposed IPLA. A meeting was also held in Aurich on 07-08 August 2006 where the parties signed Heads of Agreement with regard to a Share Holder Agreement. A meeting was scheduled in Germany for 17-20th September 2006 for finalising the IPLA. On 15.09.2006, a final version of IPLA was sent by electronic mail by Ms. Fritsch-Nehring to Mr. Yogesh Mehra for his perusal. It was also stated therein that Dr. Wobben had desired that he would like to first discuss the final version of the IPLA before any discussion takes place on other issues. Since the finalised draft of the IPLA was only sent at the last moment, Mr. Yogesh Mehra postponed his trip to Germany with a view to consider the said draft.

44. Ultimately, Mr. Yogesh Mehra arrived in Bremen (Germany) on the morning of 29.09.2006. Dr. Wobben received him at the Airport and accompanied him to the Hilton Hotel. Discussions on the proposed IPLA ensued. They were joined at

lunch by Mr. Hans Dieter Kettwig. The Tribunal noticed the evidence of Mr. Kettwig where he testified that he sensed the discussions had not gone smoothly and he could feel some tension. Dr. Wobben had informed Mr. Kettwig in the presence of Mr. Mehra that Mr. Mehra also wanted a further document to set out certain principles that would be reflected when it came to subsequently finalising other contracts. However, this was on a clear understanding that the IPLA was to be entered into without change and the agreed principles related to other agreements which would be shortly entered into. Before leaving, Dr. Wobben had frustratingly exclaimed that the IPLA should be accepted in its current form. Dr. Wobben had left Mr. Kettwig to discuss the new document headed "Agreed Principles". However, it is common ground that no document was signed on this date.

45. The Tribunal was of the considered view that the evidence furnished by Mr. Kettwig appeared to be reliable vis a vis the version of events disclosed by Mr. Yogesh Mehra. The Tribunal observed that the objections/reservations expressed by Mr. Mehra to the drafts of IPLA shared with him earlier by Enercon GmbH had been firmly dealt by Dr. Wobben in August 2006. It was improbable that Dr. Wobben would now have made a 'U-turn' on the issues canvassed by Mr. Mehra during negotiations which took place 29.09.2006.

46. Mr. Kettwig stated in evidence that to the best of his recollection, Mr. Mehra had brought with him a draft of Agreed Principles in hard copy. The Agreed Principles were predominantly drafted by Mr. Mehra in advance of the meeting rather than being drafted together in the meeting. Mr. Kettwig further deposed that Mr. Mehra accepted at the meeting that he would enter into the IPLA the next day, and this was unaffected by the Agreed Principles. Per contra, Mr. Mehra claimed in his evidence that the draft of Agreed Principle had not been brought by him. He stated that this document had been typed on the computer in the Bremen Hotel. In this regard, the Tribunal observed that Mr. Kettwig was neither a lawyer nor fluent in English, unlike Mr. Mehra. The language of the Agreed Principles suggested that its substance was derived from Mr. Mehra and his legal advisors in India. It was further held that Mr. Mehra understood that the Agreed Principles would have no effect upon the IPLA and that the IPLA was expected to be executed by the parties during his stay in Aurich, Germany.

47. The Tribunal observed that Mr. Kettwig was not an astute lawyer. He could thus could not visualise the effect of the words- "Draft enclosed" comprised in the document-Agreed Principles and that these words could later be construed to be inconsistent with Enercon's intention of executing the IPLA without any amendment. It was held that evidence of relevant surrounding circumstances emerging from the contemporaneous correspondence between parties and the evidence of Mr. Kettwig established that both sides clearly understood that before any discussion of other agreements took place, IPLA had to be executed.

48. It was also observed that it was highly implausible that the parties would sign the IPLA (twice in the case of Dr. Wobben as he appended his signatures on

behalf of Enercon GmbH as well as WPG) and initial every page merely to identify it as the latest draft under discussion. The Tribunal noticed that such an approach had not been adopted by the parties before with respect to other documents that were available for similar treatment.

49. The Tribunal also held that the assertion of Mr. Kettwig that after the execution of IPLA; which had been pending since a long time, Mr. Mehra appeared rather emotional, was supported by the contents and tenor of a letter authored by Mr. Mehra on that very day viz. 30.09.2006. The letter was addressed to Dr. Wobben and was penned by Mr. Mehra at his hotel before leaving for India.

50. The contents of the said letter read :

"Dear Dr. Wobben, Today when I reached back to Bremen, and before I leave back to India Mr. Wobben, in the last 13 years since I first met you, I have never felt so de-motivated lost, confused and empty!

Mr. Wobben, my this trip to Germany was besides of course to clarify all the points of the agreements, was to also find some solutions to my problems which you had also promised to do. But I am sorry to state that I go back without any solutions!

Mr. Wobben, you asked me to trust you, which I have always done-

(1) I signed the agreement, without even reading it, only because I trust you.

(2) I did not even speak when Mr. Kettwig decided to write the royalty figure at 5%, because I trusted you, to be fair, because you always told me, that you wanted to make Enercon India Ltd. financially strong. Now with this, it reduces the profitability of Enercon India Ltd by 40% straight away. [I have never said no to payment (sic.) of royalty, only I thought you will be fair and just].

This royalty, is when the agreements do not even (sic.) provide for any other technologies. In fact it does not even provide for the E-82!

(3) I trusted you, when you told me, that I should not pursue the 'UBS' proposal, because you did not feel comfortable, I dropped the idea totally, because you promised me that we would find a solution to my 'family' issues. But I go back again without any solution!

Respected Mr. Wobben, it hurt me, when Mr. Kettwig mentioned today, that the value of Enercon's operations in India should be of a value of 250 Million Euro. If you believe that this is correct, then [sic] I personally take responsibility of the fact that, I failed, and for which I am willing to resign.

Mr. Wobben, you asked me to be truthful and open to you, which I always will be, and I thought I must write to you on exactly how I feel, because one thing for sure, is if I am not motivated, how can I motivate my team in India? If I cannot do that, all I can say is it is not fair for Enercon India! Dear Mr. Wobben, you

have always been my source for inspiration and you have always motivated me, to be able to do my best!

Mr. Wobben, I go back to India a disappointed man, as I have no face to show to my family, whom I promised, and who have always supported me for the last 13 years! Mr. Wobben, the decision is in your hands and please do not ask me to talk to anyone else about the issue, because I will not!

At the end all I want to say is I trust you. Do not let me down!

Regards! Yogesh Mehra."

51. The Tribunal observed that this reproachful letter was inconsistent with Mr. Mehra's claim that only a draft had been signed. None of this recrimination would have made sense if everything was still open to negotiation. The Tribunal did not accept the explanation tendered by Mr. Mehra in evidence that that the agreement which referred in his letter to have signed was the Agreed Principles and not the IPLA and that he was not to be taken literally.

52. Perusal of the majority Award reveals that the Tribunal also formed an adverse opinion on the credibility of Mr. Mehra, especially in view of his vacillating stand before different forums. The Tribunal noticed that in July 2008, Mr. Mehra had stated on solemn affirmation in the criminal proceedings initiated in India before the Court of Magistrate that he had been coerced into signing the Agreed Principles. It was observed that there were no allegations of coercion made before the Tribunal and rather it was claimed that almost immediately upon his arrival in Germany Dr. Wobben accepted his objections to the IPLA and agreed that it should be renegotiated at some indeterminate future date.

53. The Tribunal was of the considered view that it appeared that Mr. Mehra was unwilling to execute the IPLA, however after extensive rounds of deliberations and sustained obstinacy of Dr. Wobben, he succumbed to sign the IPLA. He later regretted the execution of the IPLA as Dr. Wobben did not favourably accede to his proposal of floating an IPO to raise additional money and neither did Dr. Wobben purchase additional shareholding from the Mehra's on the tentative terms indicated earlier during the course of negotiations. In the considered view of the Tribunal, Mr. Mehra sought to retrace his acts by belatedly propounding the version that he had merely signed a draft when he sent an electronic-mail dated 03.11.2006 expressing his disappointment at the withdrawal of the offer to purchase additional shareholding.

54. The Tribunal also attached significance to the circumstance that the parties appended their signatures at the spot where they are expected to be placed when a contract is to be signed with an intent to create legal obligations and not for the purpose of mere identification for future reference. It held that though the surrounding circumstances that the IPLA is referred as a draft in the Agreed Principles and that the IPLA as executed omitted certain annexes which had been referred to in the body of the document, were relevant, yet other circumstances

as alluded to by the Tribunal tilted the scales in favour of the conclusion that the IPLA had been executed as a concluded contract.

55. While rendering its findings, the Majority in its wisdom did not choose to comment upon the dissenting views expressed by Justice Raveendaran on this issue. Further, it was deemed unnecessary to undertake the exercise of analysing the Agreed Principles to decide whether or not the IPLA was inconsistent with them.

IPLA VOID FOR UNCERTAINTY

56. An alternate contention that was canvassed on behalf of the Appellants-herein before the Arbitral Tribunal was that even if it were held that the IPLA was executed with the intent of creating binding legal obligations, yet the same was not liable to be enforced as the same was void for uncertainty. Reliance was placed upon Section 29 of the Indian Contract Act, 1872.

57. It was submitted that the IPLA was inchoate. The annexes with regard to trademarks and patents were not present, and thus the identity of the licensed patents/trademarks was not discernible.

58. In the absence of identification of patents, it was submitted that the date of expiry of the agreement could also not be determined as Clause 12.1 of the agreement provides that the agreement would expire upon the expiry of the last to expire patents.

59. Further, there existed discrepancies, which resulted in the date of commencement of the agreement being uncertain. Clause 1.1 mandates the 'effective date' as the date on which the agreement is executed by the parties. It was highlighted that the cover sheet bears the date 29 September 2006 whereas the agreement commences with the recital that this agreement is entered into at Aurich on 17 September 2006.

60. The Tribunal noticed decisions of various High Courts wherein it had been held that the Courts ought not to readily declare the solemn contracts entered into between parties void for apparent vagueness or uncertainty which may otherwise be capable of being removed by a process of proper interpretation.

61. Apropos, the contention with regard to date of commencement of the agreement it was observed that there was no doubt that the same was executed on 30.09.2006 and therefore the same was liable come in effect from the same date as mandated by Clause 1.1 of the agreement itself. The fact that the cover sheet and the introductory recital contains other dates was explainable as Mr. Mehra was initially expected to visit Germany on 17.09.2006 for signing this agreement and in view of the same the opening recitals contained reference to execution of the agreement on 17.09.2006. The said inaccuracies and clerical discrepancies would not in the opinion of the Tribunal make the date of commencement of IPLA uncertain.

62. With regard to the argument of absence of discernible identity of patents and trademarks licensed, it was observed by a matter of construction that license must have extended to include all Indian patents and trademarks to Enercon's name. Such patents and trademarks were clearly identifiable as being available on the face of public record. It was observed that there was no evidence to suggest the reason why parties would have wished to exclude certain patents/trademarks from the license. In wake of the finding that the Tribunal was of the view that the patents which formed the subject matter of the agreement were capable of being identified, it could be no longer be contended that the date of expiry of the agreement could not be ascertained.

NATURE OF RIGHTS STEMMING FROM THE TKHA

63. The Tribunal noted that in view of the fact that it had held that the IPLA was a concluded contract capable of binding the signatories thereto, it was not necessary to opine upon the rights of the parties flowing from the TKHA as the same had expired and at any rate stood superseded by the IPLA. However, in view of the fact that a substantial amount of time had been dedicated to this issue during the proceedings and expert evidence had been led by the parties, the Tribunal chose to render its findings on this aspect of the matter.

64. That it had been contended before the Tribunal on behalf of the Appellants-herein that the TKHA resulted in outright transfer of rights in perpetuity of the technology comprised therein. Emphasis was laid upon the meaning of the term 'transfer' and the regulatory backdrop of RBI in which it was required to be interpreted. It was submitted that the approvals accorded by the RBI were predicated on the premise that the transfer of technology was in perpetuity and the same would stand absorbed/indigenized. Expert evidence was led in the form of testimony of Mr. Khizer Ahmed to suggest that mere license of technology for a specified duration would fall foul of the regulatory framework of the RBI. Thus, the Appellants-herein were entitled to manufacture WTG's comprised under the TKHA/STKHA and no longer be required to pay royalty to the Claimants (Respondents-herein) upon the expiry of the agreement or in the case of reaching the ceiling cap of two million five hundred thousand Deutsche Mark; which limit had reached in the year 2002 itself. It was further submitted that the transfer of technology of the various models of WTG's in favour of the Appellants-herein was pursuant to the stipulated contractual obligations upon the Claimants (Respondents-herein) under the TKHA and STKHA.

65. The Tribunal held that the issue was required to be answered essentially upon the construction of the terms of the TKHA and STKHA itself. However, it would also be permissible to look into the terms of the SHA in order to ascertain if they throw light upon the nature of rights under the TKHA. It was observed that the SHA was simultaneously executed by the parties on 12-01-1994 along with the TKHA as part of the same transaction. Reference to the term-'license' found at various junctures in the agreements was noticed. The Tribunal refused to look into the contents of documents which comprised the views of the parties

at the stage of negotiations preceding the execution of the TKHA. The Tribunal observed that negotiation of a contract is an iterative process in which only the final contract represents the concluded intention of the parties. With regard to the expert evidence on the regulatory background led by the parties, the Tribunal was pleased to observe that it derived no assistance therefrom. It appeared that there seemed no published guideline to unequivocally indicate that outright transfer of technology was a sine qua non for approval to be accorded by the RBI. The Tribunal noted that reported decisions of various Courts had been referred before it which would indicate that the Court had no hesitation in arriving at the conclusion that an agreement by which a foreign company licensed an Indian company to use know-how for a limited period was not an outright sale of property and that the payments received by the foreign company were in the nature of royalty rather than a capital receipt for the transfer of an intangible asset. There was no suggestion of any regulatory obstacle to this conclusion.

66. Upon advertent consideration primarily to the provisions comprised in the agreements themselves, the Tribunal concluded that the TKHA contemplated a license to use the technical know-how of the technology comprised therein, however, the same was not limited for a period of 10 years as suggested by the Claimants (Respondents-herein). It was held that the right to utilise the technical know-how transcended beyond the period of expiry of the TKHA. The Tribunal fortified its conclusion in this regard by citing Article 5.5 of the TKHA, inter-alia, which obliged the Claimant (Respondents-herein) to ensure supplies of Electronic Control Components to WWIL. The Tribunal observed that the fact that WWIL was given a right to buy the components would necessarily entail that it must have the right to manufacture the WTG's in which they would be used.

67. The Tribunal, however, repelled the contention of the Appellants-herein that the TKHA and the STKHA enwombed within its fold the right to manufacture E-48 and E-53 models of the WTG's. It had been contended on behalf of the Appellants- herein that the STKHA had contemplated supply of atleast two other ranges/models in addition to E-26, E-30 and E-40. It was on strength of this recital comprised in STKHA that the Appellants staked the claim to manufacture E-48 and E-53 as a matter of right. It was observed by the Tribunal that the transfer of technology for E-33, E-48 and E-53 models of WTG's was initiated by Enercon GmbH only after the expiry of the TKHA and STKHA in January 2004. The said transfer was made in anticipation of a fresh agreement that would be formalised between the parties after negotiations. The Tribunal held that the right to receive technical know-how and manufacture atleast two other ranges/models stood satisfied upon the receipt of technical know-how of E-40/644/E2, E-40/644/E3B and E-40/644/E2B, as explained by Mr. Kettwig in his evidence. Further, the Tribunal placed reliance upon Mr. Yogesh Mehra's letter dated 17-10-2008 wherein he listed each of the E-40's separately as a model for which technology had been supplied to WWIL. The position was similarly stated by him in the draft of the new TKHA prepared by him and shared with Enercon GmbH on

14-10-2004.

CLAIMS UNDER THE IPLA

68. The Tribunal observed that WWIL did not comply the terms of IPLA. However, on 22.08.2007 royalties to the tune of 986,399.88 pounds were remitted for the period 01.10.2006 to 31.12.2006. Similarly, further royalties to the tune of 1.64 million pounds were transmitted to Enercon GmbH on 16.10.2008 in respect of the period 01.01.2007 to 31.03.2007, and 570,000 pounds were remitted in respect of the period from 01.04.2007 to 31.12.2007. On 14.11.2009, WWIL made a last payment of royalties in the sum of 2,114,852 pounds. It was however submitted by the Claimants (Respondents-herein) that the payments were not accompanied by Statement of Accounts/books and thus there were no means to verify if the royalties had been paid appropriately. It was the claim of the Appellants-herein that the said royalties were not payable and were transmitted under bonafide mistaken belief. It is in this view of the matter that they counterclaimed for repayment. They attempt to explain that the said payments were not made pursuant to the IPLA, which was never executed to bind the parties. It was contended that the monies were transmitted pursuant to the obligations perceived by WWIL under the Agreed Principles.

69. The Tribunal observed that after termination of IPLA, the Claimant (Respondents-herein) were entitled to damages for wrongful use of its Intellectual Property and Technology. The royalty which WWIL had agreed to pay was the best measure for the loss occasioned to the Claimants (Respondents-herein).

70. The Tribunal observed that Appellants own expert- Mark Taylor assessed the total of royalties which fell due from the inception of IPLA until 08.09.2015 using the IPLA method of calculation (but without interest) to be 62.5 million pounds. The Tribunal noticed that in fact, the said figure was more than the amount assessed by the expert witness produced by the Claimants (Respondents-herein). The expert witness produced by the Claimant, Nicolas Good, assessed the amount due to be 63.1 million pounds together with interest. The Tribunal noted that the Claimants (Respondents-herein) were content to accept the amount assessed by their own expert witness even though it was substantially less than the amount computed by the expert witness produced by the Appellants-herein.

71. The Tribunal also observed that at the relevant time, WWIL was only manufacturing E-53 WTG. There was no dispute that the said product was being manufactured by the Technical Know-How provided by Enercon GmbH. The Tribunal was pleased to grant injunctive relief against WWIL for manufacturing the said WTG. The Tribunal was pleased to direct WWIL to return the documents and other materials containing the confidential technology as defined in the IPLA.

CLAIM FOR GOODS SOLD AND DELIVERED

72. Before the termination of IPLA, Enercon GmbH supplied WWIL with components and raw materials upon its standard Terms and Conditions. The Tribunal observed that it had not been disputed that in May 2008 WWIL owed Enercon GmbH 19,025,296.38 pounds for these supplies.

COUNTERCLAIM

73. The Appellants-herein set up a counterclaim before the Arbitral Tribunal alleging breach of contract by the Claimants (Respondents-herein) in failing to supply parts and raw materials ordered by WWIL. The breaches are alleged to have occurred (a) between 16.02.2007 and third week of March 2007 (b) between 13.07.2007 and December 2007. It was further contended that even when supplies were resumed pursuant to directions passed by the Bombay High Court by an interim Order dated 31.10.2007, the said supplies were deliberately mismatched. It was submitted that as a result of suspension of supplies and mismatching of parts, WWIL was able to make and sell fewer WTGs than it would have done if Enercon had complied with its contractual obligations. It was claimed that the contribution which the additional sales would have made to the revenue during the first spell of disruption of supplies was estimated to be Rs. 43 crores and Rs. 429 crores for the second.

SUSPENSION OF DELIVERIES

74. The Tribunal observed that the TKHA was no longer in force and had been replaced by the IPLA. There was no specific reference to a failure to deliver Electronic Control Components, for which Enercon GmbH was saddled with a positive contractual obligation to ensure supplies. It was held that with respect to other parts and raw materials there was no pre-existing contractual obligation to ensure supply. The Tribunal analysed the mechanism of processing orders that was in place at Enercon GmbH. It was observed that no contract was created until the purchase order had been accepted. In the case at hand, the grievance of the Appellants-herein was that the purchase orders had not been accepted by the Claimants (Respondents-herein) rather than the Claimants having failed to honour them. The Tribunal further observed that a prior discussion of production plans between parties assumed a mere moral commitment to use their best endeavours to enable them to be carried into effect. However, the same did not fasten any contractual liability on either side. The production plan was a plan to which the parties hoped to adhere but not a contract for the sale of goods. In view of the said reasons, the Tribunal opined that the two spells of suspension of deliveries in the year 2007 were not breaches of contract.

MISMATCHED DELIVERIES

75. Apropos, the allegation of deviousness on part of the Claimant (Respondents-herein) to deliberately mismatch the deliveries, it was observed by the Tribunal that perusal of correspondence revealed that the Appellants-herein were themselves reluctant to assist the Claimants (Respondents-herein) when a query had been posed to remedy the situation. Therefore, the claim in this regard was

rejected.

TORT CLAIMS

76. In the defence and counterclaim, the Appellants- herein had alleged that by suspending deliveries and certain other actions, Claimants (Respondents-herein) had intentionally caused WWIL loss by unlawful means and intimidation. The Tribunal observed that no evidence had been led in this regard, and the claims were not mentioned by the Appellants-herein at the hearing or in closing submissions. The Tribunal assumed that the same had been abandoned.

SAP SYSTEM

77. Enercon had a computerised data-processing system (SAP system) on a server in Aurich which was used by all its subsidiaries to maintain their records, each having access to its own information. The Appellants-herein had alleged that there was a three day interruption in August 2007. Upon termination of IPLA, WWIL was disconnected from the server. It was contended that this was a malicious act to cause harm to WWIL. The Claimants (Respondents-herein), on the other hand, submitted that the Mehra Directors were abusing the system by attempting to obtain information about Enercon's worldwide activities. The Tribunal observed that there was no evidence of any particular loss occasioned by such disconnection. Further, the merits of the dispute were not explored by the parties. Under such circumstances, the Tribunal chose not to render any findings on this issue.

REPAYMENT OF ROYALTIES

78. The Tribunal held that it had already adjudged that royalties were payable by the Appellants-herein. Therefore, counterclaim for return of royalties was rejected.

CLAIMS AGAINST MEHRA DIRECTORS

79. The Claimant (Respondents-herein) contended that it was illegally ousted from the management of WWIL in as much as it was being denied its rights in the governance of WWIL, contrary to the terms of the SHA. No prior notice of meetings was dispatched as required by the agreement. Further, its consent was not sought with respect to 'reserved matters'. It was further contended that it was not allowed to appoint an Auditor as contemplated under the Agreement, and no information with regard to the affairs of WWIL was shared. Other instances of usurpation of power by Mehra Directors were also illustrated. It was also claimed that the Mehra Directors breached the fiduciary duties under the SHA and company law by effecting transfers of value and confidential technology from WWIL to companies owned/controlled by the Mehra directors. A list of 37 such companies and partnerships owned/controlled by the Mehra Directors were annexed to the Statement of Claim.

80. In this regard, the Appellants-herein pressed jurisdictional objections with

regard to the arbitrability of these claims as the same were overlapping and also pending adjudication before the Company Law Board.

81. The Tribunal observed that the judgment of the Supreme Court of India dated 14.02.2014 unequivocally mandated that all disputes arising from the SHA, inter alia, were referred for arbitration. The Tribunal accepted the contention of the Appellants-herein that the issues raised by the Claimants (Respondents-herein) may indeed overlap with the issues pending adjudication before the Company Law Board. However, it was observed that it was a matter of procedural discretion, whether to await the decision of the Company Law Board. The Tribunal noticed the delay which had already been occasioned in adjudicating these disputes. It was held that it would be unjust to the parties not to proceed with the mandate given by the Supreme Court by awaiting the outcome of proceedings before the Company Law Board.

82. With respect to the allegations of having being ousted from the management of the affairs of WWIL, it was contended on behalf of the Appellants-herein that the Claimants (Respondents-herein) had rather abdicated their responsibilities by not attending meetings. Thus, the right of notice to such meetings stood waived. It was observed that it had not been demonstrated that Enercon GmbH was served with prior notice of meetings and yet its representatives consciously chose not to attend the meetings. The Tribunal did not accept the extreme proposition propounded by the Appellants-herein that the express obligations under the SHA could be circumvented by inferring a waiver from the conduct of the other party to whom such obligation was owed.

83. The Tribunal observed that the Articles of Associations (AoA) were mysteriously amended to remove Art. 170 (a) and substitute the same. The said provision dealt with 'reserved matters', which conferred a valuable right in favour of Enercon GmbH in governance of WWIL. No valid special resolution to amend the AoA was passed. The Tribunal found that it was highly improbable that Enercon GmbH would have consented to a resolution cutting down its rights in respect of the 'reserved matters'.

84. The Tribunal also held that the Board resolution dated 26.04.2007 conferring wide powers on Mr. Yogesh Mehra, including the power to commence legal proceedings that fell within the ambit of 'reserved matters', was illegal. No notice of the meeting had been given to Enercon. It was observed that the Mehra Directors were not entitled to ignore the solemn undertakings made to Enercon GmbH in the SHA. The plea raised on behalf of the Appellants-herein that the powers were exercised only in the interest of WWIL was negated by the Tribunal, and it was held that the parties may have different perception of what is in the interest of the Company.

85. The Tribunal also observed that since the breakdown of relations between the parties, Enercon GmbH was not consulted in the matter of appointment of Auditor and therefore they were unable to exercise its rights under Art. 8.2 of

SHA. It was held that Enercon had a right of access and participation in an audit conducted by the Auditor which had in effect been appointed by the Mehra's.

86. The Tribunal also accepted the contention of the Claimants (Respondents-herein) that information with regard to the functioning of WWIL was wrongly withheld by the Appellants-herein and the said right stemmed from the SHA as well as Company law.

87. Thereafter, the Tribunal proceeded to adjudicate upon the last limb of issues which pertained to transfer of technology and/or value to Vish Wind Companies/ Partnership.

88. The Tribunal noticed that in paragraphs 84 and 92.2 of the Statement of Claim, the Claimants (Respondents-herein) at the very outset had pleaded their apprehensions in this regard.

However, in absence of information with regard to the affairs of WWIL from which they have been ousted, the Claimants (Respondents-herein) were then not in a position to substantiate their claims.

89. The Tribunal traced the events as they dramatically unravelled during the course of Arbitral proceedings. It emerged that the Appellants-herein had not faithfully complied with the directions of the Tribunal with regard to disclosure of documents pertaining to transactions between WWIL and the Vayuu Companies. On day 7 of the evidential hearing, the relevant documents were ultimately produced.

90. It appeared from these documents that substantial sums in the form of interest-free loans were doled out to these Companies and LLPs from WWIL. Further, development rights were purchased by WWIL from these companies and, in such transactions, huge profits were earned by the Vish Wind Companies/ Partnerships that were owned/controlled by the Mehra's.

91. In view of this fresh material that had come on record during the course of evidential hearings, parties were permitted to lead further evidence on this issue.

92. The Tribunal observed that the Vish Wind transactions were a breach of express terms of Art. 4 of the SHA. The transactions required the consent of Enercon representative. Instead, Enercon was not even given notice of the transactions. The Tribunal held that such conduct also amounted to breach of fiduciary duty to act in good faith. The evidence led by the Appellants-herein to justify the valuations of these transactions was not accepted. The Tribunal did not accept the explanation offered by Mr. Mehra that WWIL did not embark upon the task to itself develop rights and rather chose to purchase them as it would have caused distractions from the core activity of WWIL. The Tribunal further observed that the acts of Mehra directors fell foul of the mandate of Section 88 of Indian Trusts Act, 1882. The Mehra directors had a conflict of interest and duty in as much as they made profit by sale of development rights to WWIL in which Enercon had a majority interest, whereas, their family exclusively owned/

controlled the companies/partnerships with whom such transactions for purchase of development rights were made. The Tribunal noticed that according to accounts Vish Wind had no employees, business and virtually no money. It financed the purchases of land with loans from WWIL.

93. The Tribunal rejected the objection raised by the Appellants-herein that the claim in respect of Vayuu Companies was not sufficiently pleaded. The Tribunal observed that concrete evidence emerged towards the end of the hearing in view of the fact that the Appellants-herein had themselves breached the earlier Order of the Tribunal directing supply of relevant documents. Hearing was kept open to enable the Appellants-herein to counter the allegations of the Claimants (Respondents-herein). Sufficient opportunity was given to lead evidence, and the Appellants availed of such opportunity by tendering evidence of two experts, namely, Mr. Kaushik Khona and Mr. D. Vaidyanathan.

94. The Tribunal noticed that the Claimants (Respondents-herein) sought damages from Mehra directors and claimed that the same be paid directly to Enercon GmbH. The Tribunal, however, observed that it was WWIL which was most immediately affected by the breaches committed by the Mehra directors. Therefore, the Tribunal held the Mehra directors accountable to WWIL for the 97 million pounds profit, which Vish Wind made on the development rights transactions.

95. The Tribunal did not proceed to make any award with respect to Vayuu Renewable Energy (Purna) Pvt. Ltd. in view of the fact that there was no evidence to demonstrate that Purna and its subsidiaries had yet succeeded in attracting any business.

96. The Tribunal refused to grant costs in favour of the Claimants (Respondents-herein) for expenses incurred on litigation before the commencement of arbitration. The Tribunal also negated the contention of the Claimants that the Mehra Directors ought to be held personally liable for the debts of WWIL stemming from failure to pay royalties and price for the goods supplied.

97. The Tribunal was pleased to direct that Enercon GmbH was entitled to the unredacted documents supplied by the Appellants-herein under Procedural Order No. 1 and therefore LCIA was directed to release them in favour of the Claimants (Respondents-herein). The said documents contain information with regard to WWIL's suppliers and components manufactures.

98. In paragraph 316, the Majority concatenated its conclusions on various issues which had arisen for its consideration. The same are summarised for the sake of convenience. The Tribunal held that the Claimants (Respondents- herein) were entitled to the declaration that the IPLA was valid and binding but lawfully terminated on 08.12.2008 upon which WWIL ceased to be entitled to use the technology of the Claimant. The Claimants were entitled to payment of arrears of Royalty and outstanding monies due for the parts/materials supplied to WWIL. Mehra Directors were required to account for 97 million pounds to WWIL for the

profits on sale of development rights wrongly diverted to Vish Wind. The Claimants were entitled to injunctive relief to restrain the Mehra Directors from preventing them to exercise their rights under the SHA to participate in the management of the Company, have access to information, and appoint the Auditors. It was held that the Claimants were entitled to injunctive relief to restrain the Mehra Directors from causing WWIL to take actions within the reserved matters of Art. 4 of SHA.

99. With regard to the issue of payment of costs of arbitration, the Tribunal held that the Claimant (Respondents- herein) had substantially prevailed on merit and were entitled to cost. It was however clarified that this was not a case in which the Tribunal would award the Claimants (Respondents-herein) costs on full indemnity basis. In paragraph 330 of its Award, the Tribunal fixed the reasonable cost of arbitration to be 3,794,970 pounds which was payable in favour of Claimants (Respondents- herein) within 28 days.

100. In paragraph 331 of the Award, the Tribunal crystallised its final directions and the sums of monies which the Appellants-herein were liable to be pay in terms of the findings. We reproduce the same for the sake of clarity.

"(1) The Tribunal declares:

(a) The IPLA executed by the parties thereto on 30 September 2006 was intended to create legal relations and was a valid and binding contract;

(b) The Mehra directors caused WWIL to repudiate liability under the IPLA and to commit breaches of the IPLA amounting to a repudiation thereof.

(c) The Claimants accepted the repudiation and terminated the IPLA on 8 December 2008;

(d) WWIL was indebted to Enercon in respect of

(a) royalties due under the IPLA until its date of termination and (b) damages for wrongful use of its intellectual property and technology after termination until 8 September 2015 in the sum of ₹55.2 million and interest;

(e) Pursuant to clause 13(1)(b) of the IPLA, WWIL is not entitled to use or exploit the confidential Technology disclosed by the Claimants to WWIL during or before the subsistence of the IPLA and is obliged to return to Enercon documents or materials which contain such Technology

(f) WIL is indebted to Enercon for components and materials sold and delivered before May 2008 in the sum of ₹19,025,296.38 and interest;

(2) The Tribunal orders WWIL -

(a) To pay to Enercon

(i) ₹55,200,000 in respect of royalties due under the IPLA together with interest thereon in the sum of ₹7.9 million until 8 September 2015 and thereafter at the

rate of 3% over European Central Bank rate until the date of this Award;

(ii) ₹19,025,296.38 in respect of components and materials sold and delivered together with interest in the sum of ₹5.9 million until 31 March 2016 and thereafter at the rate of 3% over European Central Bank rate until the date of this Award;

(b) To return to Enercon the documents and other materials containing the confidential Technology (as defined in the IPLA) disclosed to WWIL pursuant to the TKHA and IPLA;

(c) To allow Enercon, pursuant to clause 6.1(b) of the IPLA, to inspect its books and records and take relevant copies.

(3) The Tribunal orders the Second and Third Defendants:

(a) Not to prevent or obstruct Enercon or its nominated directors from exercising their rights under the SHA or as directors to -

(i) Receive notice of board and company meetings;

(ii) Obtain information about the affairs of the company;

(iii) Secure the appointment of auditors by the company in general meeting;

(b) Jointly and severally -

(i) to pay to WWIL the sum of INR 6,772,456,570, being the profit made by Vish Wind on the sale of allotment rights to WWIL in the years ending 31 March 2011 and 2012 together with interest thereon at the rate of 3% over European Central Bank rate from those dates until the date of this Award.

(ii) To pay to the Claimants their legal and other costs in the sum of ₹3,794,970

4. All other claims and counterclaims are dismissed.

5. From the date of the award, all sums payable will carry interest in accordance with section 31(7)(b) of the Indian Arbitration and Conciliation Act 1996."

ANALYSIS OF MINORITY AWARD

101. Justice R.V Raveendran expressed his inability to agree with the views of the majority with regard to four issues namely,

(i) That IPLA is a completed contract and not a draft;

(ii) That WWIL is liable to pay a sum of Euro 55.2 million towards Royalty and Euro 7.9 million towards interest thereon; and

(iii) That Yogesh Mehra and Ajay Mehra were accountable to WWIL for Euro 97 million, towards the profit on development right transactions made by M/s. Vish Wind Infrastructure LLP.

(iv) That Yogesh Mehra and Ajay Mehra were liable to expend the costs of the

proceedings rather than WWIL.

WHETHER IPLA IS A CONCLUDED CONTRACT OR A DRAFT

102. The learned Arbitrator took notice of the fact that the Claimants (Respondents-herein) had deliberately filed the document titled "Agreed Principles" separate from the IPLA despite the fact that the document titled "Agreed Principles" referred to the draft IPLA as an enclosure. It was observed that the Appellants-herein had in fact filed the "Agreed Principles" along with the entire bundle of enclosures which included the note(s) of Deloitte Haskins and Sells (DHS) and the IPLA. The conduct of the Claimant (Respondents-herein) was chastised by observing that the apparent reason for suppressing the two attachments to the Agreed Principles was that if they were produced they would support the case of the Appellants-herein that the IPLA was a mere draft which was enclosed along with the document titled 'Agreed Principles' and would militate against the stand of the Claimant (Respondents-herein).

103. The learned Arbitrator noticed that the correspondence exchanged between the parties since 15.09.2006 clearly indicated that there was no consensus between the parties in regard to the terms of the IPLA. It is in this view of the matter that Dr. Wobben and Mr. Mehra met on 29-30 September 2006 in Germany to find a solution to the impending issue of computation of royalty and certain other aspect relating to IPLA amongst other issues relating to sale of shares. The discussions for three long hours on 29.09.2006 did not bear any fruit as Mr. Mehra did not agree to the terms of draft IPLA. Thus, Dr. Wobben asked Mr. Kettwig to join Mr. Mehra and prepare the Agreed Principles in regard to the various pending issues so that it could be executed on 30.09.2006. It was observed that if the issue regarding IPLA had been creased out during the discussions on 29.09.2006, there would be no need for the Agreed Principles to have been drawn and executed by the parties. Significance was attached by the learned Arbitrator to the fact that the document titled Agreed Principles referred to the IPLA as a draft.

104. It was further noticed that the disputed document in question contained several indications which probablised that it was only a draft. There was a blank space in the title portion at page 1 where the parties were described. Similarly, blank spaces were also observed in clause 15/Page 23 relating to delivery of notice. Further certain particulars were left blank with regard to name and address of the person to whom notices addressed to the licensor should be endorsed. Blank spaces could also be observed in the particulars of Respondent licensee. The learned Arbitrator was pleased to observe that it would militate against the natural course of probabilities that a final document which was ready to be executed would contain numerous blank spaces considering big companies like Claimants (Respondents-herein) are involved and are ably assisted by their legal teams.

105 It was also highlighted that the IPLA refers to certain annexures with regard

to trademark and patent portfolio amongst others. However, such annexures were not produced.

106. The learned Arbitrator also noticed that the opening recital indicates that the agreement was entered into at Aurich on 17.09.2006 whereas it is the case of the Claimant (Respondents- herein) that it was executed on 30.09.2006. It was observed that if this document was intended to be the final IPLA, it was expected that the date of the document would have been corrected as 30.09.2006.

107. It was held that the question was not whether the blank spaces in the agreement and absence of annexures were with reference to material terms or not. In the view of the learned Arbitrator, such facets probabalised the conclusion that the document was a mere draft, especially in light of the fact that the agreed principles described it as a draft IPLA.

108. With regard to the circumstance that the parties had appended their full signatures on the last page of the disputed document along with their initials, it was observed that the explanation tendered by Mr. Mehra in his evidence that he merely followed the suit and appended his signatures following Dr. Wobben, merited acceptance.

109. The correspondence and conduct of the parties subsequent to the execution of the Agreed Principles on 30.09.2006 were also taken into consideration to fortify the conclusion that the disputed document was a mere draft. The learned Arbitrator referred to an email dated 18.10.2006 sent by Ms. Fritsch Nehring to Mr. Mehra wherein she stated that that the IPLA was in consonance with the Agreed Principles and any amendment of IPLA was not required. It was observed that if the IPLA had been already executed as a concluded contract, there was no requirement for Ms. Fritsch Nehring to persuade Mr. Mehra that the amendments to IPLA in terms of Agreed Principle was not required.

110. It was also noticed that Mr. Mehra in his electronic mail dated 03.11.2006 expressly pronounced that the IPLA was a draft which contains certain inconsistencies. However, the Claimants (Respondents-herein) did not denounce this assertion in their response dated 24.11.2006. Rather the tenor of the reply probablised the case of the Appellants-herein. The learned Arbitrator extracted the relevant portion of the said response, which we reproduce hereunder:

"Thema: Final IPLA, shareholding and other successive agreements Dear Yogesh, First I have to apologise for the delay in sending you the outstanding drafts of the agreements mentioned above. At present, there are still some discrepancies in the contract compared to the agreed principles which we have to discuss internally..."

111. Thereafter the Learned Arbitrator proceeded to analyse the ocular evidence led by the parties in support of their claims with regard to what transpired on 29-30 September 2006. At the outset, it was noticed that Ms. Nicole Fritsch

Nehring was not present during the meetings whereas Mr. Kettwig was only present during part of the discussions. The evidence tendered by Mr. Kettwig was found to be vague, uncertain and inconsistent. It was noticed that he could not remember many details. The evidence tendered by this witness was found contrary to documentary evidence i.e. Agreed Principles. It was observed that Mr. Kettwig had no explanation why Dr. Wobben signed the Agreed Principles on 30.09.2006 agreeing to change the draft IPLA to the satisfaction of the parties if the IPLA had been finally concluded. It was not the case of the Claimant that on 30.09.2006 the Agreed Principles was signed and thereafter the draft IPLA was corrected to the satisfaction of Mr. Mehra, and then the final version of IPLA was signed on 30.09.2006 itself. On the other hand, the learned Arbitrator found evidence of Mr. Mehra as to what transpired on 29-30 September 2006 to be more probable, logical and in consonance with the documentary evidence.

112. The learned Arbitrator negated the contention of the Claimants (Respondents-herein) that in his emotional letter dated 30.09.2006, Mr. Mehra admitted to have signed the agreement and therefore the hypothesis of IPLA having been merely initialled as a draft was debunked. It was observed that Mr. Mehra was a layman and loosely referred to the Agreed Principles as the Agreement.

113. An adverse inference was also drawn against the Claimants (Respondents-herein) considering their conduct in arbitrarily novating the initial offer to purchase additional shareholding of WWIL to the tune of 6% Equity Shares for a sum of Euros 40 million.

COMPUTATION OF ROYALTY/DAMAGES

114. It was observed that since it had been held that the IPLA was not executed as a concluded contract capable of binding parties, therefore it necessarily follows that the terms of the draft IPLA would not govern the royalty.

115. The learned Arbitrator held that Enercon (India) Ltd./WWIL continued to use the technology provided by the Claimants (Respondents-herein) and was therefore liable to pay royalty in terms of DHS formula agreed under the Agreed Principles, from the period commencing 30.09.2006.

116. The evidence tendered by expert witnesses produced by both the sides with respect to computation of royalty was analysed by the learned Arbitrator and it was opined that the report of Mr. Nicholas Good; the expert witness produced by the Claimant (Respondents-herein), was liable to be accepted in so far as the calculation of quantum is concerned.

117. It was concluded that upon adjustments of the payments already made, the Appellants-herein were liable to pay Euro 39.8 million as total amount due towards royalty along with interest upto 30.09.2015.

DIRECTIONS TO MEHRAS' TO PAY WWIL EURO 97 MILLION IN REGARD TO SALE OF DEVELOPMENT RIGHTS BY VISH WIND

118. At the outset, the learned Arbitrator noted that the reliefs sought by the Claimants (Respondents-herein) in the Statement of Claim did not include a prayer for payment of any sum by the Mehra brothers in favour of WWIL. All reliefs sought in the statement of claim were proposed to be in favour of the Claimants themselves. Further, there was no indication that the present claim is a derivative action by Enercon GmbH as a shareholder for grant of relief in favour of WWIL from Mehra's.

119. It was also observed that in absence of pleadings, no amount of evidence could be looked into to grant reliefs that were not expressly sought. It was held that the Mehra brothers did not have the opportunity to submit their defence in regard to the proposed relief. It was highlighted that there was no averment for sale of development rights in the Statement of Claim.

120. The learned Arbitrator held that if the claimants (Respondents-herein) became aware of the development right transactions belatedly, they ought to have sought amendment of its Statement of Claim. No amount of proof could substitute the pleadings, which are the foundation of a claim by a litigating party. Reliance was placed upon the decision of the Supreme Court reported as (1995) 5 SCC 612 'Abubakar Abdul Inamdar v. Harun Abdul Inamdar'. It was observed that the statement of claim merely comprised the averment of an apprehension that confidential technology was being unauthorisedly passed on to the Vayuu Companies.

121. The learned Arbitrator did accept that some material disclosed during evidence gave rise to an inference of impropriety on the part of Mehra's, however, in absence of pleadings, due opportunity for letting in evidence and arguments on the specific issue, liability for a huge sum of Euro 97 million could not be fastened.

122. In paragraph 58 of the Award, the learned Arbitrator expressed his respectful agreement with the views of the majority on all other issues. However, with the regard to the directions of payment of costs, the learned Arbitrator was of the opinion that WWIL ought to be liable to pay such costs and not the Mehra brothers.

123. The Conclusions and consequent directions recorded in the dissent were crystallized in paragraph 59 of the Award.

"59. In view of the above, I record my dissent to the Award by the majority and make the following Award:

(a) I declare that the 'IPLA' relied upon by claimants is not a finally executed IPLA, but a draft enclosed to Agreed Principles which was intended to be finalised and signed after certain pending issues were sorted out;

(b) I declare that as first respondent continued to use technology, it is liable to pay royalty in terms of the DHS formula agreed under the 'Agreed Principles' from 30.9.2006; and

(c) WWIL shall pay to Enercon, Euro 35.2 million towards royalty and Euro 4.6 million as interest upto 30.9.2015, and thereafter, simple interest at the rate of 3% over European Central Bank rate until date of Award.

(d) Agreeing with the majority, I direct that WWIL shall pay to Enercon, Euro 19,025,296 in respect of components and materials sold and delivered, with interest of Euro 5.9 million till 31.3.2016 and thereafter, simple interest at the rate of 3% over European Central Bank rate until the date of the Award;

(e) Agreeing with the majority, I direct that WWIL shall return to Enercon the documents and other material containing the confidential technology disclosed to WWIL by Enercon;

(f) Agreeing with the majority, I order that respondents 2 & 3 not to prevent or obstruct Enercon or its nominated Directors from exercising their rights under the SHA or as Directors to (i) receive notice of Board and company meetings; (ii) obtain information about the affairs of the company; and (iii) secure the appointment of auditors by the company in General Meeting.

(g) The amounts awarded shall carry simple interest from the date of Award till date of realisation at the rate of 3% over European Central Bank Rate.

(h) I direct WWIL to pay to the claimants, their legal and other costs in the sum of Euro 3,794,970

(i) Agreeing with the majority, all other claims and counter-claims are dismissed.
"

ANALYSIS OF THE IMPUGNED JUDGEMENT

124. The Arbitral Award was assailed before this Court by preferring three petitions under Section 34 of the Arbitration and Conciliation Act, 1996. The said petitions were dismissed by a common judgment dated 14.12.2018 passed by the learned Single Judge of this Court.

125. Perusal of the judgment reveals that it was strongly urged by the Petitioners (Appellants-herein) that the award was liable to be set aside in view of the fact that opportunity was not granted to the parties to make oral submissions upon conclusion of evidence. It was submitted that the approach adopted by the learned Tribunal was violative of the principles of natural justice and was in breach of Section 24(1) of the Arbitration and Conciliation Act, 1996. Thus, the award was said to have been passed in a manner which is opposed to the fundamental policy of India and warranted interference.

126. Apropos, the relief granted in respect of purchase of development rights from Vish Wind, it was contended that the Arbitral Tribunal adopted an approach which was patently perverse and opposed to the quintessential norms of fair play. The issue was not sufficiently pleaded yet the Tribunal proceeded to grant relief on the strength of the fact that some material had emerged in evidence. It was highlighted that the relief granted was not even expressly sought and the

Tribunal exceeded its jurisdiction to mould relief.

127. The Petitioners also reiterated their submissions as made before the Tribunal that the IPLA was not a concluded contract capable of binding the signatories but was a mere draft that had been initialled and signed merely for the purpose of identification.

128. Before advertng its consideration to the above-noted submissions, the Court elaborately set out the factual backdrop of the dispute and the spate of litigation initiated between the parties before different forums.

129. While dealing with the contention of failure to grant an oral hearing, the Court took note of the calendar of proceedings before the Tribunal and proceeded to analyse the Procedural Orders passed at each stage. The Court observed that it had been made amply clear at the stage of passing Procedural Order No. 5 that closing oral submissions would be granted only if determined necessary and could not be claimed as a matter of right. In this regard, the dates 27-28 April 2016 were reserved for the purpose of oral evidence with respect to the issue of Vish Wind Infrastructure LLP and closing oral submissions, if any. The Court extracted the transcripts of proceedings on Day 10 of the evidential hearings, wherein, the learned Senior Counsel appearing on behalf of the Petitioners was categorically intimated the course proposed by the Tribunal, and he approved of the same.

130. During the course of evidential hearings, the team of lawyers representing the Petitioners sought discharge and expressed their inability to continue to represent them. The Tribunal modified its calendar on numerous occasions to accommodate the newly engaged legal team.

131. Vide an e-mail dated 13.04.2016, the Tribunal reminded the advocates for parties that closing submissions were due to be filed on 22.04.2016 and the Tribunal would notify the parties as soon as possible after receiving closing submissions whether the Tribunal wishes to hear any oral submissions. If not, the provisional arrangements for the oral hearings on 27-28 April 2016 would be cancelled. In response to this e-mail, the counsels for the Petitioners herein sought further time to file closing written submissions and reserved their right to apply to the Tribunal for permission to make closing oral arguments after 30.06.2016.

However, since the closing written submissions were not submitted promptly in accordance with the proposed schedule and could be submitted after submitted only on 25.05.2016 after seeking further extension of time, no opportunity was provided for further oral hearing. The Court observed that it could not be demonstrated that absence of an opportunity to advance closing oral submissions occasioned any prejudice. It was held that the approach of the Tribunal had by far been transparent.

132. The Court repelled the contention that the Tribunal fell in error by

proceeding to grant relief in absence of specific pleadings. The Court observed that the Statement of Claim sets out the loss caused to Enercon by the Mehra's by breach of their duties under the SHA. Further, material evidence with regard to Vish Wind transactions had only emerged belatedly during the cross-examination of Mr. Mehra as the same had been suppressed by the Petitioners. In view of such disclosure, the Tribunal while formulating Procedural Order No. 5 categorically alerted the Petitioners that Vish Wind transactions would be an integral issue to be adjudicated during the course of the proceedings and evidence in this regard could be adduced. The Court observed that the decision of the Supreme Court reported as 1966 2 SCR 286 'Bhagwati Prasad v. Chandramaul' was squarely applicable to the case at hand. It was held by the Supreme Court that if a plea was not specifically made and yet it was covered by an issue by implication and the parties knew that the plea was involved in the trial then the mere fact that the plea was not expressly taken in the pleading would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. The test is whether the parties knew that the matter in question was involved in the trial and whether they did lead evidence about it. The Learned Single Judge further observed that in the context of arbitration proceedings, strict rules of pleadings as comprised in the Civil Procedure Code would not apply with the same rigor as the Arbitral Tribunal is not bound by the Code of Civil Procedure, 1908 in view of Section 19(1) of Arbitration and Conciliation Act, 1996.

133. The Court held that the findings of the Tribunal that the IPLA was a concluded contract could not be faulted. It was observed that royalties were paid by the Petitioners, and if the IPLA was not treated to have been binding, there would have been no obligation to make such payments. The Court expressed a note of caution that proceedings under Section 34 of the Arbitration and Conciliation Act, 1996 were not akin to an appeal and do not entail a review on merits of the dispute.

134. Further, the submission that the approach of the Tribunal reeked with bias was merely noted to be rejected as the Court found no justification for such an allegation.

135. We have carefully perused the Award passed by the Arbitral Tribunal, including the dissent authored by Mr. Justice Raveendaran and also the impugned Judgment upholding the majority Award. The *raison d'être* forming the basis for the conclusions has sought to be comprehensively culled out in the preceding paragraphs. In light of the same, we now proceed to note the submissions made before us.

SUBMISSIONS OF MR. SHYAM MEHTA, SENIOR ADVOCATE APPEARING ON BEHALF OF THE APPELLANT- AJAY MEHRA IN COMMERCIAL APPEAL NO. 314 OF 2019

136. Mr. Shyam Mehta, learned Senior Counsel ventured to make submissions on

two counts.

First, that the Arbitral Tribunal fell in grave error by denying oral hearing upon the culmination of proceedings despite a request having been made.

Second, that the relief granted by the majority Arbitrators with respect to Vish Wind transactions was beyond the scope of pleadings and the reliefs sought therein.

137. Apropos, the first proposition with respect to absence of oral hearing it was submitted that the proviso to Section 24 (1) of the Arbitration and Conciliation Act, 1996 mandates that the arbitral tribunal shall hold oral hearings, at an appropriate stage of the proceedings, on a request by a party. It was pointed out that the only exception to this proviso is a specific agreement between the parties not to hold oral hearings. It was thus submitted that in the present case, there was no agreement by the Appellant's-herein to exclude oral hearings.

138. Mr. Mehta drew attention of the Court to Procedural Order No. 4, wherein the Arbitral Tribunal gave liberty to the parties to apply for further hearings on oral closing submissions at the discretion of the Tribunal. However, the said Procedural Order recorded the disagreement on part of the Appellant's with the aforesaid direction. It was submitted that the Appellant's had unequivocally indicated their intention to request for further oral hearings even after the filing of written submissions, as it was their understanding that it was open for them to do so.

139. With respect to the contents of the Procedural Order No. 5 wherein the Arbitral Tribunal, inter alia, reserved 27- 28.04.2016 as dates for oral evidence and oral submissions, if any were requested and if determined necessary by the Arbitral Tribunal, it was submitted that the said Order was in the nature of directions and could not be construed to contemplate any agreement between the parties to not hold oral hearings. At best, it was an agreement on the timetable to be followed.

140. Taking the argument forward, Mr. Mehta submitted that Procedural Order No. 5, which was issued on 11.12.2015, is required to be read with Procedural Order No. 4 issued on 26.11. 2015, wherein in Paragraph 8, a similar direction is comprised as contained in Sr. No. 9 of Procedural Order No. 5. As highlighted earlier, the note forming part of Procedural Order No. 4 clearly records that the Appellants-herein desired an oral hearing to make submissions although Enercon desired to leave this to the Arbitral Tribunal's discretion. Procedural Order No. 4 and Procedural Order No. 5 were passed in close succession i.e. within a span of merely fifteen days, and it could not be construed that the Appellants had changed their stand during that period.

141. It was contended that at any rate, the Arbitral Tribunal in its Order dated 26.05.2016 had not provided any reason for refusing to hold an oral hearing. The Arbitral Tribunal merely observes that the Act does not provide that the Arbitral

Tribunal shall hold as many hearings as a party may request and at such times as a party may propose. The Arbitral Tribunal referred to hearings held in December 2014 and November and December 2015. It was submitted that it was apparent that the Arbitral Tribunal failed to appreciate the distinction between a hearing to record evidence and a hearing to hear submissions / arguments of the parties.

142. Mr. Mehta submitted that the Appellant's-herein repeatedly pleaded and sought an oral hearing, however, they were denied the same. The requirement of oral hearing assumed all the more significant considering the abstruse issues involved in the case at hand, and the voluminous evidence led during the course of proceedings. Furthermore, the Arbitral Tribunal proceeded to adjudicate upon the issues which were not even pleaded and therefore atleast a fair opportunity of closing oral submissions ought to have been granted to also effectively raise an objection in this regard.

143. It was highlighted that the Arbitral Tribunal vide e- mails dated 14.02.2016 and 13.04.2016 had informed the parties that it would decide whether or not to hold oral hearings only after receiving their written submissions. By an email dated 18.02.2016, the Advocates representing the Appellant's-herein informed the Arbitrators that the new legal team would not be able to peruse the voluminous record within the close deadline of 22.04.2016. It was suggested that an oral hearing was necessary and if necessary, the same could be held in Hong Kong. Curiously, on 20.04.2016 the Arbitral Tribunal hastily cancelled the dates tentatively reserved for oral hearings (27-28.04.2016) without considering the written submissions, even before the scheduled date for filing written submissions. Mr. Mehta urged that even assuming without conceding that the parties had agreed that oral arguments would be permitted only at the discretion of the Arbitral Tribunal, such an agreement was necessarily premised on the Arbitral Tribunal deciding on this aspect after a fair consideration of all relevant factors including change in advocates and the Tribunal's own declarations that it would determine the request for oral hearings only after considering the parties written submissions. It was thus submitted that the decision to refuse oral hearings was not arrived at upon a determination having been made upon perusal of written submissions. It appeared that the Arbitral Tribunal cancelled the oral hearings solely on account of its own scheduling constraints and its difficulty in finding appropriate dates.

144. It was highlighted that the learned Single Judge placed reliance on the transcripts of Day 9 and Day 10 of the evidential hearings to hold that the learned Counsel for the Appellant's- herein was made aware that the Arbitral Tribunal was not committed to oral hearings. In this context, it was submitted that the awareness exhibited by the learned Counsel to the course proposed to be adopted by the Tribunal would not be sufficient to clothe the same as a waiver to oral hearings which assumed the character of a statutory right. The statement made by the learned Counsel in a polite verbal interchange with the Arbitrator's

ought not to be construed as an agreement of waiver to exclude oral hearing as contemplated in the exception to proviso to Section 24(1) of the Act.

145. While summing up his submissions on this aspect, Mr. Mehta clarified that the fact that the Appellant's-herein repeatedly applied/requested for oral hearing during the course of arbitral proceedings did not imply that they accepted the course proposed under the Procedural Order No. 5 and pursued the same by abdicating their statutory right of oral hearing by relegating the decision to the discretion of the Tribunal. It was submitted that such requests were made to the Tribunal in terms of the mandate of Section 24 of the Act itself which requires such a formal request to be made.

146. The next plank of submissions sought to be urged by Mr. Mehta pertained to insufficiency of pleading with respect to Vish Wind transactions of sale of development rights to WWIL on which the Tribunal has proceeded to make an award. Linked with this issue is also the grievance that the novel relief of directing the Mehra brothers to recompense WWIL; a co-respondent at the Arbitration was not even sought. The majority Award, inter alia, directs the Mehra brothers to pay a sum of Rs. 677,24,56,570/- to WWIL, towards profits allegedly made by Vish Wind Infrastructure LLP on the sale of allotment (development) rights to WWIL.

147. Attention of the Court was drawn by the learned Senior Counsel to the Statement of Claim submitted by the Claimants (Respondents-herein). It was submitted that perusal of the Statement of Claim establishes that the damages sought against the Mehra's were with regard to (i) the alleged wrongful dissemination of the technical know-how (in relation to wind turbine generators) of Enercon GmbH by WWIL and the Mehra's; and (ii) the alleged breaches committed by the Mehra's under the SHA, namely relating to no proper notice to Enercon regarding board meetings, passing of board resolutions in respect of reserved matters without Enercon's affirmative vote, etc. The only mention of Vaayu Companies (including Vish Wind) in the Statement of Claim is in relation to the alleged receipt or exploitation by the Vaayu Companies, of Enercon's technical know-how and the resultant transfer of value from WWIL to the Vaayu Companies. There is no mention in the Statement of Claim with regard to any purported wrongful profiteering by Vish Wind by transfer of allotment / development rights to WWIL.

148. It was further highlighted that in prayer I (c) of the Statement of Claim, Enercon GmbH sought damages and/or on account of profits from the Mehra's for their alleged breaches of the SHA and /or duties arising as a matter of Indian Law. It was submitted that this was a vague prayer and is not supported by any particulars, much less material particulars, in the Statement of Claim. Prayer I(d) seeks an award against the Mehra's for payment of all sums and damages and/or an account of profits that may be ordered to be paid by WWIL. Thus, the relief claimed is of payment by Mehra's to Enercon GmbH and not of any payment to be made by Mehra's to WWIL as finally granted.

149. Elaborating on his submissions, Mr. Mehta submitted that the alleged damages claimed by Enercon are not quantified either in the Statement of Claim or in any witness statement. Accordingly, apart from not pleading any case for damages on account of profits allegedly made by Vish Wind or the quantification thereof, Enercon even failed to prove the same by way of evidence. If loss was caused to WWIL, the effect of the same on Enercon GmbH would at the highest be by way of a loss in the value of the shareholding. There was neither any pleading nor proof in this regard. The action initiated by Enercon GmbH was not in the nature of a derivative action on behalf of WWIL but was a proceeding in their personal capacity seeking damages caused to them. In the absence of the requisite pleadings with proper particularization, such proceedings could not have been converted into a derivative proceeding leading to an award in favour of WWIL against the Mehra's.

150. It was contended that though by Procedural Order No.5, the Arbitral Tribunal granted an opportunity to the parties to lead evidence responsive to the documents pertaining to Vish Wind produced by the Mehra's, however, since these facts were neither pleaded nor proved, there was no fair opportunity to the Mehra's to meet any allegations. There was neither any affidavit of evidence supporting any claim awarded nor was any such claim proved. It was pointed out that Enercon did not even amend their Statement of Claim to incorporate any such claim for damages nor led any effective evidence in support thereof. In this regard reliance was placed on the decision of the Supreme Court reported as (2008) 17 SCC 491 Bachhraj Nahar v. Nilima Mandal & Anr and AIR 2008 SC 2594 State Bank of India v. S.N Goyal.

151. It was submitted that the Appellants-herein filed two affidavits pursuant to Procedural Order No.5 - one of Mr. D. Vaidyanathan and the other of Mr. Kaushik Khona. It was sought to be clarified by Mr. Mehta that these Affidavits were filed only to allay a prejudicial impression which was perceived to be held by the majority arbitrators as regards the conduct of Mehra's pursuant to the production of documents by them and also the recusal of their advocates. Neither of these Affidavits dealt with the merits of the claim that allegedly arose out of the documents produced by the Appellants. The Affidavit of Mr. Vaidyanathan was restricted to explaining the procedure for obtaining rights to establish wind farms (namely allotment/ development rights). The Affidavit of Mr. Khona was restricted to placing on record instances of the benefits received by WWIL from the sale of development rights acquired from Vish Wind. It was urged that the Appellants did not venture to lead evidence as regards the merits of the allegations or the alleged claim since these were not even a subject matter of the pleadings.

152. It was highlighted that the Appellants in their Written Submissions, at the outset itself, stoutly raised a contention that the claim for alleged profits wrongfully earned by Vish Wind was not pleaded in the Statement of Claim and hence the same could not be considered by the Arbitral Tribunal. Without

prejudice to this contention, they sought to deal with this claim on merits, even though no evidence was led by either party in respect thereof. The same was dealt with only by way of abundant caution.

153. It was submitted that the findings comprised in the impugned majority award were based only on the written submissions filed by the parties and not on the basis of any pleadings and/or evidence. Further, even while dealing with the submissions of the Appellant's-herein with respect to these transactions, the Arbitral Tribunal glossed over material contentions raised therein. Various contentions of the Mehras in the Written Submissions while justifying that no improper profit was made by Vish Wind were completely overlooked. It had been pointed out in the Written Submissions that in fact, WWIL had made profits by selling development rights which it acquired from Vish Wind to third parties. It was also highlighted that Enercon had not led any evidence that the acquisition by Vish Wind was at an over valuation. The Appellant's had produced valuation reports, which went unchallenged. Even the evidence of Mr. Vaidyanathan and Mr. Kona, which explained that the transaction between WWIL and Vish Wind were at arms length, were completely ignored and not dealt with. The said witnesses had already pointed out that time and effort expended in developing the rights and obtaining various permissions which added value.

154. Learned Senior Counsel further submitted that the majority Award accepts the position that the required pleadings and particulars were absent in the Statement of Claim but holds that the same were present in the application filed by Enercon under Section 17 of the Arbitration and Conciliation Act, 1996 which was sufficient. The majority Award grants this relief under the head of "further and other reliefs". In this context, it was contended that pleadings set up in interim proceedings can never be the substitute for the main pleadings and evidence in support thereof.

155. It was emphasized that the pleadings are a concomitant of natural justice and any relief granted sans pleadings is clearly in teeth with the principles of natural justice. Even if the strict rules of CPC and Evidence do not apply to arbitrations, the same surely are applicable to the extent necessary for compliance of the avowed principles of fairness and natural justice.

156. The learned Senior Counsel drew support from the reasons advanced in the minority opinion on the aspect of lack of pleadings. It was submitted that a minority view ought not to be lightly brushed aside. The Supreme Court, in various cases, has taken note of a minority opinion and has, in fact, affirmed the minority opinion in preference to the majority view. Reliance in this regard was placed on the judgment reported as 2007) 8 SCC 466 Numaligarh Refinery Ltd. v. Daelim Industrial Company Ltd.

SUBMISSIONS OF DR. BIRENDRA SARAF, ADVOCATE APPEARING ON BEHALF OF THE APPELLANT- YOGESH MEHRA IN COMMERCIAL APPEAL NO. 315 OF 2019

157. Dr. Saraf addressed submissions on broadly three issues, namely-

(i) That the majority Award dealt with and decided disputes emanating from the SHA which were foreign to the IPLA and rather fell within the domain of the CLB proceedings. Such disputes were therefore not arbitrable under the IPLA, and it was the arbitral clause comprised in the IPLA alone that had been invoked by the Claimants. It was thus submitted that such disputes relatable to the SHA could not fall within the scope of reference to arbitration as set out by the Supreme Court in paragraph 153 of its judgment dated 14.02.2014, if the same was construed meaningfully in light of the factual setting under which the arbitral machinery was set into motion.

(ii) Likelihood of Prejudice/Bias in the mind of the Tribunal as inferred from the disparaging and vitriolic remarks against Mr. Yogesh Mehra contained in the majority Award.

(iii) Perverse approach adopted by the majority Arbitrators whilst levying costs upon the Mehra brothers rather than WWIL.

158. Commencing his submissions on the issue of arbitrability of the disputes relatable to the SHA in the present arbitration, it was submitted that the disputes which were referred to arbitration were in relation to the IPLA. The disputes in relation to SHA were never intended to and were in fact not referred to arbitration.

159. In the alternative and without prejudice, it was contended that even if it were held that the disputes in relation to SHA were also referred to arbitration, the disputes which formed the subject matter of proceedings before the CLB were certainly not within the scope of reference to arbitration.

160. Dr. Saraf drew our attention to the SHA executed between the parties on 12.01.1994. Clause 16 thereof incorporated an arbitration agreement which reads as under:

"16.1 If any dispute, difference, claim or question shall arise between the parties hereto concerning the contents of this Agreement, or in any way relating to the contents of this agreement, or arising from the contents of this Agreement or the operation thereof, or the rights, duties, or liabilities of either party thereof in connection with this Agreement, the parties hereto shall do their best to settle the said disputes or differences amicably between themselves.

16.2 All disputes, differences, claims, questions, and controversies arising in connection with this Agreement and the operation of this Agreement which the parties are unable to settle between themselves are to be brought in writing to the attention of the Indo-German Chamber of Commerce in Bombay. The Indo-German Chamber of Commerce will finally settle the said disputes by arbitration. Both parties expressly agree to be bound by the results of said arbitration." (emphasis supplied).

161. This was in clear contrast to the arbitration clause comprised under the IPLA which reads as under:

"17. GOVERNING LAW

17.1 This Agreement and any disputes of claims arising out of or in connection with its subject matter are governed by and construed in accordance with the Law of India.

18. DISPUTE AND ABRITRATION

All disputes, controversies or differences which may arise between the Parties in respect of this Agreement including without limitation to the validity, interpretation, construction, performance and enforcement or alleged breach of this Agreement, the Parties shall, in the first instance, attempt to resolve such dispute, controversy or difference through mutual consultation. If the dispute, cotroversy or difference is not resolved through mutual consultation within 30 days after commencement of discussions or such longer period as the Parties may agree in writing, any Party may dispute(s), controversy(ies) or difference(s) for resolution to an arbitral tribunal to consist of three (3) arbitrators, of whom one will be appointed by each of the Licensor and the Licensee and the arbitrator appointed by Licensor shall also act as the presiding arbitrator.

The arbitrators shall have powers to award and/or enforce specific performance. The award of the arbitrators shall be final and binding on the Parties.

IN order to preserve its rights and remedies, either Party may seek preliminary injunctive relief or other temporary relief from any court of competent jurisdiction or from the arbitration tribunal pending the final decision or award of the arbitrator(s). Any such application to a court of competent jurisdiction for the purposes of seeking injunctive relief, shall not be deemed incompatible with this agreement to arbitrate or as a waiver of this Agreement to arbitrate.

All proceedings in such arbitration shall be conducted in English. The venue of the arbitration proceedings shall be London. The arbitrators may (but shall not be obliged to) award costs and reasonable expenses (including reasonable fees of counsel) to the Party (ies) that substantially prevail on merit. The provisions of the Indian Arbitration and Conciliation Act, 1996 shall apply. ..."

162. It was submitted that disputes arose between the parties as to whether the IPLA was a binding and concluded agreement or was it only a draft which was finalized. There were disputes as regards the rate of royalty and also the basis of computation of royalty. It was the case of Appellants that the IPLA was not a concluded contract and that the draft was at variance with the Agreed Principles and yet to be finalised. It was signed only for the purpose of identification.

163. Dr. Saraf painstakingly traced the sequence of events that transpired thereafter. It was pointed out that the first proceeding between the parties was a petition being Company Petition No. 121 of 2007 filed by Enercon GmbH before the Company Law Board, Bombay under Section 397 and 398 of the Companies Act, 1956. Various allegations were made in the said petition as regards the functioning of the Joint Venture Company, Enercon (India) Limited / Wind World

India Limited (WWIL), about alleged wrongdoings of the Mehra Group, alleged breach of the SHA and also alleged siphoning off funds by the Mehras to various other companies, which companies were impleaded as party respondents to the petition. Vish Wind Infrastructure Limited (Vish Wind) was arrayed as Respondent No.33. It was contended that a bare perusal of the petition would clearly evince that all issues regarding their functioning of WWIL and the alleged siphoning away of funds were raised in the said petition and reliefs were sought in that regard. Some of the relevant averments comprised in the petition are extracted as under:

"21. ... Despite the Technical Know-How Agreement between the Petitioner and the Company having expired and despite demanding new and newer technology (which were invariably made available by the Petitioner) Respondent No.2 resisted efforts to formalize a new technology arrangement. When at last the Intellectual Property Licence Agreement was entered into between the Petitioner and the Company (through Respondent No.2) pursuant to the Agreed Principles, copies of which are annexed hereto and marked Annexure P-7, Respondent No.2 would neither reveal the "net sales" figures of the Company, nor carry out the required self assessment of royalties. Most importantly the financials of the Company were hidden by Respondent No.2.

...In other words, the Company is being run by manipulation of its accounts to portray a rosy picture so as to dip into public funds by indulging in excessive and unjustified borrowings from banks, including PSU Banks, which would never agree to become lenders to the Company if the true and fair accounts were known.

...Instead of concentrating the core area of specialization of the Enercon Group, that is manufacture of wind turbines, Respondent No.2 has diverted the focus of the Company to indiscriminately acquiring land and capacity for power generation, vesting these in many separate companies. Thus Respondent Nos. 2 and 3 authored a slew of companies (the subsidiary and associate companies - Respondents 9 to 35 herein), many of which became Independent Power Producers (IPPs) under the Electricity laws of the country. All the associate companies are owned by Mehra Group.

...Being the Managing Director of the Company and in actual day-to-day control of its affairs; Respondent No.2 is in a position to cause the books of account of the Company to reflect only what suits him. Restricting access to accounts and doctoring accounts for unfairly depriving the other shareholder from exercising its rights to purchase offered shares, a right provided by Article 58 of the Articles, makes it clear case of oppression and mismanagement and it is imperative, in the most respectful submission of the Petitioner that an independent audit be immediately conducted. ...

24. ... So long as the Petitioner shall own not less than 51% of the total issued equity shares of the Company, the Petitioner shall have the right to appoint two

directors, one of whom to be a non retiring director and so long as the Mehra Group shall own not less than 49% of the total issued equity shares of the Company, the Mehra Group shall have the right to appoint two directors, one of whom to be a non retiring director. This was given effect to (including the change in shareholding to 56% of Petitioner and 44% Mehra Group) in Article 128 of the Articles of Association of the Company and the said Article, as it reads today, states that so long as the Petitioner is holding 56% of the total Equity share capital of the Company and the Mehra Group is holding 44% of the total Equity share capital of the Company,

74. Another aspect of the way the business of the Company was being conducted by Respondent No.2 was his focus on acquiring land and capacity for power generation, vesting these in a separate company. The deal with the future customer would include complete management of the power utility by Respondent No.2. Thus Respondent No.2 authored a slew of companies (the subsidiary and associate companies - Respondents 9 to 35 herein), many of which became Independent Power Producers (IPPs) under the Electricity laws of the country. Furthermore, Respondent Nos. 2 and 3 have set up some of the associate companies themselves wherein utilizing the monies of the Company assets such as land have been acquired in the name of such associate companies. This also constitutes a wrongful diversion of funds and amounts to grave mismanagement of the affairs of the Company.

...

76. When the Petitioner, having left the day- to-day management to the Mehra Group, started to have serious reasons to doubt the rosy picture portrayed by the Mehras, the Petitioner commissioned financial audit and legal due diligence so as to determine the actual state of affairs of the Company and its subsidiary and associate companies. The facts of mismanagement of the affairs of the company that emerged included: ...

81. Restricting access to accounts and doctoring accounts for unfairly depriving the other shareholder from exercising its rights to purchase offered shares, a right provided by Article 58 of the Articles, makes it imperative that an independent audit be immediately conducted.

PRAYERS

88. It is therefore respectfully prayed as under:

Main Prayers

a) pass appropriate orders and directions removing the Respondent Nos. 2 and 3 from the positions of Managing Director and Whole Time Director respectively of Enercon (India) Limited.

b) Pass appropriate orders and directions removing the Respondent Nos. 2 and 3 from the positions of Managing Director and/or Whole Time Director and

respectively of the said subsidiary and associate companies of Enercon (India) Limited.

...

e) Direct Respondent Nos. 2 to 8 to transfer their entire shareholding (44% in Enercon (India) Limited to the Petitioner at a fair value to be independently arrived at on the basis of the balance sheet of the Company giving the true view of the Company.

f) Direct Respondent Nos. 2 to 8 to transfer their entire shareholding in the subsidiary and associate companies of Enercon (India) Limited including but not limited to Respondent Nos. 9 to 35 herein to the Petitioner at a fair value to be independently arrived on the basis of the balance sheet of each of the said companies giving the true view of each company.

g) Direct an investigation to ascertain the conduct of the Respondent Nos. 2 to 8 in dealing with assets, properties, monies and management of the Respondent No.1 Company.

h) Direct Respondent No.1 to take all necessary and consequential action to the report of the investigation, including but not limited to tracing out the monies, property and assets of the Company in the hands of the Respondent Nos. 2 to 8 or any of them and direct restoration of such monies, properties and assets to Respondent No.1.

Interim prayers

...

iv. Restrain Respondent Nos. 9 to 35 being the subsidiary and associate companies of Enercon India Limited, their employees, officers, servants and agents, from dealing with, transferring or creating any third party interests in their respective assets except in the ordinary course of business.

viii. Injunct Mehra Group (Respondent Nos. 2 to 8) or any of them from transferring, selling, mortgaging, creating third party rights of all or any part of their shareholding in the Company to any other person, except the Petitioner;

ix. Direct the Respondent Nos. 2 to 8 to furnish an affidavit before this Hon'ble Board the details of contracts between the Mehra Group or any of the Respondent Nos. 2 to 8 and the Company.

x. Restrain Respondent Nos. 1 to 35 from divulging or diverting to third parties the Technical know-how and proprietary informations of the Petitioner;"

164. It was highlighted that in the said petition, the Appellant's-herein filed Company Application No. 484 of 2007 under Section 8 of the Arbitration and Conciliation Act, 1996 seeking reference to arbitration. The same was opposed by Enercon GmbH (Respondent-herein) and vide Order dated 29.10.2007 the said application was dismissed.

165. The relevant portions of the said Order as referred to by Dr. Saraf during the course of his submissions are reproduced as under:

"5. Shri Sarkar, Senior Advocate for the petitioner submitted: In terms of Section 8, to refer the parties to arbitration, this Board should be satisfied that the subject matter of the petition is the subject matter of the arbitration agreement and that there is a commonality of parties. In the present case, the SHA is between the petitioner and the Mehra group and the company is not a party. Similarly, TKA is an agreement between the petitioner and the company and Mehra group is not a party. This TKA has already expired by efflux of time and is no longer effective. That is why IPLA was entered into. As a matter of fact, when the petitioner stopped supply of equipments etc., the Mehra group filed a suit seeking for a direction to the petitioner to supply equipment in terms of SHA/TKA. Instead of submitting the same to arbitration, thus, very clearly indicating that Mehra group has given a go bye to arbitration. This would indicate that they do not rely on the arbitration clauses. Further, respondents 9 to 35, against which reliefs have been sought, are not parties to either of the two agreements. Further in the petition, the petitioner alleged mismanagement and there is no provision regarding the same in either of the two agreements. Even in respect of removal of the 2nd and 3rd respondents and also relating to transfer of shares, the petitioner has relied on the Articles and not on the terms of the SHA. Therefore, in view of the fact that there is no commonality of parties, and that many of the allegations particularly in relation to financial mismanagement are not matters arising out of the arbitration agreements and that bifurcation between the Board and the Arbitration Tribunal is not permissible, the application should be dismissed.

...

8. It is evident from the provisions of Section 8 that if the subject matter brought before this Board is the subject matter of arbitration agreement, the Board is bound to refer the parties to arbitration. Therefore commonality of the subject matter is a prerequisite to invoke/apply Section 8. Likewise, a reading of Section 7(1) read with Section 2(1)(h) would indicate that the parties before the judicial proceedings should be parties to the arbitration agreement to refer the disputes between them arising out of the defined relationship. This would indicate that there should be a commonality of parties also. Section 7(3) mandates that an arbitration agreement has to be in writing or in terms of Section 7(4), it should satisfy one of the requirements as specified in sub-Sections (a) to (c).

Thus, before referring parties to arbitration, this Board has to satisfy itself, that there is commonality of parties, subject matter and the requirements of Section 7(3) or 7(4) are met with.

9. Having dealt with the legal position, I shall deal with the factual aspects of this case. There are two agreements viz. SHA and TKA in which the parties thereto have agreed to refer the disputes to arbitration. The admitted fact is that the

company is not a party to SHA and Mehra group is not a party to TKA. As a matter of fact, ShriSarkar pointed out that the currency of TKA has expired by a flux of time and that is why IPLA relating to supply of technical know how was entered into in September 2006, the existence of which has also been challenged by Mehra group. On the basis of the reliefs sought, Mehra group is contending that the reliefs sought arise out of the SHA. It is on record that the terms relating to shareholding and directorship as in the SHA have been incorporated in the Articles in toto. In such a situation, in Goyal M Gases case relying on the decision of this Board in EIH Limited vs. Mashobra Resort Ltd. (119 CC 993), this Board has held that once terms of SHA containing arbitration clause have been incorporated in the Articles of the company, then the terms of the Articles will prevail over the SHA. It also further held that once the terms of the shareholders' agreement have been incorporated in the Article with the omission of arbitration clause, that clause has no validity. In the present case, the petitioner has relied on the Article 58(a) of the Articles of Association of the company in regard to the allegation of depriving the petitioner of its pre-emption rights and likewise the petitioner has sought for amendment to the Articles regarding directorship. Both these matters can be decided independent of the terms of SHA. ... Even otherwise, in view of the judgment of the Apex Court in Sukanya Holdings, there is no possibility of bifurcation of the subject matter between the CLB and the Arbitrator. Whether, there is a breach of right of pre-emption, whether the Mehra group is guilty of financial mismanagement meriting their removal as MD and WTD and whether Articles relating to directorship is to be amended etc. would all depend on the merits of the case and need not be gone into while dealing with the instant petition under Section 8 of the Act.

10. Considering the fact that the company is not a party to SHA and that some of the allegations cannot be traced to the terms of the SHA, even assuming that pre-emption rights and directorship are covered under the terms of SHA, the application is not maintainable and is accordingly dismissed."

166. Emphasis was laid on the circumstance that the Appellants request for referring the disputes which were subject matter of the CLB proceedings was opposed by Enercon GmbH (Respondent-herein) and such request was rejected by the CLB, making it clear that Enercon GmbH never intended to refer such disputes to arbitration. In this context, it was submitted that the Respondents-herein cannot be permitted to belatedly set up an inconsistent plea of 'intent to arbitrate' even for the disputes relatable to the SHA, as sought to have been done in the case at hand.

167. Taking the argument forward, Dr. Saraf highlighted that on 13.03.2008, a notice invoking arbitration was issued by Enercon GmbH invoking Clause No. 18 of the IPLA and seeking to refer the disputes in respect of IPLA to arbitration. The relevant portion of the notice are as under:

"There have arisen in respect of the IPLA a series of substantive disputes,

controversies and differences between Enercon GmbH, WPG on the one hand and EIL on the other hand which EIL is obliged to refer to arbitration in London. Further, to the extent that you yourselves seek to advance such claims in the name of or derivative of EIL, you are both likewise bound to refer such claims to arbitration in London.

The parties' substantive disputes in respect of the IPLA cover at least the following:

1) The extent to which the supply of Special Components, any other parts, components, etc. to EIL since September 2006 and the further supply since November 2007 is governed by and protected by the terms of IPLA and the amount payable towards the sale of Special and other components, parts and materials by Enercon to EIL and any questions relating to the alleged claim of EIL for damages for non-supply of Special Components.

2) The validity of the IPLA ...

3) Whether the parties have concluded a binding agreement to refer disputes in respect of the IPLA to arbitration ...

4) The amount of royalty payable by EIL to Enercon ... pursuant to the terms of clause 5 of the IPLA.

5) The access to and provision of accounts pursuant to ... IPLA ...

6) EIL's and your liability in damages.

In respect of these disputes, Enercon GmbH and WPG hereby give notice of their Joint nomination of Mr VV Veeder QC as the Licensors' arbitrator pursuant to clause 18.1 of the IPLA. ...

...As you know we have also looked to the need for the regularisation of the affairs of EIL through the appointment of the joint managing directors to EIL as mandated by the order of the Company Law Board's decision dated 29 October 2007. Notwithstanding, however the appointment of a joint managing director on 28 November 2007, effectively, EIL has continued to be run as it was before the joint managing director's appointment. Further, in light of the discoveries of systematic financial and managerial abuse of EIL's affairs that we discovered in the short review that we had in January 2008, we have had no option but to apply to the CLB for further orders protecting Enercon's position in EIL as a shareholder. In so doing Enercon GmbH has not submitted any of the above substantive disputes arising out of the IPLA to the CLB. "

168. From the notice of invocation, it was apparent that what was invoked was the arbitration clause in the IPLA incorporated in Clause 18 therein. No disputes in relation to the SHA were referred to arbitration. In fact, it was expressly made clear that disputes which were pending before the CLB would not be a subject matter of the arbitration and would be prosecuted independently. It is on the basis of the arbitration clause in the IPLA that it was stated that the venue

should be London and the reference would be to three arbitrators. Under the SHA, the arbitration was contemplated under the aegis of the Indo German Chambers of Commerce.

169. Consequent thereto, on 27.03.2008 Enercon GmbH filed an Arbitration Claim Form being Claim No.2008 F 040296 in the Queen's Bench of the Commercial Court in England based on Clause 18 of the IPLA seeking a declaration that there was a valid and binding arbitration agreement, and also seeking a restraint on the proceedings initiated by the Mehra's in the Bombay High Court. Under the head of 'Relief Claimed' at page 2 of the said proceeding, it was apparent that the entire reference was to the IPLA and Clause 18 thereof being the arbitration agreement on the basis of which the proceedings were initiated.

170. Proceeding further in his endeavour to highlight that the intention expressed by Enercon GmbH to arbitrate was confined to disputes under the IPLA in view of which only the arbitral clause comprised therein was invoked, Dr. Saraf referred to the contents of the application filed by Enercon GmbH under Section 45 of the Arbitration and Conciliation Act, 1996 in the Daman Suit. As highlighted by us in our factual narrative, on 08.04.2008 the Mehra's had instituted Regular Civil Suit No. 9 of 2008 before the Court of Civil Judge, Senior Division, Daman. The suit sought a declaration that the IPLA was not a concluded contract between the parties and that there was no valid arbitration agreement for submission of disputes between the parties. The plaintiffs in the suit asserted that the invocation of English Arbitration Act and the initiation of proceedings in England were without jurisdiction and sought relief restraining the proceedings initiated by Enercon GmbH in England in Claim No.2008 F 040296.

171. Significantly, it was pointed out that the application filed by Enercon GmbH under Section 45 of the Arbitration and Conciliation Act, 1996 on 28th July 2008 also sought to invoke arbitration agreement as enmeshed in Clause 18 of the IPLA. Much emphasis was laid on the said circumstances as it was contended that it was this application which ultimately formed the subject matter of consideration before the Supreme Court; where reference to arbitration was authoritatively made by judgment dated 14.02.2014.

172. Dr. Saraf elaborately took us through the judgment of the Supreme Court to buttress his submission that the operative text contained in paragraph 153 directing all disputes to be referred for arbitration including those emanating from the SHA had to be read in the context of what had arisen for consideration of the Court. Emphasis was laid on the issues formulated by the Supreme Court that it proceeded to ultimately answer. We reproduce the relevant portion hereunder.

"69. ...The issues that arise for consideration of this Court are :

(i) Is the IPLA a valid and concluded contract?

(ii) Is it for the Court to decide issue No. (i) or should it be left to be considered by the Arbitral Tribunal?

(iii) Linked to (i) and (ii) is the issue whether the Appellants can refuse to join arbitration on the plea that there is no concluded IPLA?

(iv) Assuming that the IPLA is a concluded contract; is the Arbitration Clause 18.1 vague and unworkable, as observed by both the Arbitrators i.e. Mr. V.V. Veeder QC and Mr Justice B.P. Jeevan Reddy?

(v) In case the arbitration clause is held to be workable, is the seat of arbitration in London or in India?

(vi) In the event it is held that the seat is in India, would the English Courts have the concurrent jurisdiction for taking such measures as required in support of the arbitration as the venue for the arbitration proceedings is London?

(vii) Linked to (v) & (vi) is the issue whether the Appellants are entitled for an anti-suit injunction?

These, of course, are only broad based issues; many other supplementary questions will have to be examined in order to give a definitive determination."

173. It was urged that from the issues framed by the Supreme Court, it was pellucid that the Court was only considering the IPLA, whether the IPLA was a concluded contract, the validity of the arbitration clause in Clause 18.1 of IPLA and as to whether the same was workable. Further, the Supreme Court was also considering whether the seat of the arbitration was in India or in England solely with reference to Clause 18 of IPLA and the effect of London being specified as venue therein. The entire gamut of consideration of the Supreme Court revolved around the IPLA and the arbitration clause incorporated therein.

174. Dr. Saraf submitted that the decision of the Supreme Court bears not even a reference to the arbitration clause comprised under the SHA. The SHA is referred to only as a historical fact.

175. It was pointed out that the Supreme Court ultimately allowed the application under Section 45 filed before the Daman District Court and while various proceedings in Daman Court and the English Courts were stayed, the Supreme Court in its considered wisdom consciously chose not to stay the proceedings before the CLB.

176. On the strength of this circumstance, it was therefore submitted that the only discernible reason for choosing to exercise such a course was that the disputes under the SHA were subject matter of adjudication before the CLB and were never contemplated to be referred to arbitration. It was reiterated that the directions of the Supreme Court cannot be read out of context to expand a scope of reference much beyond the invocation and also the proceedings under Section 45. In this regard reliance was placed upon the decision of the Supreme Court reported as (2006) 7 SCC 735 Commissioner of Central Excise, Delhi v. Allied Air-

Conditioning Corporation (Regd).

177. It was highlighted that the issue of want of jurisdiction of the Arbitral Tribunal to adjudicate upon disputes arising under the SHA was raised before the Tribunal. The Arbitral Tribunal dealt with the issue of jurisdiction in paragraphs 227 and 230 of the Award. Paragraphs 227 and 230 read as under:

"A. Jurisdiction and Discretion

227. The first question is whether the Tribunal has jurisdiction to deal with these matters and if so, whether as a matter of procedural discretion it should exercise that jurisdiction. The SHA has a clause (16.2) providing for arbitration of "all disputes ... arising in connection with this agreement and the operation of this agreement" by the Indo-German Chamber of Commerce in Bombay.

...

230. In the Tribunal's view, the last point is fallacious. The refusal to stay the CLB proceedings does not entail staying these arbitration proceedings. Both may continue. The Tribunal considers that the judgment of the Supreme Court makes clear this Tribunal's mandate to resolve the disputes under the SHA. It is true that the Supreme Court did not stay the CLB proceedings (correctly, if one may say so with respect), for the same reason as the CLB itself refused to stay such proceedings in 2007. The issues may overlap; but they are not the same and the statutory remedies sought are not necessarily available to the Tribunal. The Supreme Court did not stay the proceedings before the CLB but neither did it stay the arbitration. The resolution of issues of fact or law by either the CLB or the Tribunal may give rise to issue estoppels or other forms of res judicata in the proceedings before the other, but the question of whether the one should wait for a decision by the other is a matter of procedural discretion and case management for the CLB and the Tribunal. The Tribunal notes that it took from 2007 until 2012 for the CLB to deliver a final judgment on the Company Petitions and a further three years for that judgment to be set aside on appeal by the Bombay High Court. The Tribunal therefore considers that it would be procedurally unjust to the parties not to proceed with the mandate which it has been given by the Supreme Court."

(emphasis supplied)

178. It was thus submitted that the Arbitral Tribunal clothed itself with the jurisdiction on the specious basis that there would be delays in disposal of proceedings in the CLB. It was urged that such considerations could supply no legitimate basis for conferring jurisdiction on an Arbitral Tribunal which it inherently lacked.

179. While summing his submissions on this issue, which needless to state goes to the root of the matter, Dr. Saraf submitted that in the aforesaid circumstances, it was apparent that neither were the disputes referred to arbitration nor were the same adequately pleaded before the Arbitral Tribunal and as such, the Award

against the Appellants on the aspect of breach of SHA is without jurisdiction.

180. In the context of scope of reference, reliance was placed on a passage from Russel On Arbitration, 24th Edtn, which reads as under:

"5-028 Scope of the reference. Whether a particular is within the reference will be determined as a matter of construction of the notice of arbitration, giving the words used their natural meaning in the context in which they were used and applying an objective test. The scope of matters that can be referred will normally be constrained by the scope of the agreement to arbitrate, although the parties may agree that the reference should be broader and can agree an adhoc submission of issues enlarging the scope of the Tribunal's jurisdiction beyond their original agreement to arbitrate. The scope of reference may include both claims by a claimant and counterclaims brought by a respondent, which again must be within the agreement to arbitrate. The factual background to the giving of the notice and any previous communications between the parties concerning the issues between them will also be relevant in construing the scope of the reference to arbitration. If, by the time the notice of arbitration is given, the parties' previous communications indicate that it would be natural to expect the reference to arbitration to include all the outstanding disputes, that fact may be taken into consideration. The reference may also include claims arising subsequent to the commencement of arbitration if the notice of arbitration demonstrates the parties' intention to do so. Provided they are within the scope of reference, the Tribunal has a discretion whether to permit new claims to be introduced in the course of the arbitration, but if they are outside the scope of reference new claims cannot be entertained without agreement of the parties."

181. Reliance was also placed on the judgment of the Supreme Court reported as (2011) 5 SCC 532 Booz Allen and Hamilton Inc. v. SBI Home Finance Limited & Ors,. and in particular paragraph 34 (iii) which we reproduce as under:

"34. The term "arbitrability" has different meanings in different contexts. The three facts of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:

...

(iii) Whether the parties have referred disputes to arbitration?

That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral Tribunal."

182. It was therefore contended that in these circumstances, the award to the

extent that it impinged upon the disputes under the SHA was liable to be set aside by the learned Single Judge of this Court under Sub-Section 2 (b)(iv) of Section 34, which reads as under:

"34. Application for setting aside arbitral award. ...

(2) An arbitral award may be set aside by the Court only if-(a) the party making the application furnishes proof that-

...

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:

Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or..."

183. Grievance was also raised that the Arbitral Tribunal fell in error by passing the Award directing the Mehra brothers to make payment of monies to WWIL under the residual head "relief claimed as further and other reliefs" in the Statement of Claim. It was urged that it is a settled law that the residual head of "any relief of further and other relief" has to be read in the context of entirety of the pleading and the main relief claimed in the proceedings and cannot be read de hors the same. It was submitted that at any rate it must derive colour from the main relief claimed and must not be materially different so as to radically alter the nature of proceedings. In this regard reliance was placed on the decision of the Privy Council reported as 1927 SCCOnline PC 98 (527) *Abdur Rahim & Ors. v. Mahomed Barkat Ali & Ors.*

184. Incidentally entrenching upon the issue of absence of requisite pleadings that was separately dealt by Mr. Mehta, learned Senior Counsel, Dr. Saraf placed reliance upon Section 23 of the Arbitration and Conciliation Act, 1996 which mandates that a statement of claim needs to be filed by a claimant pleading and stating "the fact supporting the claim, the points at issue and the relief or remedy sought" and the respondent is entitled to state his defence in respect of these particulars. Under Section 23 (3) a right is conferred on any party to amend or supplement his claim. It was, therefore, urged that in the absence of any relief claimed or any basis of such relief being stated in the Statement of Claim, no award could have been passed by the Arbitrator as done in the instant case. Without prejudice to the contention that the entire controversy was beyond the scope of arbitration, it was submitted that Enercon GmbH did not even amend its statement of claim to incorporate such pleadings /relief as mandatorily required.

185. The next contention canvassed by Dr. Saraf was that the entire majority Award was vitiated by the prejudice/bias formed by the learned Arbitrators against the Mehras. The said argument was essentially anchored on the

observations made in the majority Award against the Mehra's, in particular, Mr. Yogesh Mehra whilst appreciating his account tendered as a witness. It was pointed out that extremely sharp and strong observations were made against Mr. Yogesh Mehra, which was a tell-tale sign of the fact that the Arbitrators formed a prejudicial opinion about Mr. Yogesh Mehra's character. The two Arbitrators holding a majority opinion completely disregarded the evidence of Mr. Yogesh Mehra because they formed an adverse opinion that Mr. Yogesh Mehra was "devious, manipulative and dishonest." Having formed this opinion, the two Arbitrators holding the majority view completely disregarded the only direct evidence of the meeting in the form of testimony of Mr. Yogesh Mehra and instead placed heavy reliance on the testimony of two witnesses on behalf of Enercon GmbH whose evidence as regards what happened at the said meeting was nothing beyond hearsay evidence and hence not admissible. It is in this context that Dr. Saraf ventured to draw our attention to the relevant portions of the majority Award which we reproduce hereunder.

"VII. THE WITNESSES

90. The Tribunal considers that, with the exception of Mr. Yogesh Mehra, all the witnesses were honest and trying to assist the Tribunal. Their memories may sometimes have been inaccurate, but they were doing their best with events taking place many years ago. Mr. Mehra, as will be apparent from many places in this Award, was not a reliable witness. He is a highly emotional man who felt very strongly that his German counterparties had treated him unfairly. His deep sense of grievance may have enabled him to believe that what he would have liked to have happened had actually happened. But it also made him feel that he was entitled to behave in a way which, viewed objectively, was devious, manipulative and dishonest. In his testimony to explain away this behaviour, he gave evidence to the Tribunal that sometimes even he must have known to be untrue, as indeed it manifestly was.

(emphasis supplied)

...

119. On the morning of 29 September 2006 Mr. Mehra arrived in Bremen. Dr Wobben met him at the airport and took him to the Hilton Hotel. They had a discussion together in the morning and were joined at lunch by Mr. Kettwig. We do not of course have Dr. Wobben's evidence about what was discussed in the morning, but Mr. Kettwig said that when he arrived, it appeared that the discussions had not gone smoothly.

He said he could "feel some tension, or an atmosphere that was not quite normal ... I tried to calm them down because there were a lot of emotions". The main issue appeared to be that "Dr. Wobben had pointed out that the IPLA should be accepted in its current form". In his witness statement, Mr. Kettwig added a detail:

"After having made this clear, I recall that Dr.Wobben put his things into his bag and shut the clasp. From my experience of Dr.Wobben, this was a typical reaction of his where he was frustrated or annoyed...

...

121 Mr. Mehra's account of the discussions with DrWobben at the Hilton Hotel is very different. He testified:

"We discussed, amongst other matters, my objections to the draft IPLA (as communicated in August 2006). After about 3 hours of discussion, it became clear that there were outstanding issues between the parties. It was felt that the draft IPLA required amendments ... Dr. Wobben assured me that he would decide on a fair basis for computing the royalty ... At that point Dr. Wobben called Mr. Kettwig, Managing Director of Enercon, to join us at the Hilton. Mr. Kettwig arrived at about 4 pm. The three of us then discussed the basis on which we would move forward and Dr. Wobben agreed to some of the key objections raised by me in August 2006."

122. The Tribunal does not accept Mr. Mehra's evidence and prefers the evidence of Mr. Kettwig. The IPLA had been discussed at length and in detail. DrWobben had dealt firmly with Mr. Mehra's comments in August 2006 and was expecting that Mr. Mehra had come to Aurich to sign the IPLA. That Dr. Wobben should now have made a U-turn on MrMehra's points seems to the Tribunal highly improbable and is contrary to all other credible evidence. Nor is it probable that Dr.Wobben would have been willing to re-open discussion about the 5% royalty agreed in the HoA. There is no credible evidence for this either.

(emphasis supplied)

...

124. Mr.Mehra, on the other hand, testified that, it having been decided between himself and Dr.Wobben that "the draft IPLA required amendments", the Agreed Principles were intended to reflect the changes which would have to be made in that document as well as the other agreements yet to be finalised. He denied that he had brought a draft of the Agreed Principles: "maybe I had my points with me, but this document was very clearly typed on the computer in the Bremen Hotel."

125. Mr.Kettwig is neither a lawyer nor fluent in English (unlike Mr.Mehra). The language of the document suggests that its substance is derived from Mr.Mehra and his legal advisers in India. ...

...

146. The Tribunal regrets that it is not unanimous on this point. The contrary views of Justice Raveendran will be found in Appendix A. The majority members do not think it would be helpful for them to undertake a point by point examination of his reasons. They would only observe that he appears to attach

little importance to what the persons involved said and did not say at the time of the meetings in Aurich at the end of September 2006. It is essentially a question of credibility. The majority regard Mr. Kettwig as an honest and credible witness and accept, as explained in paragraphs 127-128 and 131 above, that Dr. Wobben's instructions to him at Bremen, given in the presence of Mr. Mehra, were that he and Mr. Mehra were to settle the Agreed Principles but that the IPLA was to be executed unchanged and that his discussions of the Agreed Principles with Mr. Mehra it was accepted that they would not affect the IPLA. The majority do not regard Mr. Mehra as an honest or reliable witness and in any case, he has not suggested that he said anything to contradict what he must have known that Dr. Wobben and Mr. Kettwig understood the position to be."

(emphasis supplied)

186. On the strength of the aforesaid observations, it was submitted that it was apparent that having formed a very strong prejudicial opinion about Mr. Mehra, the majority arbitrators disregarded every evidence of his and accepted every testimony of Mr. Kettwig and Ms. Fritsch Nehring as the gospel truth. As against the aforesaid, the learned Arbitrator holding the minority opinion, on an impartial and unbiased assessment of evidence held that Mr. Yogesh Mehra was the only reliable witness and that Mr. Kettwig and Ms. Fritsch Nehring were unreliable witnesses who were trying to either skirt the issues or to give erroneous evidence. Reference was made by the learned Counsel to the observations of the learned Arbitrator in this regard.

187. Dr. Saraf also sought to give another dimension to his plea of bias. It was submitted that the 'general territorial bias' of the majority arbitrators is also apparent from their observations in paragraph 230 of the award wherein they clothed themselves with jurisdiction as regards disputes which were the subject matter of CLB proceedings on the basis that such disputes in India remain pending for years. The attention of the Court was drawn to the relevant observations of the majority Arbitrators on this aspect, which we quote as under.

"...The Tribunal notes that it took from 2007 until 2012 for the CLB to deliver a final judgment on the Company Petitions and a further three years for that judgment to be set aside on appeal by the Bombay High Court. The Tribunal therefore considers that it would be procedurally unjust to the parties not to proceed with the mandate which it has been given by the Supreme Court..."

188. In support of this plea, reliance was placed on the following pronouncements.

(i) (1998) 5 SCC 513-State of W.B. v. Shivananda Pathak ; wherein the Supreme Court extensively laid down the contours of the law with regard to bias.

(ii) (2000) Q.B. 451- Locobail (UK) Ltd. vs. Bayfield Properties Ltd.; wherein the Court held that real danger of bias may well exist if credibility of that individual could be significant in the decision of the case; or if in a case the credibility of

any individual where an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such persons evidence with an open mind.

(iii) (2015) 2 Mah LJ 38- Inox Leisure Ltd. v. Goa State Infrastructure Corporation Ltd.; wherein it was observed by this Court that when bias on the part of the arbitrator became evident only upon the receipt of the Award, Section 12 and Section 13 of the Act would not apply in cases of such nature.

189. The last issue agitated by Dr. Saraf during the course of his arguments was imposition of costs of arbitration upon the Mehra brothers rather than WWIL. It was submitted that the majority Award imposes costs of Euro 3,794,970 on the Mehra's being the entire costs on actuals of the arbitration as assessed by the Tribunal. It was pointed out that a large part of the award relates to the claim of royalty against WWIL. The Arbitral Tribunal in paragraph 306 and 307 of the Award clearly held that there is no personal liability of Mehra brothers for the liability of WWIL under the IPLA. The issues were complex, and Mehra's were under their bonafide rights in contesting the same. In such circumstances, the award of the entire cost against the Mehra's was perverse. The dissenting Arbitrator in paragraphs 58-59 of the minority Opinion fairly ordered WWIL to bear the cost. It was contended that the award of Costs as against the Mehra brothers cannot be countenanced and is not backed by any reason.

SUBMISSIONS OF MR. ZAL ANDHYARUJINA, ADVOCATE APPEARING ON BEHALF OF THE APPELLANT- WWIL IN COMMERCIAL APPEAL NO. 316 OF 2019

190. The learned counsel at the outset before proceeding to make his submissions informed the Court that a Corporate Insolvency Resolution Process in respect of WWIL was initiated on 20.02.2018 appointing an Interim Resolution Professional and the moratorium had been imposed.

191. Mr. Andhyarujina addressed the Court on the aspect whether the IPLA was a concluded contract or a mere draft upon which signatures had been appended only as a mark of identification. The learned counsel also dealt with the issue of payment of royalties in respect of WTG's. He clarified that the Appellant-WWIL would not be challenging the directions issued by the Arbitral Tribunal to pay Enercon GmbH the price of components and materials supplied to it.

192. Apropos the issue whether the IPLA had fructified as a contract capable of binding parties or had remained in the realm of inchoate draft, the learned counsel submitted that Agreed Principles admittedly executed between the parties on 30.09.2006 clearly dislodged the theory of IPLA having been executed as a concluded contract. It was highlighted before us that the Agreed Principles referred to the IPLA as a draft and therefore it strikes a discordant note with the assertion of the Respondents-herein that the IPLA had been finally executed. It was submitted that both the documents are admittedly signed on the same date, and significantly it is not the case of the Respondents-herein that the IPLA was executed some time after the execution of the Agreed Principles. Rather, it had

emerged in evidence that the documents were signed by Dr Wobben and Mr Yogesh Mehra in succession at one sitting.

193. Mr. Andhyarujina further contended that the IPLA executed by the parties on 30.09.2006 in its present form unequivocally evidences that the same was a mere inchoate draft in view of the fact that there are blank spaces comprised therein. The cover page of the said document bears a date which is different from the date comprised in the recitals of the agreement . The Annexures referred in the agreement are not appended and admittedly not drawn up. It was submitted that the said circumstances are a tell-tail sign that the IPLA was a mere draft enclosed to the Agreed Principles.

194. The learned counsel also raised an alternative submission that even if the IPLA was executed with the intention to create legal relations, yet the same could not be enforced as it was uncertain and hit by Section 29 of the Indian Contract Act, 1872.

195. It was urged that given the unambiguous nature of the Agreed Principles executed between the parties, oral evidence to dislodge the same could not have been permitted in terms of Sections 91 and 92 of the Indian Evidence Act.

196. The learned counsel submitted that the handwritten letter authored by Mr. Yogesh Mehra on 30.09.2006 from his hotel referred to the execution of the Agreed Principles and not the IPLA as has been interpreted by the Tribunal.

197. Taking the argument forward, Mr Andhyarujina placed emphasis on the e-mail sent by Ms. Nehring on 24.11.2006 referring to the IPLA as a final draft.

198. It was contended that it would militate against the natural course of probabilities that Enercon GmbH handed over the valuable technical know-how of various WTG's only in mere anticipation of a formal agreement. In this context, it was submitted that the plea of the Appellants that they were entitled to further WTG's in terms of the TKHA (as amended by STKHA) cannot be brushed aside. According to learned counsel Enercon (India) Ltd. was entitled to E-26, E-30, E-33, E-40 and E-48 WTG's under the TKHA (as amended by STKHA).

199. The learned counsel contended that the TKHA contemplated one time transfer of technology and the same was in consonance with the Industrial Policy of the Government of India of the year 1991 and the RBI Norms. It was submitted that the Tribunal did not attach significance to the aspect of indegenisation as contemplated under Article 5.2 of the TKHA. Further, Article 3.1 of the TKHA employs the expression 'transfer' in respect of the supply of technology.

200. With respect to the issue of seeking restitution of royalties remitted by Enercon (India) Ltd., it was submitted that the said amounts were transferred under bona fide mistake, and it is the case of the Appellants that no further royalties were payable upon the threshold mark of 2.5 Million Deutsche Marks having reached in the year 2002.

SUBMISSIONS OF MR. ASPI CHINOY, SENIOR ADVOCATE APPEARING ON BEHALF OF THE CONTESTING RESPONDENTS- ENERCON GMBH AND WPG IN COMMERCIAL APPEAL NO. 314 OF 2019

201. Mr. Aspi Chinoy, learned Senior Counsel appearing on behalf of the contesting Respondents in the above captioned appeal addressed submissions on two issues that were raised during the course of hearing by Mr. Shyam Mehta, learned Senior Counsel appearing on behalf of the Appellants.

First, namely, whether the Award passed by the Tribunal insofar as 'Vish Wind' transactions were concerned was liable to be set aside owing to insufficiency of pleadings in that regard.

The other cardinal issue adverted to by Mr. Chinoy before us was whether it could be safely concluded that the Appellants-herein had themselves waived the right to oral hearing during the course of proceedings before the Tribunal, and thus the absence of the opportunity to address closing oral submissions would not vitiate the Award from the root to the fruit.

202. Apropos the first issue with regard to insufficiency of necessary averments in the pleadings of the Claimants and consequent failure to raise the foundation of claim with respect to Third Party transactions, Mr. Chinoy painstakingly alluded to the various pleadings drawn by the parties at different stage of the proceedings to trace the genesis and evolution of this claim which ultimately succeeded before the Tribunal.

203. At the outset attention of this Court was drawn to the Statement of Claim. It was pointed out that de hors the claims against WWIL, separate claims had been raised against the Mehra brothers since the very inception. In this regard, he referred to Para 96.2 and Para 96.3 of Part H of the Statement of Claim, inter alia, wherein it had been specifically claimed that Vaayu Companies had been set up for exploiting the claimants technology and value was transferred from WWIL to such companies. The relevant extracts are reproduced hereunder.

Para 96.2 of Part H of the Statement of Claim

"...set up the Vaayu Companies for the purpose of receiving and exploiting the Claimants technology and/or have assisted the Vaayu Companies in receiving and/or exploiting the Claimants technology and/or have transferred value from WWIL to the Vaayu companies, such also constitutes breaches of Mr Yogesh Mehra and/or Ajay Mehra's obligations under the SHA and/or Indian law, including their duties of good faith, which has caused loss to the claimants and for which the claimants are entitled to damages to be assessed and/or an account of profits, plus interest..."

Para 96.3 of Part H of Statement of Claim

"...The loss caused to Enercon by Mr Yogesh Mehra and/or Mr Ajay Mehra's breach of their duties under the SHA and/or under Indian Law, including their

obligations of utmost good faith, trust, confidence and commitment towards Enercon, include the damage caused to the value of Enercon's shareholding in WWIL and Enercon is entitled to Damages (to be assessed) plus interest, in regards to this loss. Further and alternatively, Enercon is entitled to an account of profits plus interest, in relation to Mr Yogesh Mehra and/or Mr Ajay Mehra's breach of their duties of utmost good faith, trust, confidence and commitment towards Enercon..."

Prayer Clause (I)(c) stated as follows:

"(1) In respect of Mr Yogesh Mehra and Mr Ajay Mehra's breaches of the SHA :

(a)

(b)

(c) An order that Yogesh Mehra and Mr Ajay Mehra pay damages (to be assessed) and/or an account of profits for their breaches of the SHA and/or duties arising as a matter of Indian Law."

204. On the strength of the above noted material, it was urged that the Statement of Claim contained material pleading to the effect that the Mehra's had transferred value from WWIL to the Vaayu Companies in breach of their obligations under the SHA and/or Indian Law. Further, it had been categorically prayed that the Mehra brothers be held liable to pay damages and/or account for the profits made by such transfer. It was emphasised that this was in clear contra-distinction from the pleadings with respect to the loss suffered owing to exploitation of Claimants technology by the Mehra's.

205. Mr. Chinoy however fairly submitted that the Statement of Claim fell short of disclosing any concrete particulars of the manner of such unauthorized transfer of technology and/or value was effected, The Statement of Claim merely voiced the apprehensions under which the Claimant's were laboring as they were in dark about the affairs of WWIL. As events would subsequently unravel, this deficiency was overcome at a later stage in the form of Written Submissions and other applications preferred by the Claimants detailing the Third Party transactions with a greater degree of specificity. It was submitted that actionable information with regard to such transactions had started to surface only sometime around September 2015 in view of the disclosures made by the Appellants-herein pursuant to Procedural Order No.2 dated 22.06.2015 passed by the Tribunal. Documents prima facie revealed that transactions to the tune of Euro 124 million had taken place between WWIL and Vish Wind; one of the Vaayu Companies for the purchase of what was later sought to be termed as 'development rights' and interest in land. It was pointed out that even at this stage, financial statements of the Vaayu Companies were deliberately withheld by the Mehra's.

206. The Claimant's had pursued their apprehension of unauthorized value transfer from WWIL in favour of Third Party entities and subjected the documents

received through the process of disclosures to forensic scrutiny by Experts. Report prepared by Mr. Nicholas Good lent credence to the fears of the Claimant's and brought to notice past transactions to the tune of Euro 124 million as described above. The said Report was also submitted before the Tribunal.

207. Armed with this material gained from disclosures made during the course of Arbitral Proceedings, the Claimants proceeded to positively aver material particulars in their Opening Written Submissions submitted on 25.11.2015 with respect to the claim of value transfer having been made to third parties. Special emphasis was placed by Mr. Chinoy to the following portions comprised therein.

"114...In setting up the Vaayu Companies and procuring that WWIL transact with related companies, including but not limited to the Vaayu Companies, Mr Yogesh Mehra and/or Ajay Mehra have breached their obligations under the SHA and/or Indian Law including clauses 2.7 & 4.1 of the SHA and/or their duties of good faith towards Enercon. Accordingly Mr Yogesh Mehra and Mr Ajay Mehra should pay damages and/or account for profit in respect of transactions undertaken by WWIL with these related companies. By way of example it has now been seen that WWIL has purchased from related companies land or land rights at a cost of Euro 124 million in recent years. No valid consent from Enercon has been obtained for these transactions by which very large sums have been paid to entities which Yogesh Mehra or his family own or have a significant interest in. It amounts to self dealing on the part of Mr Yogesh Mehra and/or Ajay Mehra and/or consists of breaches by Mr Yogesh Mehra and Mr Ajay Mehra of clauses 2.7 and 4.1 of the SHA and/or their duties of good faith towards Enercon and they are obliged to account for all profits they have earned. The same legal principles apply with respect to benefits received from loans made by WWIL to related companies."

208. It was also highlighted that the Appellant's-herein also took cognizance of the issue of unauthorized value transfer in favour of Third Party entities-Vaayu Companies and at various junctures expressly denounced the same in their Opening Written Submissions. Attention of this Court was drawn to the relevant portions on this aspect at Paragraphs 87, 88(iii)(iv) and Para 89(iii) of the Opening Written Submissions submitted before the Tribunal on behalf of the Appellants. It had been contended that there has been no transfer of value from WWIL to the Vaayu Companies. They also defended the sale and purchase of Development rights by WWIL from the related companies as being backed by independent valuation reports.

209. Mr. Chinoy submitted that further discoveries on this issue were made during the course of cross-examination of Mr. Yogesh Mehra in consequence of which he finally produced financial statements of Vish Wind on 07.12.2015 pursuant to the directions of the Tribunal. The said documents evinced the following material facts.

- 'Vish Wind' had a subscribed capital of Rs. 500,000 [Euro 7500], which had been subscribed by the Mehras.

- From 2007 'Vish Wind' had borrowed substantial sums interest free from WWIL; with Euro 650,000 being owing in 2008. These funds were used for purchasing land.

- In 2010-11 'Vish Wind' had sold development Rights to WWIL for Euro 50 million, as against the total operating expenses incurred of Euro 463,000. The Profit & Loss account showed a profit of over Euro 49 million.

- In 2011-12 'Vish Wind' had sold Development Rights to WWIL for Euro 49 million against total expenses incurred of Euro 1.4 million.

- The contracts for the sale of Development Rights were signed by Yogesh Mehra for 'Vish Wind' and by Mr Ajay Mehra for WWIL.

- That 'Vish Wind' had no employees, no business and virtually no money apart from the loans received from WWIL.

210. In view of the dramatic developments that had transpired during the course of evidential hearings, Procedural Order No. 5 came up to be passed on 11.12.2015 wherein, significantly, the Tribunal categorically recorded the fact that it proposed to give ample opportunity to the parties to adduce further evidence with respect to Vish Wind Infrastructure LLP. It was submitted that no objection/demur was raised at this stage to resist the proposed reception of evidence with respect to Vish Wind on any ground including non-arbitrability of this claim or the alleged insufficiency of pleadings. Rather, the Appellants- herein ventured to lead evidence in terms of such liberty provided under Procedural Order No.5 by submitting the statements of Mr. Kaushik Khona and Mr. D Vaidyanathan to explain/justify these Third Party transactions.

211. Further, the Closing Written Submissions submitted by both the parties also unequivocally evidenced detailed exchange of submissions on the aspect of the Third Party transactions. Reference was made to the Closing Submissions dated 13.05.2016 tendered by the Claimants wherein this issue was explored at Part VI(F) whereas the Closing Submissions of the Appellants-herein dated 25.05.2016 also elaborately dealt with the said issue in Paragraphs 153-220.

212. It was in this backdrop which we have noted at some length that Mr. Chinoy submitted that the Appellants-herein were well aware that value transfer to Third Party entities was an integral claim raised by the Claimants and the concise facts/particulars upon which such claim was founded ultimately emerged to the fore during the course of the proceedings even if not discernible at the commencement of the proceeding; when it remained in the realm of apprehension. It was contended that at any rate Procedural Order No.5 passed by the Tribunal sufficiently alerted the Appellant's that the issue of Vish Wind transactions was well within the domain of adjudication. It was in this view of the matter that the Appellant's even embarked to lead evidence with respect to such

transactions with a view to render them innocuous. Thus, it was submitted that there existed no element of surprise and the circumstance of absence of sufficient pleadings in the Statement of Claim by itself would not result in jettisoning such a claim from judicial calculus in view of the host of subsequent events which unequivocally demonstrate the conscious awareness exhibited by the Appellant's that the issue was very much under the lens of adjudication.

213. In support of his submissions, reliance was placed upon the decision of the Supreme Court reported as AIR 1966 SC 735 Bhagwati Prasad v. Chandramaul, wherein it was observed that though as a matter of principle the importance of pleadings could not be underscored enough, however, there may be peculiar cases where a plea though not expressly adopted at the inception may, in fact, emerge during the course of a Trial and the parties may be aware in substance that the plea is being tried. It was held that under such circumstances when both the parties being aware, there being no element of surprise and ample opportunity having been given to lead evidence, the pedantic requirement of pleadings may stand relaxed provided the possibility of prejudice could be foreclosed.

214. Adverting to the issue of denial of oral hearing to present concluding arguments, Mr. Chinoy stoutly refuted the plea of violation of natural justice as canvassed on behalf of the Appellants. It was contended that there was no cavil with the proposition that right to oral hearing was engrafted under Section 24 of the Arbitration and Conciliation Act, 1996. It was submitted that however, it was open for the parties to waive/exclude such a right.

215. Extensive reference was made to the proceedings conducted before the Tribunal as evidenced from the perusal of the Procedural Orders passed and transcripts of Proceedings. It was submitted that opportunity for making opening oral submissions was duly accorded by the Tribunal to both sides before commencement of evidential hearings.

216. It was highlighted that during the course of recording evidence, more particularly on Day 6-7, during cross-examination Mr. Yogesh Mehra, that financial statements of Vish Wind were required to be produced under the directions of the Tribunal. The documents revealed high value transactions between WWIL and Vish Wind, which also took the learned Counsels representing the Appellants-herein by surprise. In this regard, Mr. Chinoy drew our attention to the relevant transcript of the Proceedings dated 10.12.2006. For the sake of appreciating the contentions, we reproduce the relevant portions thereof herein-below.

"We on this side were, I think, by as much surprise as anyone else as to some of the evidence that was heard yesterday and AZB [the Respondents' solicitors] has not yet received instructions from the client on these related party matters, so I am instructed today not to examine Mr Good [the Claimants accounting expert] on these matters."

217. It was submitted that the Tribunal, under these attending circumstances, proceeded to pass Procedural Order No.5 on 11.12.2015 fixing a proposed calendar enumerating the timeline to be adhered by the parties. It was contended by Mr. Chinoy that the said Order was formulated upon clear consensus/agreement between the parties as expressed by their lawyers. Significantly, Item No.9 of the Procedural Order No. 5 recorded the fact that opportunity for Closing Oral Submissions would be accorded only if determined to be necessary by the Tribunal. We extrapolate the said Procedural Order in entirety.

"The following Timetable is agreed between the parties:

Sr.No.

Particulars

Date

1.

Claimants to file an Application under Sec 17 of the Arbitration & Conciliation Act 1996

13 Dec 2015

2.

Respondents to file their Reply to the Claimants Application under Sec 17 of the Arbitration & Conciliation Act 1996

19 Dec 2015

3.

Respondents to respond to the Claimants request for production of documents set out at Annex A

15 Dec 2015

4.

Tribunal to make a ruling on the Claimants Application (i) under sec. 17 of the Arbitration and Conciliation Act 1996 & (ii) in relation to any disputed item in Annex A

23 Dec 2015

5.

Respondents to provide any documents/information in accordance with (3) and (4) Above

4 January 2016

6.

An Application to the Tribunal, if either party seeks to adduce further evidence responsive to the Vish Wind Infrastructure LLP documents or the new documents produced at (5) above

18 January 2016

7.

An Application to cross examine or respond to the evidence adduced pursuant to (5) above

25 January 2016

8.

Exchange of Closing Written submissions

16 March 2016

9.

Any oral evidence in accordance with (7) above and Closing oral submissions if any are requested and if determined necessary by the Tribunal."

27 & 28 April 2016 in London.

(Emphasis Supplied)

218. It was contended that the transcript of Proceedings dated 11.12.2015 also contemporaneously recorded the views of the Tribunal and the learned Counsels representing the parties. Mr. Chinoy submitted that a perusal of the said transcript also lends credence to his submission that the Appellants-herein did not assert any legal right to make Closing Oral Submissions and rather relegated the decision to the wisdom of the Tribunal. The relevant portions of the transcript of Proceedings dated 11.12.2015 is extracted hereinbelow.

"The Chairman : "I assume we are not necessarily committed to an oral hearing at all?".

Mr Khambata : [WWIL & the Mehras Counsel] "No, I understand".

The Chairman : It may be that no one wants to cross examine and then we just do it.

Mr Joseph [Claimants Counsel] : I think Lord Hoffmann, you are absolutely right. We are not committing ourselves, and I think, maybe we said closing submissions, if any are requested, or something along those lines.

The Chairman : Yes.

Mr Khambata : Yes, that would give us the opportunity to go back and make an appropriate application for oral submissions.

Mr Joseph : If any is required and that again would not commit the Tribunal to acceding to the request, if the request were made.

Mr Khambata : Of course not. Of course not."

219. Mr. Chinoy sought to deal with the contention canvassed by Mr. Shyam Mehta and Dr. Birendra Saraf, learned Counsels for the Appellants that the transcript of Proceedings for Day 9 dated 10.12.2015 evidenced categorical request for oral hearing having been made by Mr. Khambatta, the learned Senior Counsel representing the Appellants-herein before the Tribunal and therefore waiver of the right to oral hearing ought not to be lightly inferred from the statements exchanged on the subsequent date i.e. Day 10 of evidential hearings on 11.12.2015.

The said contention was countered by Mr. Chinoy by explaining that a perusal of the transcript of Proceedings dated 10.12.2015 would reveal that the learned Senior Counsel representing the Appellants-herein did not have proper instructions and sought time for obtaining the same. The transcripts further suggest that even on the said date, the learned Senior Counsel had himself offered the alternative recourse of submitting Written Submissions instead of oral hearing. It would thus emerge that he had no instructions to adopt a hardened position committed to an Oral hearing. Further, the Procedural Order No. 5 was made the following day i.e 11.12.2015 upon the consent of parties, and the same is consistent with the contents of the verbal interchange that took place between the Tribunal and the Counsels which was also contemporaneously recorded in a transcript. It was submitted that the prior intention to the contrary, if any, stood superseded by the unequivocal and unambiguous submission by the learned Senior Counsel to the discretion of the Tribunal to determine the requirement of Closing Oral Hearing.

220. It was further urged that even the Solicitors which were inducted subsequently and entered appearance on behalf of the Appellants-herein on 07.01.2016 did not assert that they had an indefeasible right to make Closing Oral Submissions. Rather intent was expressed at repeated intervals to apply to the Tribunal to take leave to make such submissions. In order to buttress his submission, Mr. Chinoy drew attention of this Court to various communications addressed by the Solicitors to the Tribunal, including the communication dated 09.02.2016, 14.04.2016, 22.04.2016 and 11.05.2016. It was only on 25.05.2016 that the Solicitors representing the Appellants-herein belatedly for the first time asserted that they had a right to oral hearing in terms of proviso to Section 24(1) of the Arbitration and Conciliation Act, 1996 and that the parties had not excluded such a right. The said request was promptly rejected by the Tribunal on 26.05.2016 by highlighting that the Procedural Order No. 5 was made by consent of parties and it expressly recorded the fact that Closing Oral Submissions would be granted only if requested and determined to be necessary by the Tribunal.

222. While summing up his submissions on this aspect, Mr. Chinoy contended that the procedure adopted by the Tribunal was transparent and reasonable. Repeated accommodations were granted in favour of the Appellants-herein by the extending time- lines. The Tribunal was considerate to accede to such requests in view of the fact that the legal team of Counsels and Solicitors representing the Appellants-herein withdrew from the case on 14- 15.12.2015. Procedural Order No. 5 was subsequently modified by Procedural Order No. 7 dated 03.02.2016 at the instance of the Appellants-herein. However, further extensions were sought. It was owing to such repeated extensions that the dates of 27-28 April 2016 initially reserved for possible Closing Oral Submissions had to be cancelled by the Tribunal vide communication dated 20.04.2016 as the Appellants-herein had already indicated they were not in the position to submit their Closing Written Submissions in the stipulated time and had sought further extensions. The Appellants-herein ultimately submitted their Closing Written Submissions only on 25.05.2016 again breaching the further extended deadline fixed for 13.05.2016. The Tribunal thus no longer had the opportunity to peruse the submissions in advance and determine the necessity, if any, of permitting Closing Oral Submissions.

223. It was further submitted that no prejudice stemming from absence of such hearing had been demonstrated. All issues, including the issue of Third Party transactions-Vish Wind, were comprehensively contested in the exhaustive Written Submissions submitted on behalf of the Appellant's-herein before the Arbitral Tribunal and thus the plea was a legal after-thought.

SUBMISSIONS OF MR. S.U KAMDAR, SENIOR ADVOCATE APPEARING ON BEHALF OF THE CONTESTING RESPONDENTS- ENERCON GMBH AND WPG IN COMMERCIAL APPEAL NO.S 314 OF 2019

224. Mr. Kamdar, learned Senior Counsel appearing on behalf of the contesting Respondents sought to counter the contentions canvassed by Dr. Saraf.

Mr. Kamdar dealt with three issues, namely-

(i) Whether the disputes relatable to the SHA, which included the 'Vish Wind' transactions could have been the subject matter of the present arbitration.

(ii) The allegations of Bias/prejudice harboured by the majority Arbitrators as sought to have been inferred from the observations contained in the majority Award qua Mr. Yogesh Mehra.

(iii) Whether the Arbitral Tribunal fell in error by saddling the Mehra brothers with the Costs of arbitration rather than having imposed the same upon WWIL.

225. With regard to the issue of arbitrability of disputes in relation to the SHA, it was submitted that the Supreme Court in paragraph 153 of its decision made unambiguous directions to refer all disputes arising between parties in relation to various agreements, inter alia, the SHA. It was contended that it was impermissible for this Court to go behind the unequivocal directions of the

Supreme Court and its wisdom could not be called into question by the Appellants in these proceedings by posing novel objections that ought to have been urged before the Supreme Court to resist reference of disputes under the SHA for arbitration.

226. It was further submitted that it was evident that the Supreme Court proceeded to comprehensively refer all disputes for arbitration in view of the fact that the disputes had been precipitating for nearly a decade before different forums and inordinate delays had occasioned. It was also highlighted that in the peculiar facts of the present case, with a view to mitigate further delays, the Supreme Court in Paragraph 154 of its judgment itself proceeded to nominate the Third Arbitrator.

227. Mr. Kamdar submitted that the Supreme Court noticed the circumstance that each of the agreements- IPLA, HoA, SHA, TKHA comprised arbitral clauses and thus there was a clear 'intention to arbitrate'.

228. It was further contended that the directions passed by the Supreme Court in the case at hand was somewhat akin to its approach in an earlier pronouncement reported as (2013) 1 SCC 641 - Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc, which was incidentally cited by the learned Counsels before the Supreme Court in another context.

229. It was also urged that Sections 8 and 45 of the Arbitration and Conciliation Act, 1996 contemplate referring parties to arbitration and not per se the matters/disputes. Reliance was placed upon the decision of the Supreme Court reported as (2012) 12 SCC 581 - State of Goa v. Praveen Enterprises.

230. Taking the argument forward, Mr. Kamdar submitted that significantly the Terms and Conditions of Tribunal's Appointment also expressly contained reference to the directions passed by the Supreme Court in its judgment dated 14.02.2014.

231. Countering the submissions of the Appellants, Mr. Kamdar submitted that the Supreme Court in its judgment dated 14.02.2014 did not grant stay to the CLB proceedings as at the relevant time the said proceedings had already concluded and statutory appeals u/s 10F Companies Act, 1956 were pending before the Bombay High Court. Mr. Kamdar further elaborated that the ambit of CLB proceedings was not restricted to merely disputes under SHA but also enwombed within its fold disputes arising from unauthorized amendment of Articles of Association and other breaches of other statutory rights/duties under the Companies Act, 1956 that were not the subject matter of arbitration. Therefore, the two proceedings though having some overlap could be permitted to operate concurrently in their own spheres.

232. It was also urged that the plea of want of jurisdiction was not raised by the Appellant's-herein before the Arbitral Tribunal and the Tribunal was merely called upon to exercise its procedural discretion not to pronounce upon the matters

relatable to SHA as the same were also pending adjudication before the CLB. It was submitted by Mr. Kamdar that what was urged before the Tribunal was the plea that exercise of such jurisdiction would result in duplication of proceedings and not that the Tribunal inherently lacked jurisdiction as the Supreme Court did not intend to refer disputes arising from the SHA. Reference was made to Paragraphs 83-85, 150 of the Statement of Defence, Paragraphs XII (A)-(D) of the Written Opening Submissions and Paragraph 139 of the Written Closing Submissions to demonstrate the nature of objections raised before the Tribunal.

233. In this context, it was submitted that it was a trite proposition of law that the objection of jurisdiction if not raised in terms of Section 16(2) and (3) of the Act, 1996 is deemed to be given up. Reliance was placed upon the decision reported as (2014) 11 SCC 366 - Union of India v. Pam Development Pvt. Ltd. and (2002) 3 SCC 572 - Narayan Prasad Lohia v. Nikunj Kumar Lohia & Ors.

234. On this aspect, Mr. Kamdar while summing up his submissions, contended that the exercise of jurisdiction by the Tribunal was on a plausible and sound reasoning. The same had been affirmed by the learned Single Judge, and this Court must be slow in interfering. Reliance was placed on the recent decision reported as (2019) 4 SCC 163 - MMTC Ltd. v. Vedanta Ltd.

235. Adverting to the next set of issue pertaining to bias, Mr. Kamdar submitted that bias/prejudice was sought to be inferred merely on the basis of certain scathing observations expressed by the learned Arbitrators while appreciating evidence the evidence of Mr. Yogesh Mehra and contending that Mr. Yogesh Mehra, on the other hand, had been observed to be a truthful witness in the minority Award. It was submitted that the very premise for inferring bias was tenuous. Further, the issue in substance pertains to appreciation of evidence that had been undertaken by the Arbitrators by advancing reasons in support of their conclusions. The intensity of review under Section 34/37 of the Act, 1996 was not of such amplitude that it would be permissible for this Court to re-appreciate evidence.

236. Mr. Kamdar also highlighted that in Paragraph 22 of the Affidavit in Rejoinder (in Notice of Motion (L) No. 84 of 2019 dated 20.02.2019 filed by Ajay Mehra it had been pertinently averred that the Appellant was already apprehensive of the alleged prejudice and personal bias of the majority of the Arbitral Tribunal by 11.12.2015 i.e. during the pendency of the arbitral proceedings itself.

237. In this context, it was submitted that in terms of Section 13(2) of the Act, 1996 such a challenge ought to have been raised at that stage itself before the Arbitrators, failing which such a challenge is deemed to have been waived. Reliance was placed upon the decision of this Court reported as (2015) 7 BomCR 141 M/s Visakha Petroleum Products Pvt. Ltd. v. B.L Bansal and Ors.

238. On the issue of award of Costs, Mr. Kamdar submitted that issues of such nature could hardly be urged under Section 34/37 of the Act, 1996 given the

limited nature of such jurisdiction. It was submitted that the issue of costs in the case at hand is determined by Section 31A of the Act, 1996. It was highlighted that Clause 18(3) of the IPLA expressly contemplated that a party which prevails on the merits of the proceedings is entitled to an award of costs and reasonable expenses. It was pointed out that the Tribunal did not award the costs prayed for but a substantially less amount bearing into consideration the expenses incurred by the Appellant's-herein. The approach adopted by the Tribunal was stated to be fair and reasonable.

239. It was urged that that the directions issued by the majority Arbitrators directing the Mehra brothers to bear the costs of proceedings was logical in as much as they were in the de-facto control of the management of WWIL during period of actionable breaches. Further, a direction to WWIL to expend the costs would in effect imply saddling Enercon GmbH (the successful Claimant) with such liability as it owns shareholding in WWIL to the tune of 56%.

SUBMISSIONS OF MR. JANAK DWARKADAS, SENIOR ADVOCATE APPEARING ON BEHALF OF THE CONTESTING RESPONDENTS- ENERCON GMBH AND WPG IN COMMERCIAL APPEAL NO.S 316 OF 2019

240. Mr.Janak Dwarkadas, learned Senior Counsel embarked upon the task of persuading us that the IPLA executed between Dr. Wobben and Yogesh Mehra on 30.09.2006 at Aurich, Germany was a concluded contract capable of binding the signatory - parties and not a mere draft as contended by the Appellants-herein. He also dealt with the submissions made by Mr. Andhyarujina that the transfer of technology for various WTG's under the TKHA/STKHA was a transfer in perpetuity and not a mere license for a limited duration, therefore royalties not being payable.

241. Mr. Dwarkadas traced the fruition of the commercial relationship between Enercon GmbH and the Mehras from the very inception leading to surrection of Enercon (India) Ltd.

242. The learned Senior Counsel drew attention of the Court to the contents of the TKHA executed between the parties on 12.01.1994 wherein Enercon GmbH agreed to provide Enercon (India) Ltd. with the 'right and license' to use the technical know-how for the manufacture of certain WTG's (E-26 and at least two other ranges/models). It was highlighted that as per Article 4 Enercon GmbH was entitled to receive a royalty at the rate of 5% on the sale of WTG's and components over a period of seven years not exceeding 2.5 Million Deutsche Mark. As per Article 6.1, Enercon (India) Ltd. was prohibited from sub- licensing or transferring the technical know-how to any party. The TKHA would expire in ten years from the effecting date or seven years from the date of commercial production.

243. It was pointed out that Enercon GmbH agreed to supply E-30 and E-40 WTG's and at least two other ranges/models to Enercon (India) Ltd. by expanding the scope of products as defined in the TKHA by entering into a

STKHA on 19.05.2000. Mr. Dwarkadas submitted that the Arbitral Tribunal rightly held that Enercon GmbH fully complied with its stipulated obligations of supplying the know-how of WTG's in as much as technology in respect of E-26, E-30 and four ranges of E-40 WTG's (E-40/6.44/E1, E-40/6.44/E2, E-40/6.44/E-3B and E-40/6.44/E2B).

244. By November 2002 the royalty amount of 2.5 Million Deutsche Mark had been generated, and the TKHA (as amended by the STKHA) expired on 12.01.2004.

245. In view of the expiry of these agreements the parties commenced negotiations to enter into a further agreement to govern the supply of technical know-how in future. However, during the interregnum, in anticipation of a formal agreement which was on the horizon, Enercon GmbH also provided the technology in respect of E-33, E-48 and E-53 models of WTG's.

246. Mr. Dwarkadas referred to the observations made by the Tribunal in its Award with respect to the contention canvassed by the Appellants -herein that the TKHA contemplated a transfer of technology in perpetuity and after its expiry Enercon (India) Ltd. would be at liberty to utilize the said technology without further payment of royalty. The Appellants had sought to urge before the Tribunal and also before this Court that the regulatory framework of RBI prevailing in the country compulsorily mandated permanent transfer of technology to foster indiginization, failing which approvals would not be granted. The Tribunal had repelled this contention by observing that no authoritative rule/policy to fortify such an assertion was produced, and therefore the contention that the TKHA was required to be interpreted in light of the regulatory backdrop was liable to be rejected. The Tribunal proceeded to interpret the agreement de hors the regulatory backdrop and arrived at the conclusion that the TKHA (as amended by STKHA) did not amount to a transfer but was a permanent license which applied only to E-26, E-30 and E-40 models of WTG's.

247. It was urged by Mr Dwarkadas that perusal of the correspondence between Mr. Yogesh Mehra and the representatives of Enercon GmbH would reveal that no claim was ever made at the relevant time that Enercon (India) Ltd. was entitled to further WTG's under the TKHA (as amended by STKHA) and thus the question of paying royalties would not arise. It was highlighted by the learned Senior Counsel that Mr. Yogesh Mehra merely attempted to negotiate in this regard citing considerations of commercial viability, however, no assertion of the right to receive technology for further WTG's without payment of royalty was ever made. In this regard, reference was made to the communication dated 29.10.2004 authored by Mr. Yogesh Mehra and addressed to Dr. Wobben. Our attention was also drawn to a communication dated 11.02.2005 wherein the representatives of Enercon GmbH expressed gratitude to Mr Yogesh Mehra for having accepted that the royalty fee would be adopted as it was adopted before for the two new WTG models. It was submitted that overwhelming evidence led before the Arbitral Tribunal establishes that Mr. Yogesh Mehra reconciled to the fact that royalties

would be payable and the only bone of contention that survived was its quantum and method for computation. We were referred to the discussion of the Tribunal in this regard as contained in paragraphs 93 & 96 of the majority Award. The portions of the same are reproduced hereinbelow:

"93. But the draft contained no provision for a royalty on the new models. On 19 October 2004, Mr. Kettwig wrote to say that he and Dr. Wobben were considering a royalty of 4% or 5%. On 29 October 2004 Mr. Mehra sent a five-page letter to Dr Wobben arguing his case for no royalty. The letter is well argued and courteous, ("I totally leave the decision to you, and whatever your decision, ultimately I shall follow!"). For present purposes, its significance is that at no point did Mr. Mehra suggest, as is now the Respondents' case, that WWIL was already entitled free of charge to the technology for the new models. The letter accepts that it is a matter of negotiation and leaves the decision to Dr. Wobben.

...

96. In his oral testimony at the Hearing, Mr Mehra found it difficult to explain why he had never told Dr Wobben or anyone at Enercon that WWIL was actually entitled to the E-33 and E-48 technology for free (to say nothing of the yet undeveloped E-53) because it had already been permanently transferred under the TKHA. Nor could he explain why he had said nothing to dispute Mr Monnerjahn's letter of 11 February 2005. The best he could offer by way of explanation was:

"My discussions with Dr Wobben were as a businessman. I never took the chance to explain my legal right... There was a huge amount of trust and understanding on both sides."

248. Mr. Dwarkadas urged that the approach adopted by the learned Arbitrators authoring the majority Award in arriving at the conclusion that the IPLA executed on 30.09.2006 was a concluded contract, could hardly be termed as perverse and the same was based on cogent reasons. The Tribunal analysed the vast volume of documentary and ocular evidence to support its findings.

249. For our benefit, Mr. Dwarkadas compartmentalized the lengthy deliberation of the learned Arbitrators on this issue into three broad heads, evidence (oral and documentary) with respect to events preceding 29-30.09.2006, evidence (oral and documentary) with respect to what transpired on the fateful dates of 29-30.09.2006 at Aurich, Germany and the evidence (oral and documentary) of the subsequent events which would throw light on the intent/understanding of the parties as to what they executed on 30.09.2006.

250. It was urged that it was not the case that the Tribunal arrived at conclusions sans any reasoning or without reference to material in support of the same. In this context, it was submitted that it was settled beyond pale of controversy that the jurisdiction of Courts under Sections 34/37 of the Act, 1996 would not enwomb within its fold re-appreciation of evidence.

251. With a view to satisfy us that the approach adopted by the learned Arbitrators penning the majority Award was unexceptionable, Mr. Dwarkadas extensively took us through the observations comprised in the Award.

252. The Tribunal comprehensively took into account the sequence of events that transpired during the protracted period of negotiations. As noted by us earlier, the discussions between the parties now centred on the method of computing the royalties in future. It seems that some headway was made on 23.05.2006 when non-binding Heads of Agreement on a Proposed Intellectual Property License Agreement (HoA) was executed at Aurich, Germany. The said document was expressed to represent the final views of the parties on the terms of a new agreement. A draft of the IPLA was attached to the same. Clause 5.1 of the draft IPLA contemplated royalty of 5% on the net sales value of products sold by WWIL. The net sales value was elaborately defined to mean -

"the net ex-factory sales price of the Products, exclusive of excise duties, minus the cost of the standard bought out Wind Energy Technology components and the landed costs of imported Wind Energy Technology components, irrespective of the source of procurement, including ocean freight, insurance, custom duties and the like."

The HoA recorded that the services of Mr. N. P. Sarda, Partner of Deloitte Haskins and Sells (DHS) be commissioned to seek their views on a formula for calculating royalties that would be in consonance with the requirements of Indian law.

253. Mr. Dwarkadas highlighted that in furtherance thereof, Mr. Yogesh Mehra corresponded with Mr. Sarda and elicited his opinion on a formula provided by him in his letter dated 23.06.2006. The formula sent by Mr. Mehra upon which opinion of Mr. Sarda was sought is extracted hereunder :

"Net Ex-Factory Sales Price of the Wind Energy Converters, excluding Excise duty, Taxes, Levies , Cess etc.

LESS:

Landed cost of all imports, other than capital equipment and the cost of standard bought out components and raw material procured locally"

254. It was pointed out by the learned Senior Counsel that the Tribunal noticed that this was not the formula as comprised in the draft IPLA on which it had been agreed that opinion of Mr. Sarda be sought. Rather it was a formula of Mr. Mehra's own devising. It included deductions which did not form part of the RBI formula. On 16.06.2006, Mr. Sarda is stated to have replied by reciting the RBI formula and certifying that the formula proposed by Mr. Mehra fell within it. The Tribunal in paragraph 107 observed that Enercon GmbH did not notice this discrepancy at this stage and the same caused difficulties later.

255. Taking his argument forward, Mr Dwarkadas delineated the succession of events to follow that would ultimately culminate to the fateful visit of Mr Yogesh

Mehra at Aurich, Germany. It was highlighted from the Award that during the months to follow there was exchange of drafts of the proposed IPLA. A meeting was scheduled in Germany for 17-20th September, 2006 for finalising the IPLA. On 15.09.2006, a final version of IPLA was sent by electronic mail by Ms. Fritsch-Nehring to Mr. Yogesh Mehra for his perusal. It was also stated therein that Dr. Wobben had desired that he would like to first discuss the final version of the IPLA before any discussion takes place on other issues. Since the finalised draft of the IPLA was only sent at the last moment, Mr. Yogesh Mehra postponed his trip to Germany with a view to consider the said draft.

256. Mr. Yogesh Mehra arrived in Bremen (Germany) on the morning of 29.09.2006. Dr. Wobben received him at the Airport and accompanied him to the Hilton Hotel. Discussions on the proposed IPLA ensued. They were joined at lunch by Mr. Kettwig. The Tribunal noticed the evidence of Mr. Kettwig where he testified that he sensed the discussions had not gone smoothly and he could feel some tension. Dr. Wobben had frustratingly informed Mr. Kettwig in the presence of Mr. Mehra that Mr. Mehra also wanted a further document to set out certain principles that would be reflected when it came to subsequently finalising other contracts. However, this was on a clear understanding that the IPLA was to be entered into without change and the Agreed Principles related to other agreements which would be shortly entered into. However, it is common ground that no document was signed on this date.

257. The Tribunal was of the considered view that the evidence furnished by Mr. Kettwig appeared to be reliable vis a vis the version of events disclosed by Mr. Yogesh Mehra. The Tribunal observed that the objections/reservations expressed by Mr. Mehra to the drafts of IPLA shared with him earlier by Enercon GmbH had been firmly dealt by Dr. Wobben in August 2006. The stand of the parties had hardened. It was improbable that Dr. Wobben would now have made a 'U-turn' on the issues canvassed by Mr. Mehra during negotiations which took place 29.09.2006.

258. The Tribunal noticed that Mr. Kettwig stated in evidence that to the best of his recollection, Mr. Mehra had brought with him a draft of Agreed Principles in hard copy. The Agreed Principles were predominantly drafted by Mr. Mehra in advance of the meeting rather than being drafted together in the meeting. Mr. Kettwig further deposed that Mr. Mehra accepted at the meeting that he would enter into the IPLA the next day, and this was unaffected by the Agreed Principles. Per contra, Mr. Mehra claimed in his evidence that the draft of Agreed Principle had not been brought by him. He stated that this document had been typed on the computer in the Bremen Hotel. On this aspect, the Tribunal observed that Mr. Kettwig was neither a lawyer nor fluent in English, unlike Mr. Mehra. The language of the Agreed Principles suggested that its substance was derived from Mr. Mehra and his legal advisors in India. It was further held that Mr. Mehra understood that the Agreed Principles would have no effect upon the IPLA and that the IPLA was expected to be executed by the parties during his

stay in Aurich, Germany.

259. The Tribunal observed that Mr. Kettwig was not an astute lawyer. He could thus could not visualise the effect of the words- "Draft enclosed" comprised in the document-Agreed Principles and that these words could later be construed to be inconsistent with Enercon's intention of executing the IPLA without any amendment. It was held that evidence of relevant surrounding circumstances emerging from the contemporaneous correspondence between parties and the evidence of Mr. Kettwig established that both sides clearly understood that before any discussion of other agreements took place IPLA, had to be executed.

260. In support of his contentions, Mr Dwarkadas drew strength from the findings of the Tribunal where the learned majority Arbitrators observed that it was highly implausible that the parties would sign the IPLA (twice in the case of Dr. Wobben as he appended his signatures on behalf of Enercon GmbH as well as WPG) and initial every page merely to identify it as the latest draft under discussion. The Tribunal noticed that such an approach had not been adopted by the parties before with respect to other documents that were available for similar treatment.

261. The Tribunal also held that the assertion of Mr. Kettwig that after the execution of IPLA; which had been pending since a long time, Mr. Mehra appeared rather emotional, was supported by the contents and tenor of a letter authored by Mr. Mehra on that very day viz. 30.09.2006. The letter was addressed to Dr. Wobben and was penned by Mr. Mehra at his hotel before leaving for India.

262. The contents of the said letter have been extracted by us in para 50 above, however, for the sake of appreciating the submissions of Mr Dwarkadas, we reproduce its contents again.

"Dear Dr. Wobben,

Today when I reached back to Bremen, and before I leave back to India Mr. Wobben, in the last 13 years since I first met you, I have never felt so demotivated lost, confused and empty!

Mr. Wobben, my this trip to Germany was besides of course to clarify al the points of the agreements, was to also find some solutions to my problems which you had also promised to do. But I am sorry to state that I go back without any solutions!

Mr. Wobben, you asked me to trust you, which I have always done-

(1) I signed the agreement, without even reading it, only because I trust you.

(2) I did not even speak when Mr. Kettwig decided to write the royalty figure at 5%, because I trusted you, to be fair, because you always told me, that you wanted to make Enercon India Ltd. financially strong. Now with this, it reduces the profitability of Enercon India Ltd by 40% straight away. [I have never said no

to paym (sic.) of royalty, only I thought you will be fair and just].

This royalty, is when the agreements do not ev (sic.) provide for any other technologies. In fact it does not even provide for the E-82!

(3) I trusted you, when you told me, that I should not pursue the 'UBS' proposal, because you did not feel comfortable, I dropped the idea totally, because you promised me that we would find a solution to my 'family' issues. But I go back again without any solution!

Respected Mr. Wobben, it hurt me, when Mr. Kettwig mentioned today, that the value of Enercon's operations in India should be of a value of 250 Million Euro. If you believe that this is correct, than [sic] I personally take responsibility of the fact that, I failed, and for which I am willing to resign.

Mr. Wobben, you asked me to be truthful and open to you, which I always will be, and I thought I must write to you on exactly how I feel, because one thing for sure, is if I am not motivated, how can I motivate my team in India? If I cannot do that, all I can say is it is not fair for Enercon India! Dear Mr. Wobben, you have always been my source for inspiration and you have always motivated me, to be able to do my best!

Mr. Wobben, I go back to India a disappointed man, as I have no face to show to my family, whom I promised, and who have always supported me for the last 13 years! Mr. Wobben, the decision is in your hands and please do not ask me to talk to anyone else about the issue, because I will not!

At the end all I want to say is I trust you. Do not let me down!

Regards! Yogesh Mehra."

263. The Tribunal observed that this reproachful letter was inconsistent with Mr. Mehra's claim that only a draft had been signed. None of this recrimination would have made sense if everything was still open to negotiation. The Tribunal did not accept the explanation tendered by Mr. Mehra in evidence that that the agreement which referred in his letter to have signed was the Agreed Principles and not the IPLA and that he was not to be taken literally.

264. Perusal of the majority Award reveals that the Tribunal also formed an adverse opinion on the credibility of Mr. Mehra, especially in view of his vacillating stand before different forums. Learned Senior Counsel placed emphasis on the observations of the Tribunal where the Tribunal noticed that in July 2008 Mr. Mehra had stated on solemn affirmation in the criminal proceedings initiated in India before the Court of Magistrate that he had been coerced into signing the Agreed Principles. It was observed that there were no allegations of coercion made before the Tribunal and rather it was claimed that almost immediately upon his arrival in Germany Dr. Wobben accepted his objections to the IPLA and agreed that it should be renegotiated at some indeterminate future date.

265. The Tribunal was of the considered view that it appeared that Mr. Mehra was unwilling to execute the IPLA, however after extensive rounds of deliberations and sustained obstinacy of Dr. Wobben, he succumbed to sign the IPLA. He later regretted the execution of the IPLA as Dr. Wobben did not favourably accede to his proposal of floating an IPO to raise additional money and neither did Dr. Wobben purchase additional shareholding from the Mehra's on the tentative terms indicated earlier during the course of negotiations. In the considered view of the Tribunal, Mr. Mehra sought to retrace his acts by belatedly propounding the version that he had merely signed a draft when he sent an electronic-mail dated 03-11-2006 expressing his disappointment at the withdrawal of the offer to purchase additional shareholding.

266. It was pointed out by Mr Dwarkadas that the Tribunal also attached significance to the circumstance that the parties appended their signatures at the spot where they are expected to be placed when a contract is to be signed with an intent to create legal obligations and not for the purpose of mere identification for future reference. It held that though the surrounding circumstances that the IPLA is referred as a draft in the Agreed Principles and that the IPLA as executed omitted certain annexes which had been referred to in the body of the document, were relevant, yet other circumstances as alluded to by the Tribunal tilted the scales in favour of the conclusion that the IPLA had been executed as a concluded contract.

267. Mr Dwarkadas drew attention of the Court to paragraphs 122, 126, 127, 131, 133 to 139 of the majority Award. Though we have already ventured to pithily summarise the reasons upon which the conclusions of the learned Arbitrators were premised, however, for the sake of completeness, we reproduce the said paragraphs herein under:

"122. The Tribunal does not accept Mr Mehra's evidence and prefers the evidence of Mr Kettwig. The IPLA had been discussed at length and in detail. Dr Wobben had dealt firmly with Mr Mehra's comments in August 2006 and was expecting that Mr Mehra had come to Aurich to sign the IPLA. That Dr Wobben should now have made a Uturn on Mr Mehra's points seems to the Tribunal highly improbable and is contrary to all other credible evidence. Nor is it probable that Dr Wobben would have been willing to re-open discussion about the 5% royalty agreed in the HoA. There is no credible evidence for this either.

126. The Tribunal has already rejected Mr Mehra's evidence that Dr Wobben agreed that the IPLA required amendment. It finds that Dr Wobben left the meeting having insisted that whatever Mr Mehra and Mr Kettwig put into the Agreed Principles. It should have no effect upon the IPLA, which should be executed as it stood before Mr Mehra left Germany. As has already been said, the IPLA had been drafted by in-house lawyers, tax advisers and patent lawyers over a lengthy period. Mr Kettwig was not a lawyer. It was one thing for Dr Wobben to entrust him with the drafting of a non-binding agreement stating the principles upon which the parties were to negotiate agreements still in draft. It was quite

another for Mr Kettwig to be authorized to negotiate and agree the terms of a document in English which would amend the finalized IPLA. The Tribunal therefore rejects Mr Mehra's evidence and finds that he understood that the Agreed Principles would have no effect upon the IPLA and that the IPLA was expected to be executed by the Parties during his stay in Aurich.

127. There are various technical points which the Claimants make about the Agreed Principles (e.g. that it was expressed to be made between the shareholders in WWIL and not between the parties to the IPLA) but the Tribunal considers that in the circumstances in which it was drafted and signed, the Agreed Principles could not reasonably have been regarded as having any binding legal effect at all. They were principles, not contractual terms. The document was not an independent agreement but an agreement about the contents of agreement which, it was agreed, were still to be negotiated. It contained a statement that the agreed principles "shall be finally incorporated into" four listed documents, including "IPLA 'Draft enclosed'". Much has been made of this language; and Mr Kettwig, if he had been an astute lawyer, might have foreseen that these words, which were true at the time he took part in drafting the Agreed Principles, could later be said to be inconsistent with Enercon's intention to have the IPLA executed without amendment. The Tribunal considers, however, that what mattered was the intention of the parties, objectively ascertained. The evidence of the relevant surrounding circumstances clearly shows that both sides understood that, before any discussion of other agreements took place, a binding IPLA in the form of the final draft was to be executed by the parties.

131. The Tribunal considers that the suggestion that the parties should have signed the document (in the case of Dr Wobben, twice, on behalf of WPG and Enercon) and initialled every page merely to identify it as the latest draft under discussion is highly implausible. It had never been done before by these parties; and was not thought necessary in the case of the drafts of any of the other agreements to which the Agreed Principles were to apply, all of which were available for the same treatment.

133. The Tribunal considers that this reproachful letter is inconsistent with Mr Mehra's evidence that Dr Wobben had immediately accepted that the IPLA needed amendment and that there had been no binding agreement between the parties. Mr Mehra felt strongly that Dr Wobben had behaved unfairly in insisting that he sign the IPLA and in particular in demanding a royalty of 5% "when the agreements do not even provide for any other technologies." The reference to the E-82 is clearly about the IPLA and not Agreed Principles. None of this recrimination would have made any sense if Mr Mehra really thought that everything was still open to negotiation, with the IPLA unexecuted. It is unclear what he meant by saying that he had signed the agreement "without even reading it". He had certainly read every word of the Agreed Principles and he had had a fortnight to study the final draft of the IPLA. Perhaps he meant that he did

not check whether the execution copy of the IPLA which he signed corresponded with the final draft he had been sent. Perhaps he was a little overwrought".

134. Mr Mehra has tried to explain away his letter, and in particular his statement that he has "signed the agreement" by saying that he meant the Agreed Principles. But that does not explain why, if he had got his way, he was so upset at having done so. Nor does it explain why he said he had not read it. All he can offer is that since he obviously had read it, his statement was "not to be taken literally."

135. The account given by Mr Mehra in his evidence in these proceedings may be compared with the solemn affirmation which he made to the magistrate in July 2008 in India to support a criminal charge of financial fraud which he laid against Enercon, its officers and advisers. Their fraud, he alleged was achieved by:

"inducing and coercing me into signing the "Agreed Principles" dated 29.09.2006 and thereafter mala fide treating a Draft Intellectual property License Agreement (IPLA) enclosed thereto as a final and binding agreement, with a view to lowering the profit margin of the Company."

136. Mr Mehra does not now say that he was coerced into signing the Agreed Principles. He accepts that in fact they were his idea. But the allegation is revealing, because, as his letter to Dr Wobben makes clear, coercion is what he was complaining about. He was angry that Dr Wobben had insisted that if the collaboration between Enercon and WWIL was to continue, he had sign the IPLA. This was the coercion that he meant, but Mr Mehra could not say so because it would have been inconsistent with his claim that the IPLA had never been executed at all.

137. In his oral evidence, Mr Mehra was asked what he meant by saying that he had been coerced.

"The Chairman: I think you were asked whether it was true that there had been coercion upon you to sign the agreed principles? A. Well, coercion in the sense there was a lot of pressure when I landed on 29 September 2006.

We have had the discussions and everything was to be done then and there. There was an atmosphere of a lot of tension of course at that point in time.

The Chairman: That, you say, was coercion? A Well, there was pressure,"

138. This evidence is not consistent with Mr Mehra's claim that almost immediately upon his arrival in Germany Dr Wobben accepted his objections to the IPLA and agreed that it should be renegotiated at some indeterminate future date. But the Tribunal considers that it is a great deal nearer the truth. Mr Mehra did not want to sign the IPLA but was put under pressure to do so, to which, with great regret, he succumbed.

139. That night in the Hilton in Bremen Mr Mehra knew perfectly well that he had signed the IPLA and that it had been duly executed. It was only afterwards that,

in his own mind, he rewrote the history of what had happened in Germany".

268. With respect to the issue of payment of royalties by Enercon (India) Ltd. post the execution of IPLA, it was submitted by Mr Dwarkadas that the same were unilaterally deposited by Enercon (India) Ltd. without offering a working sheet of calculations to suggest the basis of arriving at the figures. Further, Enercon GmbH has only retained these amounts under protest and not accepted/acquiesced that they satisfy their rightful claims.

269. Learned Senior Counsel supported the approach adopted by the majority Arbitrators in quantifying the royalties and damages. It was pointed to us that the Tribunal proceeded to act upon the evidence of Mr Nicholas Good; an expert produced by the Claimants. As a matter of fact, the quantum computed by Mr Mark Taylor; the expert witness produced by the Appellants herein was far exceeded the sum suggested by Mr Good.

270. Concluding his submissions, Mr Dwarkadas submitted that once the learned Tribunal had found that the IPLA was a concluded contract capable of binding parties, it committed no error in consequently directing the return of documents and materials containing confidential technology as the same clearly fell in purview of clause 2.11 of the IPLA.

271. Having endowed our anxious consideration to the submissions canvassed before us, we now proceed to render our findings on the issues raised during the course of hearing.

FAILURE TO GRANT OPPORTUNITY TO ADDRESS CLOSING ORAL SUBMISSIONS

272. The contention raised by the Appellants on this aspect is anchored to the proviso appended with Section 24 of the Arbitration and Conciliation Act, 1996 which mandates that the Arbitral Tribunal would be obliged to grant oral hearings at an appropriate stage of proceedings if the same are requested, unless the parties by agreement have chosen to exclude such hearing.

273. In order to appreciate the rival submissions of the learned Counsels in this regard, it would be opposite to examine the manner in which proceedings were undertaken by the learned Arbitrators.

274. The chronology of proceedings has been exhaustively catalogued in paragraphs 25 to 83 of the majority Award. We extract certain relevant events in the itinerary upon which we propose to advert our consideration.

275. On 31.07.2014, the parties signed the Terms and Conditions for the arbitration.

276. On 05.09.2015, the Claimants served an Application for interim relief, seeking disclosure of various classes of documents, access to manufacturing sites and to books and records.

277. On 30.09.2014, the Claimants served their Statement of Claim.

278. On 13.10.2014, the Respondents served a Response to the Claimants' Application for interim relief.

279. On 03.11.2014, the Claimants served a Reply to the Respondents' Response.

280. On 24.11.2014, the Respondents served a Surrejoinder to the Claimants' Reply.

281. On 13.12.2014, the Tribunal held an oral hearing concerning the Claimants' Application of 05.09.2014 at the Hong Kong International Arbitration Centre, Hong Kong, China. The Claimants were represented by Mr. David Joseph, QC and the Respondents by Mr Darius Khambatta, SC.

282. On 22.12.2014, the Respondents served their Defence and Counterclaim.

283. On 09.03.2015, the Claimants served a Reply and Defence to Counterclaim.

284. On 07.04.2015, the Respondents served a Reply to the Defence to Counterclaim.

285. On 27.04.2015, the parties each served Requests for the Production of Documents.

286. On 22.06.2015, the Tribunal issued Procedural Order No 2, ruling upon the disputed Requests for the Production of Documents.

287. On 15.09.2015, the Claimants served witness statements made by Stefan Knottnerus-Meyer, Hans-Dieter Kettwig and Nicole Fritsch-Nehring. The Respondents served witness statements made by Girish Paliwal, Yogesh Mehra and Kaushik Khona.

288. On 25.09.2015, the Claimants served expert witness reports by Anke Nestler, Nicholas Good, Shashank Karnad and Salman Khurshid. The Respondents served expert witness reports by Mark Taylor and Khizer Ahmed, an additional witness statement by Kaushik Khona and a corrigendum to his earlier statement by Yogesh Mehra.

289. On 03.11.2015, the Claimants served rebuttal witness statements by Hans-Dieter Kettwig, Nicole Fritsch-Nehring, Dr Warner Popkes and Jost Backhaus and rebuttal expert witness reports by Salman Khurshid, Nicholas Good and Shashank Karnad. The Respondents served rebuttal witness statements by Girish Paliwal, Yogesh Mehra and Kaushik Khona and rebuttal expert witness reports from Labanyendu Mansingh, Khizer Ahmed, Rahul Surana and Mark Taylor.

290. On 26.11.2015, the Tribunal held a procedural meeting by telephone conference-call with the parties to discuss the forthcoming oral hearing. The parties also submitted to the Tribunal their opening submissions in writing.

291. On 27.11.2015, the Tribunal issued Procedural Order No. 4 setting out the arrangements agreed during the procedural meeting of 26.11.2015. Since the learned Counsels appearing on behalf of the appellants have referred this Court

to the contents of this Procedural Order, we reproduce the same in its entirety hereinunder.

"PROCEDURAL ORDER NO 4

This order is made following the procedural hearing by telephone on 26 November 2015.

It is ordered that:

1. The hearing commencing on 30 November 2015 shall comprise the hearing of the oral evidence and my oral submissions.

2. The time at the hearing is to be split equally between the parties, save as otherwise allowed at the discretion of the Tribunal. It is a matter for the parties how they allocate their time at the hearing. It is envisaged that the parties are like to wish to make oral opening statements of 30 to 40 minutes.

3. The sitting hours for Monday 30 November will be as follows:

(start) 10.00 - 11.30 (morning break)

(restart) 11.45 - 1.15 (lunch break)

(restart) 2.00 - 3.30 (afternoon break)

(restart) 3.45 - 5.15 (finish)

4. At the end of each day, the Tribunal will consider whether the next day should commence at 9.30 a.m.

5. The order of the evidence will be as follows:

1. Ms. Fritsch-Nehring

2. Mr Kettwig

3. Mr. Popkes

4. Mr Backhaus

5. Mr Knottnerus-Meyer

6. Mr Yogesh Mehra

7. Mr Girish Paliwal

8. Mr Kaushik Khona

9. Dr Nestler

10. Mr Surana

11. Mr Salman Khurshid

12. Mr L Mansingh

13. Mr Khizer Ahmed

14. Mr Shashank Karnad

15. Mr Nicholas Good

16. Mr Mark Taylor

6. The Claimants do not maintain an application that the Respondents must elect whether to call either the evidence of Mr L Mansingh or Mr Khizer Ahmed. For the avoidance of doubt, the Claimants will not be expected to put matters to one expert that have been put to the other.

7. At the end of the hearing, the Tribunal will make provision for brief written closing to follow and provide direction as to the form that these will take.

8. *[The parties each have a liberty to apply to the Tribunal for another hearing of oral closing submissions, such application to be determined at the discretion of the Tribunal.]

*This point is not agreed. The Respondents' position is that, " It is our understanding that it is open to us to request for an oral hearing in a second session if we so require. The Respondents very clearly wish for the opportunity to make oral arguments, even after the written submissions. That is what they want and will request. It is our understanding that the Presiding Arbitrator did not shut out this point." The Claimants do not believe that this was the outcome of the hearing. The Claimants believe that the Tribunal's view and decision is that the Claimants and Respondents each have 5 days at the hearing to use as they see fit, and that the current hearing constitutes the parties' opportunity to cross-examine and make any oral submissions that they wish to make, to be followed by brief written closing arguments in a form directed by the Tribunal. If the Tribunal is to hear from the parties further, it should be because the Tribunal itself identifies that it will assist the Tribunal."

292. A hearing took place at the International Disputes Resolution Centre, 70 Fleet Street, London EC4Y IEU, United Kingdom on 30.11.2015 and 1, 2, 3, 4, 7, 8, 9 and 10 December 2015 (the "Hearing"). The parties were represented as stated in Part II above. Mr Joseph, QC (for the Claimants) and Mr Khambatta, SC (for the Respondents) made opening statements; and the following factual and expert witnesses were cross- examined: Nicole Fritsch-Nehring, Hans-Dieter Kettwig, Warner Popkes, Jost Backhaus, Stefan Knottnerus-Meyer, Yogesh Mehra, Girish Paliwal, Kaushik Khona, Anke Nestler, Rahul Surana, Salman Khurshid, Labanyendu Mansingh, Khizer Ahmed, Shashank Karnad, Nicholas Good and Mark Taylor.

293. On 11.12.2015, the Tribunal issued Procedural Order No 5 by which the evidential record was declared closed, save for the issue of whether the Mehra directors had been in breach of fiduciary duty and/or the SHA is connection with transactions between WWIL and Vish Wind Infrastrucre LLP and other entities

("the Vayuu Companies") which they controlled. The Order set out an agreed timetable for the disposal of this issue and the closing statements in the arbitration. We have already reproduced Procedural Order No.5 in its entirety at paragraph 217 of our Judgment and, therefore, we refrain from doing the same again.

294. On 13.12.2015, in accordance with the timetable in Procedural Order No 5, the Claimants applied for the production of documents relating to the Vayuu Companies and injunctive relief pursuant to section 17 of the Indian Arbitration and Conciliation Act 1996.

295. On 15.12.2015, Mr Darius Khambatta, learned Senior Counsel and Dr Abhinav Chandrachud, learned Counsel informed the Tribunal that they were no longer representing the Respondents.

296. On 16.12.2015, AZB Partners informed the Tribunal that they were no longer representing the Respondents.

297. On 22.12.2015, Mr Yogesh Mehra, on behalf of the Respondents, requested the Tribunal to extend the period for a reply to the application for document production and injunctive relief for four weeks.

298. On 24.12.2015, the Tribunal issued Procedural Order No. 6 by which (subject to receiving certain undertakings from the Mehra directors) it extended the period for a reply to the Claimants' application until 21.01.2016 and made further adjustments to the timetable laid down in Procedural Order No 5.

299. On 06.01.2016, Hariani & Co informed the Tribunal that they were now representing the Respondents.

300. On 07.01.2016, the Respondents applied for a further extension of 12 weeks to reply to the Claimants' application.

301. On 09.01.2016, the Claimants opposed the grant of a further extension.

302. On 03.02.2016, the Tribunal made Procedural Order No. 7, by which it extended to 26.02.2016 the time for the Respondents to reply to the Claimants' application and made other adjustments to the timetable in Procedural Order No 5.

303. On 09.02.2016, the Respondents applied for further extensions of the timetable in Procedural Order No. 7. The Claimants opposed the requested extensions.

304. On 14.02.2016, the Tribunal gave directions by which it modified but substantially maintained the timetable in Procedural Order No. 7.

305. On 18.02.2016, the Respondents applied for extensions of the timetable in Procedural Order No. 7, as modified.

306. On 14.04.2016, the Respondents applied for an extension of the time for

filing closing submissions and for a further oral hearing.

307. On 15.04.2016, the Respondents submitted a further factual witness statement by Kaushik Khona.

309. On 18.04.2016, the Respondents submitted an expert witness report by D. Vaidyanathan.

310. On 20.04.2016, the Claimants notified the Tribunal that they did not wish to cross-examine Kaushik Khona or D. Vaidyanathan.

311. On 20.04.2016, the Tribunal directed that the evidence of Kaushik Khona and D. Vaidyanathan be admitted into the evidential record, that the evidential record be declared closed, that the time for exchange of closing submissions be extended to 13.05. 2016 and that the hearing provisionally fixed by Procedural Orders Nos 5 and 7 for 27-28.04.2016 be cancelled.

312. On 22.04.2016, the Respondents made a further application for extension of the time in which to serve closing submissions and for an oral hearing.

313. On 22.04.2016, the Tribunal refused the Respondent's application of 22.04.2016 and directed that no further submissions on the timetable should be made, with the provisional hearing of 27-28.04.2016 remaining cancelled.

314. On 11.05.2016, the Respondents notified the Tribunal that their closing submissions would not be ready until 25.03.2016.

315. On 13.05.2016, the Claimants served their closing written submissions.

316. On 25.05.2016, the Respondents served their closing written submissions.

317. At the outset, we notice that upon the completion of pleadings and exchange of statements of witnesses, the Tribunal accorded an opportunity for an oral hearing to the parties in London before the commencement of evidential hearings. 'Opening statements' /submissions were addressed by learned Counsels representing the parties.

318. During the course of recording evidence, whilst Mr. Yogesh Mehra was under cross-examination, financial statements of Vish Wind were required to be produced under the directions of the Tribunal. The documents revealed high value transactions between WWIL and Vish Wind, which also took the learned Counsels representing the Appellants-herein by surprise. The relevant extracts from the transcript of Day 9 of the Proceedings dated 10.12.2006 are reproduced herein below.

"Enercon & Wobben v WWIL & Ors. [Master] Day 9

207: 1 Housekeeping

2 THE CHAIRMAN: Well, now, Let's discuss where we go from

3 here.

4 Do you want to deal now with the question of the
5 breach of fiduciary claim, or do you want to leave that
6 over to tomorrow morning?

7 MR KHAMBATA: Let me put it this way: I still haven't
8 received any instructions on that aspect.

9 THE CHAIRMAN : Yes.

10 MR KHAMBATA: I am not sure I will receive them by tomorrow
11 morning either, I must be candid with the bench. But
12 let me give the client a chance overnight, if he has any
13 instructions. I think I must give him that sort of
14 time, since we do have tomorrow.

15 MR CHAIRMAN: Very well, yes.

16 MR KHAMBATA: I should also make one thing clear, and
17 I think it is better I do it today, rather than
18 tomorrow. We did request your Lordships for time to
19 make oral closing submissions, either at a separate
20 session or, as your Lordship decided, within these
21 10 days.

22 THE CHAIRMAN: Yes.

23 MR KHAMBATA: I must confess that if I don't have adequate
24 instructions on this aspect of the matter, I pretty much
25 can't make any oral closing submissions on the related
208: 1 party issue at all.

2 THE CHAIRMAN: No.

3 MR KHAMBATA: Because I don't want to sort of improvise.
4 That is out of the question.

5 THE CHAIRMAN : No.

6 MR KHAMBATA: In which case, I am perfectly willing to make
7 some closing oral submissions on other aspects of the
8 case, would you like to do it that way or - I am perfectly happy to do it that

way, or to file detailed

10 written submissions - 11 THE CHAIRMAN : Yes.

12 MR KHAMBATA: - on the state of the record as it is now.

13 THE CHAIRMAN: Yes, which would you prefer? Do you want to

14 be able to have the opportunity, say, to lunchtime

15 tomorrow to address us on the other -

16 MR KHABATA: On some parts of the evidence.

17 THE CHAIRMAN : Is that what you would prefer? 18 MR KHAMBATA: Could I take that decision and tell

19 your Lordships tomorrow morning. 20 THE CHAIRMAN : All right.

21 MR KHAMBATA: Because I will have to see (1) whether I get

22 any instructions and, if I don't, whether it is really

23 worth my while, not addressing that aspect and

24 addressing other aspects.

25 THE CHAIRMAN: Yes, I see."

(Emphasis Supplied)

319. We may observe that at this stage of proceedings the learned Senior Counsel representing the Appellants-herein before the Arbitral Tribunal did remind the learned Arbitrators that a request had been made on their behalf to address closing oral submissions, however in wake of the recent developments he was not prepared to make closing oral submissions on the aspect of related party transactions at all owing to absence of adequate instructions. The learned Senior Counsel proposed that either he could address the Tribunal by making closing oral submissions on other aspects of the case or he could file detailed written submissions. The learned Senior Counsel thereafter requested the learned Arbitrators to defer the proceedings till next morning in order to enable him to decide the course he intended to adopt after receiving instructions, if any. Upon his request, the proceedings stood adjourned for next morning i.e. 11.12.2015.

320. The crucial events which transpired on the next session held on 11.12.2015 come to the fore from a perusal of the relevant transcript that was prepared and the contents of which in all fairness have never been disputed. The relevant portions of the transcript of Proceedings dated 11.12.2015 are extracted hereunder.

" ...

The Chairman : "I assume we are not necessarily committed to an oral hearing at all?".

Mr Khambata : No, I understand.

The Chairman : It may be that no one wants to cross examine and then we just do it.

Mr Joseph: I think Lord Hoffmann, you are absolutely right. We are not committing ourselves, and I think, maybe we said closing submissions, if any are requested, or something along those lines.

The Chairman : Yes.

Mr Khambata : Yes, that would give us the opportunity to go back and make an appropriate application for oral submissions.

Mr Joseph : If any is required and that again would not commit the Tribunal to acceding to the request, if the request were made.

Mr Khambata : Of course not. Of course not.

..." (Emphasis Supplied)

321. The inescapable conclusion which emerges from the perusal of the said transcript is that Mr. Khambatta, learned Senior Counsel representing the Appellant's-herein before the Arbitral Tribunal did concede that he was not necessarily committed to address closing oral submissions and more significantly acceded the position that in the eventuality such a request were made, it would lie within the discretion of the Tribunal to accept such a request or not. We regret that we are unable to subscribe to the submission urged by Mr. Mehta that such statements made by learned Counsels during a polite verbal interchange with the Bench could not be construed as a waiver. As a matter of fact, it would rather be inconceivable to contend the same in the case at hand in as much as the Appellant's-herein were ably represented by an eminent Senior Counsel who is expected to make statements upon instructions with utmost responsibility. The Courts of Justice, including such private dispute resolution mechanisms, proceed to act upon the statements made by the learned Counsels during the course of proceedings, as agents of the parties who they represent.

322. We find that it was under these attending circumstances that the Tribunal proceeded to pass Procedural Order No.5 on 11.12.2015 fixing a proposed calendar enumerating the timeline to be adhered by the parties. Item No.9 of the Procedural Order No. 5 clearly recorded the fact that opportunity for Closing Oral Submissions would be accorded only if determined to be necessary by the Tribunal. It is palpable from the opening lines of the Order itself that it was formulated upon clear agreement between the parties as expressed by their lawyers. The said position stands corroborated by the verbal interchange between the learned Arbitrators and the counsels, as contemporaneously recorded in the transcripts we referred above. We have already noticed that Mr.

Khambatta, learned Senior Counsel did accede to the position that in the eventuality a request for oral submissions was made, it would lie within the discretion of the Tribunal to accept such a request or not. The submission of Mr. Mehta that the relevant entry contained at S.No. 9 of Procedural Order No. 5 was not based on consensus arrived at between the parties but in the nature of directions cannot be countenanced. It assumes significance that no demur was raised on this count was raised at that time or immediately thereafter. As taken note of by us in the preceding paragraphs, on an earlier occasion when objections were expressed by the Appellant's-herein at the time of recording Procedural Order No.4, a note of disagreement faithfully reflecting the said objections was inserted therein. We find no objections or a challenge having been contemporaneously mounted upon Procedural Order No. 5 to suggest that it was premised upon the incorrect understanding of the statements made by legal practitioners during the Proceedings. We extrapolate the said Procedural Order in its entirety.

"The following Timetable is agreed between the parties:

Sr. No.

Particulars

Date

1

Claimants to file an Application under Sec 17 of the Arbitration & Conciliation Act 1996

13 Dec 2015

2

Respondents to file their Reply to the Claimants Application under Sec 17 of the Arbitration & Conciliation Act 1996

19 Dec 2015

3

Respondents to respond to the Claimants request for production of documents set out at Annex A

15 Dec 2015

4

Tribunal to make a ruling on the Claimants Application (i) under sec. 17 of the Arbitration and Conciliation Act 1996 & (ii) in relation to any disputed item in Annex A

23 Dec 2015

5

Respondents to provide any documents/information in accordance with (3) and (4) Above

4 January 2016

6

An Application to the Tribunal, if either party seeks to adduce further evidence responsive to the Vish Wind Infrastructure LLP documents or the new documents produced at (5) above

18 January 2016

7

An Application to cross examine or respond to the evidence adduced pursuant to (5) above

25 January 2016

8

Exchange of Closing Written submissions

16 March 2016

9

Any oral evidence in accordance with (7) above and Closing oral submissions if any are requested and if determined necessary by the Tribunal."

27 & 28 April 2016 in London.

(Emphasis Supplied)

323. It had been urged by Mr. Shyam Mehta and Dr. Birendra Saraf, learned Counsels for the Appellants that the transcript of Proceedings for Day 10 dated 11.12.2015 must be read in backdrop of the Proceedings conducted on Day 9 dated 10.12.2015 wherein request for oral hearing had been made by Mr. Khambatta, the learned Senior Counsel representing the Appellants-herein before the Tribunal and therefore waiver of the right to oral hearing ought not to be lightly inferred from the statements exchanged on the subsequent date i.e. Day 10 of evidential hearings on 11.12.2015.

324. As discussed by us in paragraphs 318-319, a careful reading of the transcript of Proceedings dated 10.12.2015 would reveal that the learned Senior Counsel representing the Appellants-herein did remind the learned Arbitrators that a request had been made on their behalf to address closing oral submissions, however in wake of the recent developments he was not prepared to make closing oral submissions on the aspect of related party transactions at all owing to absence of adequate instructions. The learned Senior Counsel

proposed that either he could address the Tribunal by making closing oral submissions on other aspects of the case or he could file detailed written submissions. The transcripts suggest that even on the said date the learned Senior Counsel had himself offered the alternative recourse of submitting Written Submissions instead of closing oral hearing. It would thus emerge that he had no instructions to adopt a hardened position committed to an Oral hearing. Further, as held by us the Procedural Order No. 5 was made the following day i.e on 11.12.2015 upon the consent of parties, and the same is consistent with the contents of the verbal interchange that took place between the learned Arbitrators and the Counsels which was contemporaneously recorded in a transcript. The contents of the transcript of Proceedings dated 11.12.2015 clearly establish that the prior intention to the contrary, even if any, stood superseded by the unequivocal and unambiguous submission by the learned Senior Counsel to the discretion of the Tribunal to determine the requirement of Closing Oral Hearing.

325. We may also note that even the Solicitors that were inducted subsequently and entered appearance on behalf of the Appellants-herein on 07.01.2016 did not assert an indefeasible right to make Closing Oral Submissions. Rather consistently intent was expressed to apply to the Tribunal and 'to take leave' to make such submissions. Various communications addressed by their Solicitors to the Tribunal including the communication dated 09.02.2016, 14.04.2016, 22.04.2016 and 11.05.2016 evidence that in view of the concessions made by erstwhile counsel(s) they clearly understood the purport of Procedural Order No. 5 to mean that the 'discretion now vested with the Tribunal' to rule upon a request for closing oral submissions. As rightly pointed by Mr. Chinoy, it was only on 25.05.2016 that the Solicitors representing the Appellants-herein belatedly for the first time asserted that they had a right to closing oral hearing in terms of proviso to Section 24(1) of the Arbitration and Conciliation Act, 1996 and that the parties had not excluded such a right. The said request was promptly rejected by the Tribunal on 26.05.2016 by highlighting that the Procedural Order No. 5 was made by consent of parties and it expressly recorded the fact that closing oral submissions would be granted only if requested and determined to be necessary by the Tribunal.

326. This Court has microscopically examined the calendar of proceedings, transcripts of discussions and various Procedural Orders passed by the Tribunal in order satisfy its conscience and ascertain if the Appellant's-herein were deprived of any legitimate right(s) to present their case and if closing oral submissions, under the circumstances, were wrongly denied.

327. We find that the procedure adopted by the Tribunal was transparent and reasonable. Repeated accommodations were granted in favour of the Appellants-herein by the extending time- lines. The Tribunal was considerate to accede to such requests in view of the fact that the legal team of Counsels and Solicitors representing the Appellants-herein withdrew from the case on 15- 16.12.2015.

328. Procedural Order No. 5 was subsequently modified by Procedural Order No. 7 dated 03.02.2016 at the instance of the Appellants-herein. The date of exchange of Closing Written Submissions was extended from 16.03.2016 to 22.04.2016.

329. However, even after Procedural Order No. 7 further extensions were sought by the Solicitor's vide communication dated 09.02.2016 addressed to the learned Arbitrators. Extension of time till 30.06.2016, inter alia, was sought for filing closing written submissions. Vide communication dated 14.02.2016 the Tribunal responded to the Solicitors representing the Appellants- herein and underscored the need for submission of closing written submissions in the prescribed time so that the Tribunal could determine the request of granting closing oral submissions, if any.

330. The issue precipitated further and vide communication dated 18.02.2016 the Solicitors persisted with their request seeking extension of time for submitting closing written submissions and asserting that the same causes "severe prejudice".

331. It was owing to such repeated requests for extensions that the dates of 27-28 April 2016 initially reserved for possible Closing Oral Submissions had to be cancelled by the Tribunal vide communication dated 20.04.2016 as the Appellants-herein had already indicated they were not in the position to submit their Closing Written Submissions in the stipulated time and had thus sought further extensions. The Tribunal extended the time for exchange of Closing Written Submissions to 13.05.2016.

332. We note that the Appellants-herein ultimately submitted their Closing Written Submissions only on 25.05.2016 again breaching the extended deadline fixed for 13.05.2016. It is evident that under such circumstances the Tribunal no longer had the opportunity to peruse the written submissions in advance and determine the necessity, if any, of permitting Closing Oral Hearing.

333. As a matter of fact, the laxity on part of the Appellants themselves in failing to submit the Closing Written Submissions in the prescribed time disabled/precluded the Tribunal from determining the request of Closing Oral Hearing after having had the benefit of perusing the closing written submissions, as was contemplated under Procedural Order No. 5 (as amended by Procedural Order No.7). Thus, the grievance expressed by Mr. Mehta that the Tribunal erred in hastily rejecting the request for closing oral hearing without considering the closing written submissions cannot be accepted.

334. We may note that what would be the scope and amplitude of 'oral hearing', as envisaged under Section 24 of the Arbitration and Conciliation Act, 1996 was not argued before us. The Tribunal in its ruling dated 26.05.2016 observed that oral hearings were provided to the parties in December 2014 and November-December 2015. It was further observed that Section 24 of the Act, 1996 could not be construed in a manner that a party could virtually dictate to the Tribunal

the number of hearings it necessarily desired.

335. We observe that whatever be the amplitude of rights conferred under proviso to Section 24 of the Act, 1996, yet the said proviso itself recognizes waiver of such rights by agreement. In the case at hand, we have already found that the learned Senior Counsel representing the Appellants-herein consciously waived the absolute right/prerogative vested under proviso to Section 24 of the Act and surrendered the same to the by subjecting it to the discretion of the Tribunal. In view of such express surrender by the learned Counsels representing both the parties, it legitimately fell within the province of discretion of the Arbitral Tribunal as envisaged under Section 24(1) of the Act, 1996 to determine the necessity of closing oral submissions. Thus, we conclude that there is no infraction of proviso to Section 24 of the Act, 1996.

336. This Court has examined this cardinal issue from another alternate standpoint to judge whether the Appellants-herein suffered any possible prejudice stemming from absence of such hearing and if the same resulted in violation of the principles of natural justice. Having perused the exhaustive Closing Written Submissions submitted on behalf of the Appellants-herein before the Tribunal, we find that all issues, including the issue of Third Party transactions-Vish Wind were comprehensively contested. No prejudice could be demonstrated.

337. At any rate, the moot question- 'Whether 'oral hearing' as contemplated under proviso to Section 24 of the Act, 1996 would necessarily enwomb within its fold the unfettered right to insist upon addressing such closing oral submissions, need not be gone into as the same has not been argued and more significantly even if such a right exists in law the same unquestionably stood extinguished by agreement.

WHETHER THE DISPUTES RELATABLE TO THE SHA WHICH INCLUDED THE `VISH WIND' TRANSACTIONS WERE ARBITRABLE

338. The Supreme Court in paragraph 144 of its judgment dated 14.02.2014 (paragraph 153 of the report of its decision as contained in SCC) passed directions to refer all disputes arising between parties in relation to various agreements, inter alia, the SHA to arbitration. We have already recorded in paragraphs 18-32 of this judgment the spate of litigation which ensued between the parties ultimately culminating before the Supreme Court wherein these directions came up to be passed. For instilling clarity in our discussion, we reproduce paragraph 144/153 herein-under.

"153. For the reasons recorded above, Civil Appeal No.2087 of 2014 @ SLP (C) No.10906 of 2013 is dismissed. The findings recorded by the Appellate Court that the parties can proceed to arbitration are affirmed. The findings recorded by the Trial Court dismissing the Application under Section 45 are set aside. In other words, the Application filed by the Respondents for reference of the dispute to arbitration under Section 45 has been correctly allowed by the Appellate Court as

well as by the High Court. The findings of the High Court are affirmed to that extent. All the disputes arising between the parties in relation to the following agreements viz. SHA, TKHA, SSHAs and STKHA, Agreed Principles and IPLA, including the controversy as to whether IPLA is a concluded contract are referred to the Arbitral Tribunal for adjudication."

(Emphasis Supplied)

339. At the outset, we must observe that the directions are clear and unambiguous.

340. It has been urged by Dr Saraf, learned Counsel appearing on behalf of the Appellant's-herein that the arbitral clause comprised under the SHA (Clause 16) contemplated reference of disputes arising thereunder for arbitration before the Indo-German Chamber of Commerce. On the strength of this circumstance, it was submitted that the Supreme Court would never have intended to subject the disputes arising under the SHA to be part of the reference for arbitration made by it under the IPLA. As noted by us in paragraphs 170-175, Dr. Saraf had labored to highlight that what had arisen for the consideration of the Supreme Court was the application under Section 45 of the Act, 1996 filed by Enercon GmbH in the 'Daman Suit' and it was arbitral clause under the IPLA which had sought to be invoked.

341. We have endowed anxious consideration to the submissions of Dr. Saraf with regard to the interpretation of the directions of the Supreme Court comprised in Paragraph 153 of the report of its judgment. A meaningful reading of the decision of the Supreme Court in its entirety makes it evident that the Court proceeded to comprehensively refer the entire spectrum of disputes for arbitration in view of the fact that the said disputes had been precipitating for nearly a decade before different forums and inordinate delays had occasioned. As is pellucid from a bare perusal of paragraph 154 of the judgment, in the peculiar facts of the present case, with a view to mitigate further delays, the Court itself proceeded to nominate the Third Arbitrator.

342. The Supreme Court in paragraph 80 (SCC) of the report of its judgment also noticed the circumstance that each of the agreements- IPLA, HoA, SHA, TKHA comprised arbitral clauses and thus there was a clear 'intention to arbitrate'. Significantly, the Court observed that the parties were involved in "unnecessarily complicated and convoluted proceedings". In paragraph 94 (SCC) the Court expressed its disapproval to the approach adopted by the Appellant's-herein in lingering on with the disputes and remarked that the attitude of the Appellants- herein was to avoid arbitration at all costs.

343. In this context, the submission of Mr. Kadmar cannot be brushed aside that the directions passed by the Supreme Court in the case at hand were somewhat akin to its approach in an earlier pronouncement reported as (2013) 1 SCC 641 Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc, which was incidentally cited by the all the three learned Senior Counsels before the

Supreme Court in another context.

344. The Supreme Court in Chloro Control's case (Supra) pertinently observed that when several parties are involved in a dispute, it is usually considered desirable that the dispute should be dealt with in the same proceedings rather than a series of separate proceedings as it saves time, money and avoids possibility of conflicting decisions [Paragraphs 86-89]. Significantly, a keen perusal of the dictum in Chloro Control's case (Supra), in particular paragraphs 150-153, would evince that even in the said case Court had taken note of the fact different arbitral forums were prescribed under different agreements. Repelling this perceived road-block the Court proceeded to make a composite-reference arbitration in the said case as it was observed that in essence there was an underlying intent under the various agreements to settle the disputes by arbitration and as long as the alternative recourse contemplated under some of the agreements had not been opted by the parties, such a reference could always be made under the mother/principal agreement.

345. We find that the Terms and Conditions of Tribunal's Appointment also expressly contained reference to the directions passed by the Supreme Court in its judgment dated 14.02.2014.

346. It had also been initially submitted during the course of hearing by Dr. Saraf that the Supreme Court in its judgment dated 14.02.2014 granted stay of various proceedings pending before different Courts, however, the Court in its wisdom consciously chose not stay the CLB proceedings. It was sought to be submitted that the disputes stemming from the SHA were subject matter of the proceedings before the CLB and the said circumstance would evidence that the Supreme Court did not intend to bundle the disputes relatable to the SHA to the present arbitration under the aegis of the IPLA. Countering the said submission, it was pointed out on behalf of the Respondents- herein that at the relevant time of passing judgment when the Supreme Court was in seisin of the matter proceedings before the CLB had already concluded and statutory appeals u/s 10F Companies Act, 1956 were pending before the Bombay High Court. Thus, there was no occasion to stay proceedings before the CLB. In view of the said clarification, Dr. Saraf molded his initial submission and contended that nonetheless, the Supreme Court could have granted stay of the proceedings in Appeal. In this regard it was highlighted by Mr. Kamdar that the ambit of CLB proceedings was not restricted to merely disputes under SHA but also enwombed within its fold disputes arising from unauthorized amendment of Articles of Association and other breaches of other statutory rights/duties under the Companies Act, 1956 that were not the subject matter of arbitration. Therefore, the two proceedings though admittedly having some overlap could be permitted to operate concurrently in their own spheres.

347. We hasten to observe that the directions comprised in paragraph 153 of the judgment of the Supreme Court are categorical and unambiguous. The attending circumstances in which the said directions were passed have already been

adverted by us in the paragraphs 340-344 of this judgment. This Court cannot be expected to second-guess the reasons which may have impelled the Supreme Court not to injunct the proceedings in Section 10F Company Appeals pending before this Court. It cannot be ruled out that the Supreme Court was of the considered view that the ambit of the Company Law Board proceedings was wider and beyond the disputes relatable to SHA and therefore, it would have been inappropriate to interfere with the said proceedings. In this context, it would be pertinent to note that the CLB vide its Order dated 29.10.2007 whilst rejecting the Company Application No. 484 of 2007 preferred under Section 8 of the Act, 1996 by the Appellant's-herein seeking reference to arbitration in terms of the SHA, itself observed in paragraph 10 of its Order that some of the allegations before the CLB could not be traced to the terms of SHA. At any rate, the unequivocal directions contained in paragraph 153 of the judgment of the Supreme Court cannot be dislodged by a tenuous process of drawing a speculative inference from what the Court did not choose to do. Such a process of interpretation would be hazardous, to say the least and cannot be countenanced.

348. It would be pertinent to highlight that, as a matter of fact, the plea that the Supreme Court did not refer the disputes relatable to the SHA was never raised by the Appellant's-herein before the Arbitral Tribunal at any stage of the proceedings. The Tribunal was merely called upon to exercise its discretion not to pronounce upon the matters relatable to SHA as the same were also pending adjudication before the CLB and would result in duplication of proceedings/ possibility of conflicting findings. It assumes significance that that what was urged before the Tribunal was the plea that exercise of such jurisdiction would result in duplication of proceedings and not that the Tribunal inherently lacked jurisdiction as the Supreme Court did not intend to refer disputes arising from the SHA. Reference was made by Mr. Kamdar to paragraphs 83-85, 150 of the Statement of Defence, Paragraphs XII (A)-(D) of the Written Opening Submissions and Paragraph 139 of the Written Closing Submissions to demonstrate the nature of objections raised before the Tribunal.

349. We may note that the entire thrust of arguments before this Court has been that the judgment of the Supreme Court dated 14.02.2014 did not intend to clothe the Arbitral Tribunal the jurisdiction to deal with disputes relatable to SHA.

The alternative contention of Dr. Saraf that even if the jurisdiction to deal with such disputes was conferred upon the Arbitral Tribunal by the Supreme Court yet, the Tribunal ought to have refrained from exercising such jurisdiction was not developed before us and no material in support thereof was placed.

350. The plea that at an earlier stage of proceedings before the CLB Enercon GmbH had itself resisted the application preferred by the Appellants-herein for reference to arbitration pales into insignificance in view of the supervening circumstance that ultimately the Supreme Court directed all the disputes, including those arising under the SHA to be referred for arbitration.

351. In view of the discussion as contained in the preceding paragraphs, this Court is of the considered view that the disputes relatable to SHA were required to be adjudicated by the learned Arbitrators in terms of the directions of the Supreme Court in its judgment dated 14.02.2014 and no exception can be taken on that count.

WHETHER THE AWARD QUA VISH WIND TRANSACTIONS IS LIABLE TO BE SET ASIDE OWING TO INSUFFICIENT PLEADINGS

352. It had been contended by Mr. Shyam Mehta, learned Senior Counsel appearing on behalf of the Appellants that the majority Arbitrators fell in grave error by proceeding to make an Award with respect to Third Party transactions, more specifically, the sale of development rights by Vish Wind to WWIL in view of the fact that necessary averments in the pleadings of the Claimants were clearly lacking which resulted in a complete failure to raise the foundation of claim with respect to Third Party transactions.

353. In order to appreciate the submissions of Mr. Mehta, we embark upon our quest to ascertain the nature of claims raised by the Respondents-herein (Claimants) before the Arbitral Tribunal at different stages of the proceedings and whether the same were backed by statement of material facts/concrete particulars in support thereof.

354. We commence by analysing the Statement of Claim; which triggered the pleadings. As highlighted by Mr. Chinoy, in Para 96.2 and Para 96.3 of Part H of the Statement of Claim it had been specifically claimed that Vaayu Companies had been set up for exploiting the technology of the Claimant's and value was transferred from WWIL to such companies. The relevant portions of the same have been reproduced by us earlier while taking note of the submissions addressed by Mr. Chinoy. However, for the sake of coherence, we extract the same hereunder.

Para 96.2 of Part H of the Statement of Claim

"...set up the Vaayu Companies for the purpose of receiving and exploiting the Claimants technology and/or have assisted the Vaayu Companies in receiving and/or exploiting the Claimants technology and/or have transferred value from WWIL to the Vaayu companies, such also constitutes breaches of Mr Yogesh Mehra and/or Ajay Mehra's obligations under the SHA and/or Indian law, including their duties of good faith, which has caused loss to the claimants and for which the claimants are entitled to damages to be assessed and/or an account of profits, plus interest..."

(Emphasis Supplied)

Para 96.3 of Part H of Statement of Claim

"...The loss caused to Enercon by Mr Yogesh Mehra and/or Mr Ajay Mehra's breach of their duties under the SHA and/or under Indian Law, including their

obligations of utmost good faith, trust, confidence and commitment towards Enercon, include the damage caused to the value of Enercon's shareholding in WWIL and Enercon is entitled to Damages (to be assessed) plus interest, in regards to this loss. Further and alternatively, Enercon is entitled to an account of profits plus interest, in relation to Mr Yogesh Mehra and/or Mr Ajay Mehra's breach of their duties of utmost good faith, trust, confidence and commitment towards Enercon..."

(Emphasis Supplied)

The Prayer Clause (I)(c) comprised in the Statement of Claim reads as follows:

"(1) In respect of Mr Yogesh Mehra and Mr Ajay Mehra's breaches of the SHA :

(a)

(b)

(c) An order that Yogesh Mehra and Mr Ajay Mehra pay damages (to be assessed) and/or an account of profits for their breaches of the SHA and/or duties arising as a matter of Indian Law ."

(Emphasis Supplied)

355. A keen perusal of the Statement of Claim also reveals that the Claimant's furnished a list of 33 entities appended as 'Annex B' to the Statement of Claim. The Claimants suspected unauthorized dealings of WWIL with these entities. The said entities were collectively referred as the "Vayuu Companies/Partnerships". We note that Vish Wind Infrastructure LLP figures at S.No. 12 of the said list.

356. We observe that the Statement of Claim did contain a generic averment to the effect that the Mehra's had transferred value from WWIL to the Vaayu Companies in breach of their obligations under the SHA and/or Indian Law. Further, it had been prayed that the Mehra brothers be held liable to pay damages and/or account for the profits made by such transfer.

However, the Statement of Claim fell short of disclosing any concrete particulars of the manner of such unauthorized transfer of value was effected. As observed by us earlier in paragraph 205, the Statement of Claim merely voiced the apprehensions under which the Claimant's were laboring as they were in dark about the affairs of WWIL. Perhaps as a mark of abundant caution, they did make speculative pleadings to this effect so as to leave room for the possibility of exploring the issue further. As events would subsequently unravel, the instinctive premonition and apprehension of the Claimant's did turn out to be correct.

357. As demonstrated by Mr. Chinoy, actionable information with regard to such transactions had started to trickle in sometime around September 2015 in view of the disclosures made by the Appellants-herein pursuant to Procedural Order No.2 dated 22.06.2015 passed by the Tribunal. Documents prima facie revealed that transactions to the tune of Euro 124 million had taken place between WWIL

and Vish Wind. It was pointed out that even at this stage, financial statements of the Vaayu Companies were withheld by the Mehra's.

358. The Claimant's pursued their apprehension of unauthorized value transfer from WWIL in favour of Third (Related) Party entities and subjected the documents received through the process of disclosures to forensic scrutiny by Experts. The report prepared by Mr. Nicholas Good lent credence to the fears of the Claimant's and brought to notice past transactions to the tune of Euro 124 million as described above. It is stated that the said Report was also submitted before the Tribunal.

359. Armed with this material gained from disclosures made during the course of Arbitral Proceedings, the Claimants now proceeded to positively aver concrete/material particulars in support of their claims with respect to value transfer having been made to third (related) parties. We advert our consideration to Para 114 of the Opening Written Submissions submitted by the Claimants on 25.11.2015.

"114...In setting up the Vaayu Companies and procuring that WWIL transact with related companies, including but not limited to the Vaayu Companies, Mr Yogesh Mehra and/or Ajay Mehra have breached their obligations under the SHA and/or Indian Law including clauses 2.7 & 4.1 of the SHA and/or their duties of good faith towards Enercon. Accordingly Mr Yogesh Mehra and Mr Ajay Mehra should pay damages and/or account for profit in respect of transactions undertaken by WWIL with these related companies. By way of example it has now been seen that WWIL has purchased from related companies land or land rights at a cost of Euro 124 million in recent years. No valid consent from Enercon has been obtained for these transactions by which very large sums have been paid to entities which Yogesh Mehra or his family own or have a significant interest in. It amounts to self dealing on the part of Mr Yogesh Mehra and/or Ajay Mehra and/or consists of breaches by Mr Yogesh Mehra and Mr Ajay Mehra of clauses 2.7 and 4.1 of the SHA and/or their duties of good faith towards Enercon and they are obliged to account for all profits they have earned. The same legal principles apply with respect to benefits received from loans made by WWIL to related companies."

(Emphasis Supplied)

360. We observe that the deficiency in initial pleadings viz. the Statement of Claim was overcome at a later stage in the form of Written Submissions and other applications preferred by the Claimants detailing the Third (Related) Party transactions with a greater degree of specificity. The requisite particulars of material facts that are necessary to crystallise a claim, actionable in law, had finally begun to surface.

361. The Appellant's-herein also took cognizance of the issue of unauthorized value transfer in favour of Vish Wind that had been raised by the Claimants and proceeded to expressly denounce the same in their Opening Written

Submissions. Attention of this Court was drawn by Mr. Chinoy to the relevant portions on this aspect contained at Paragraphs 87, 88(iii)(iv) and Para 89(iii) of the Opening Written Submissions submitted before the Tribunal on behalf of the Appellants. It had been contended that there has been no transfer of value from WWIL to the Vaayu Companies. The perceived lacunae in the Report submitted by Mr. Good were sought to be highlighted. They also defended the purchase of Development rights by WWIL from the related companies as being backed by independent valuation reports.

362. During the course of cross-examination of Mr. Yogesh Mehra, substantial discoveries on this issue were made when he finally produced financial statements of Vish Wind pursuant to the directions of the Tribunal. As pointed out by Mr. Chinoy, the documents brought to fore the following material facts.

- 'Vish Wind' had a subscribed capital of Rs. 500,000 [Euro 7500], which had been subscribed by the Mehra.

- From 2007 'Vish Wind' had borrowed substantial sums interest free from WWIL; with Euro 650,000 being owing in 2008. These funds were used for purchasing land.

- In 2010-11 'Vish Wind' had sold development Rights to WWIL for Euro 50 million, as against the total operating expenses incurred of Euro 463,000. The Profit & Loss account showed a profit of over Euro 49 million.

- In 2011-12 'Vish Wind' had sold Development Rights to WWIL for Euro 49 million against total expenses incurred of Euro 1.4 million.

- The contracts for the sale of Development Rights were signed by Yogesh Mehra for 'Vish Wind' and by Mr Ajay Mehra for WWIL.

- That 'Vish Wind' had no employees, no business and virtually no money apart from the loans received from WWIL.

363. In view of the dramatic developments that had transpired during the course of evidential hearings, Procedural Order No. 5 came up to be passed on 11.12.2015 wherein, significantly, the Tribunal categorically recorded at Sr.No.6 the fact that it proposed to give ample opportunity to the parties to adduce further evidence with respect to Vish Wind Infrastructure LLP. For the sake of clarity, we again reproduce the contents of Procedural Order No. 5.

"The following Timetable is agreed between the parties:

Sr.No.

Particulars

Date

1.

Claimants to file an Application under Sec 17 of the Arbitration & Conciliation Act 1996

13 Dec 2015

2.

Respondents to file their Reply to the Claimants Application under Sec 17 of the Arbitration & Conciliation Act 1996

19 Dec 2015

3.

Respondents to respond to the Claimants request for production of documents set out at Annex A

15 Dec 2015

4.

Tribunal to make a ruling on the Claimants Application (i) under sec. 17 of the Arbitration and Conciliation Act 1996 & (ii) in relation to any disputed item in Annex A

23 Dec 2015

5.

Respondents to provide any documents/information in accordance with (3) and (4) Above

4 January 2016

6.

An Application to the Tribunal, if either party seeks to adduce further evidence responsive to the Vish Wind Infrastructure LLP documents or the new documents produced at (5) above

18 January 2016

7.

An Application to cross examine or respond to the evidence adduced pursuant to (5) above

25 January 2016

8.

Exchange of Closing Written submissions

16 March 2016

9.

Any oral evidence in accordance with (7) above and Closing oral submissions if any are requested and if determined necessary by the Tribunal."

27 & 28 April 2016 in London.

364. We observe that it assumes significance that no objection/demur was raised at this stage to resist the proposed reception of evidence with respect to Vish Wind on any ground including non-arbitrability of this claim or the alleged insufficiency of pleadings. As a matter of fact, the Procedural Order No. 5 was passed with the consent of parties. Even if the opening written submissions submitted on behalf of the Claimant's were not sufficient to dispel any doubt in the minds of the Appellant's-herein, Procedural Order No. 5 furnished a clear signal that the issue of Vish Wind transactions fell within the judicial calculus and realm of adjudication. Rather, the Appellants- herein positively ventured to lead evidence in terms of such liberty provided under Procedural Order No.5 by submitting the statements of Mr. Kaushik Khona and Mr. D Vaidyanathan to explain/justify these Third (Related) Party transactions.

365. Further, the Closing Written Submissions submitted by both the parties also unequivocally evidence detailed exchange of submissions on the aspect of the Third (Related) Party transactions, including Vish Wind transactions. As noted by us earlier, reference was made by Mr. Chinoy to the Closing Submissions dated 13.05.2016 tendered by the Claimants wherein this issue was explored at Part VI(F) whereas the Closing Submissions of the Appellants-herein dated 25.05.2016 also elaborately dealt with the said issue in Paragraphs 153-220.

366. The inexorable conclusion that follows from the circumstances alluded to by us in the preceding paragraphs is that the Appellants-herein were sufficiently alerted that value transfer to Third (Related) Party entities including 'Vish Wind' was an integral issue falling within the purview of adjudication in the present Arbitration. It is true that the concise statement of facts/particulars upon which such claim was founded was not discernible in the initial pleadings i.e. Statement of Claim at the commencement of proceedings. The concrete particulars ultimately emerged to the fore during the course of the proceedings under the circumstances we have elaborately noted in our discussion above. The comprehensive Written Submissions submitted by the parties at the opening and closing stage extensively deal with the Vish Wind transactions. The said submissions have all the trappings of the 'pleadings' that are filed before the Arbitral Tribunal. Procedural Order No.5 passed by the Tribunal with the consent of parties was a 'drum-beat proclamation' to all concerned, including the present Appellants, that the issue of Vish Wind transactions was well within the domain of adjudication. It was in this view of the matter that the Appellants even embarked to lead evidence with respect to such transactions and attempted to render them innocuous.

367. We do not accept the contention canvassed on behalf of the Appellants that the evidence was led on their behalf to merely as a mark of abundant caution

dispel the prejudice created in the minds of the learned Arbitrators by the fact that such transactions dramatically surfaced. To our mind, this is oversimplification. It has not been explained what other evidence would have been led before the Arbitral Tribunal if the Statement of Claim contained express reference to the transaction of purchase of development rights from Vish Wind. No prejudice is suffered by the Appellants from the failure on part of the Respondents- herein to have amended their Statement of Claim.

368. We hold that there existed no element of surprise and the circumstance of absence of sufficient pleadings in the Statement of Claim by itself would not result in jettisoning such a claim from judicial calculus in view of the host of subsequent events which unequivocally demonstrate the conscious awareness exhibited by the Appellant's that the issue was very much under the lens of adjudication.

369. Learned Counsels appearing on behalf of the parties cited precedents galore in support of their respective contentions on this aspect. There is no quarrel with the settled propositions propounded therein. Suffice would it be to observe that the signature tune of the pronouncements on the subject of the effect of insufficiency of pleadings is that the decision of the Court would ultimately rest on the peculiar factual setting of each case. However, the guiding principles which can be discerned from a studied analysis of these decisions are culled out and concatenated by us.

370. In each case the Court embarks upon the exercise to ascertain if a new case is sought to be projected later that is wholly inconsistent/destructive to the case set up earlier or whether the additional plea/issue sought to be adjudicated in the absence of requisite pleadings is merely incidental/in consonance to the case set up by a party. The Courts must then examine whether the parties contesting the dispute understood that such a plea/issue was under adjudication. Adjudication of such a plea/issue in the final judgment must not result in springing a surprise for the rival litigant. The Court must bear into consideration the circumstance whether the parties ventured to lead evidence on such a plea/issue. The possibility of any prejudice stemming from the absence of requisite pleadings must be weighed. It is upon a holistic appraisal of the above noted considerations that a Court is required to decide whether such a plea/issue ought to be adjudicated.

371. Tested on these anvils, we are of the considered view that the majority Arbitrators fell in no error in proceeding to adjudicate the issue of purchase of development rights by WWIL from Vish Wind. We regret our inability to subscribe to the views expressed by Mr. Justice Raveendran on this issue in his dissenting Opinion dated 26.08.2016

372. There can be no cavil to the principle that adjudication of disputes in a formalised Trial governed under the Civil Procedure Code, 1908 or under an alternative dispute resolution mechanism, must conform to norms of fairness and

procedures must be devised in aid of achieving such an object. We are in agreement with Mr. Mehta, learned Senior Counsel appearing on behalf of the Appellants that though the Civil Procedure Code, 1908 does not apply in proprio vigore to such sui generis proceedings yet the salutary principles of fairplay inspired from the Code must be adopted.

373. No universal generalization can be made. Everything depends on the subject matter. In deciding a controversy, the Arbitrator works in an environment which is quite different from that of a judge. He is not bound by the technical rules of pleadings and evidence. The rules of pleadings that he uses in the arbitral process are different from the foot-rules and set squares that we use in the judicial process. From the arbitrator what is wanted is a practical decision on disputes (1933 AC 502 (at 616) Abasalam Ltd. Vs. Great Western (London) Gardin Village Society). He knows that businessmen want to do business and not to argue about it. He gives not judicial justice, but rough justice of the world. Because he is not bound by the Codeless myriad of precedents. Many have found salvation in the faith they repose in this private domestic forum for settlement of disputes.

374. Before concluding, we note another incidental issue which was raised before us by the learned Counsels appearing on behalf of the Appellants. It was submitted that even the relief granted by the majority Arbitrators upon adjudicating the issue of Vish Wind transactions fell beyond the purview of the prayer clause comprised in the Statement of Claim. It was highlighted that the majority Award directed the Mehra brothers (Respondents-therein) to pay WWIL; a co-respondent, a sum of Rs. 677,24,56,570/- . It was pointed that the relief claimed in the prayer was sought in favour of the Claimant itself i.e. Enercon GmbH and not for the benefit of WWIL. It was contended that such an exercise undertaken by the Tribunal in the guise of granting a relief under the residual head of 'further and other reliefs' was impermissible.

375. The majority Arbitrators in paragraphs 298-299 of their Award record express reasons for adopting such a course. We reproduce the same hereunder.

"298. Enercon's claim is first pleaded as damages payable by the Mehra directors directly to Enercon. It also pleads an alternative claim for such further or other relief as the Tribunal considers appropriate (paragraph 18 of its application of 13 December 2015 and paragraph 323.4 of its closing written submissions dated 13 May 2016, as also its Statement of Claim of 30 September 2014, at paragraph 102(M).). In the Tribunal's view, given that WWIL is only part owned by Enercon (hence Enercon's pecuniary disadvantage resulting from the Mehra directors' wrongdoing is not the same as that of WWIL) and further that WWIL remains the person most immediately affected by such wrongdoing, the liability of the Mehra directors is best discharged by requiring them to hold in full for the benefit of WWIL the advantage gained by their wrongdoing. In deciding upon such relief in favour of WWIL (as distinct from direct relief in favour of Enercon), the Tribunal sees no material disadvantage to Enercon; and, as for the Mehra directors, no

possible prejudice or other unfairness, whether as a matter of pleading, the form of relief or otherwise.

299. The Tribunal therefore finds that the Mehra directors are accountable to WWIL for the ₹97 million profit which Vish Wind made on the development rights transactions. It is no answer that the Mehra directors personally have not received the whole profit but have diverted some of it, via Vish Wind, to other members of their family. They are liable for the whole profit because they have deprived WWIL of the opportunity to earn the whole profit. The rule is conveniently summarised in Lewin on Trusts:

"the trustee cannot avoid the rules concerning accountability for profits by arranging for the profit to be taken by his company (or a company in which he has a substantial interest) which is a mere cloak for the trustee, or which is formed by the trustee for the purpose of taking the profit, or which could have been taken by the trustee but which is arranged by him to be taken by the company ... No piercing of the corporate veil is involved. Rather the principle is that in the circumstances stated above the trustee continues to have a liability of his own which is not eliminated by the interposition of the company. In such a case the trustee will be personally accountable for the full amount of the profit, not merely a part proportionate to his interest in the company."

376. This Court finds no perversity in the approach adopted by the Arbitral Tribunal in directing the Mehra brothers to recompense WWIL; the independent juristic entity from whose exchequer the funds had been diverted. Rather such a course is fair and inures to the advantage of the Mehras as they are themselves shareholders to the tune of 44% in WWIL. The premise for granting such relief remains the same i.e. the breach of SHA by the Mehra's by indulging in Vish Wind transactions. In that sense, the relief ultimately granted is not radically different from what had been sought. Only the beneficiary to such relief has been transposed by the Tribunal. No prejudice could be demonstrated by this exercise of moulding relief.

NATURE OF RIGHTS STEMMING FROM THE TKHA (AS AMENDED BY THE STKHA) AND WHETHER THE IPLA WAS A CONCLUDED CONTRACT

377. Before proceeding to render our findings on the above-captioned set of issues we feel constrained to observe at the very outset that the determination of the said issues essentially rests upon the analysis of the conduct of the parties, correspondences exchanged between them and construction of terms comprised in certain agreements. These matters fall within the realm of appreciation of evidence. The intensity of review enjoyed by the Courts while entertaining a challenge under Section 34/37 of the Arbitration and Conciliation Act, 1996 does not enwomb within its fold re-appreciation of evidence and lightly substituting the view adopted by a Tribunal by exercising powers akin to a Court of Appeal. Reliance was placed by Mr. Kamdar upon the recent pronouncement of the Supreme Court reported as (2019) 4 SCC 163 - MMTC Limited v. Vedanta Limited.

378. This Court has ventured to microscopically examine the Award passed by the majority Arbitrators in paragraphs 38- 100 of this judgment and has also endowed anxious consideration to the erudite views comprised in the dissenting Opinion dated 26.08.2016 authored by Mr. Justice Raveendran in paragraphs 101-122. We have also noticed the observations of the Tribunal while the same were referred to by learned Counsels during the course of arguments. With a view to avoid prolixity, we eschew the exercise of again highlighting in extensio the approach adopted by the learned Arbitrators while appreciating evidence.

379. We must confess that on the issue whether the IPLA was a concluded contract or remained in the realm of an inchoate draft, the reasons advanced by the learned Arbitrators in support of their respective conclusions are equally persuasive and compelling. However, in our view, the scales of justice tilt heavily in favour of the conclusion that the parties intended to create binding legal obligations by virtue of the fact that the parties chose to append their complete signatures at the specific portions reserved at the last page meant for the execution of the document. Dr. Wobben appended his signatures at two separate points, on behalf of Enercon GmbH as well as for WPG whereas Mr. Yogesh Mehra put his signatures in complete on behalf of Enercon (India) Ltd. The fact that seasoned businessmen appended their complete signatures at the spot reserved for execution of the document excludes the hypothesis that the same was done merely for the purpose of identification. Further, it assumes significance that as highlighted above, Dr. Wobben appended his complete signatures at two separate points. Such degree of formality is plainly inconsistent with the plea advanced by the Appellants that the signatures were appended for the purpose of identification of the draft. For the purpose of identification for future reference, it would have sufficed, for instance, to have appended signatures or initials at the bottom of each page. It is interesting to note that at the bottom of every page the parties have appended their incomplete signatures, however, in contra-distinction complete signatures have been appended at the sport reserved for execution of the document.

380. It is true that there were blank spaces in the IPLA and the cover page bears the date of 29.09.2006, whereas the opening recital in the Agreement reflects the date of 17.09.2006. Further, the relevant Annexes were not drawn up. It is also a fact that the Agreed Principles, though formulated on 29.09.2006, but according to parties admittedly executed on 30.09.3006 contain reference to a draft IPLA. We find that the majority Award has adopted a satisfactory line of reasoning and dealt with these circumstances in light of the ocular evidence led before it.

381. The fact that Enercon GmbH did not scrupulously ensure, as it is ideally expected to be ensured in commercial transactions of such value, that the blank voids in the Agreement are filled, annexures are duly drawn up and the old pages reflecting the prior dates when the said Agreement was expected to be executed be replaced with new pages bearing the actual date of execution, is perhaps

attributable to the fact that Enercon GmbH was not entering into an Agreement with a stranger.

382. The IPLA was being executed with an old business confidante with whom relations had not embittered by then. Mr. Mehra himself admits in his evidence that there was lot of trust involved. It assumes significance that the IPLA was executed with Enercon (India) Ltd.; an entity in which Enercon GmbH itself controlled 56% shareholding. The execution of the Agreement had got delayed owing to the protracted negotiations.

383. Once the opportune moment arrived and Mr. Yogesh Mehra ultimately consented to entering the IPLA, the copy of the Agreement lying handy seems to have been utilized. Effort was made not to defer matters any further by waiting for a corrected copy. It appears that under these attending circumstances, the representatives of Enercon GmbH were slack in their approach and did not act promptly to crease out the said anomalies They ultimately suffered the price for this protracted dispute wherein these lapses could be telescoped and exploited by the Mehra's.

384. Similarly, it is evident that Mr. Kettwig did not meticulously ensure that the draft of Agreed Principles formulated by Mr. Mehra on advise of his lawyers was suitably amended as it contained reference to IPLA as a draft and the same no longer remained a draft. In this context, the Tribunal has correctly observed that Mr. Kettwig was not an astute lawyer and could not visualize the effect of the words- "Draft enclosed" comprised in the document-Agreed Principles and that these words could later be construed to be inconsistent with Enercon's intention of executing the IPLA without any amendment.

385. Reliance was placed by Mr. Andhyarujina upon the e- mail communication dated 24.11.2006 addressed by Ms. Nicole Fritsch to Mr. Yogesh Mehra apologizing for the delay in circulating the outstanding drafts. It was pointed out that the subject of the e-mail contained reference to other agreements including the Final IPLA. We may observe that this discrepancy highlighted by Mr. Andhyarujina stands answered upon the perusal of the e-mail dated 29.01.2007 addressed by Ms. Nicole Fritsch to Mr. Yogesh Mehra which contained the drafts of amended SHA, Corporate Name User Agreement and Successive Technology License Agreement . Conspicuously, there was no draft of any amended IPLA as the same had already been executed.

386. As already observed by us at the outset, this Court while exercising jurisdiction under Section 37 of the Arbitration and Conciliation Act, 1996 cannot usurp the task of re-appreciating the evidence as we have been invited to undertake.

387. The Tribunal in paragraphs 148-155 of its Award also repelled the alternate contention that even if the IPLA was a concluded contract capable of binding parties yet the same is liable to be avoided and not enforced in view of uncertainty/vagueness. We concur with the findings of Tribunal.

388. It is settled beyond pale of controversy that the Courts ought not to readily declare the solemn contracts entered into between parties void for apparent vagueness or uncertainty which may otherwise be capable of being removed by a process of proper interpretation.

389. The Tribunal rightly observed that there was no dispute that the signatures were appended by the parties on the IPLA on 30.09.2006 and therefore the same was liable come in effect from the same date as mandated by Clause 1.1 of the agreement itself. The fact that the cover sheet and the introductory recital contains other dates was explainable as Mr. Mehra was initially expected to visit Germany on 17.09.2006 for signing this agreement and in view of the same the opening recitals contained reference to execution of the agreement on 17.09.2006. The said inaccuracies and clerical discrepancies did not make the date of commencement of IPLA uncertain.

390. With regard to the argument of absence of discernible identity of patents and trademarks licensed, it was correctly observed by the Tribunal that it was a matter of construction that license must have extended to include all Indian patents and trademarks to Enercon's name. Such patents and trademarks were clearly identifiable as being available on the face of public record. It was observed that there was no evidence to suggest the reason why parties would have wished to exclude certain patents/trademarks from the license. In wake of the finding that the the patents which formed the subject matter of the agreement were capable of being identified, it could be no longer be contended that the date of expiry of the agreement could not be ascertained.

391. Similarly, we are also in agreement with the conclusions expressed by the Tribunal in paragraphs 156-190 of its Award on the issue of nature of rights stemming from the TKHA (as amended by the STKHA).

392. The Tribunal rightly observed that in view of the fact that it had held that the IPLA was a concluded contract capable of binding the signatories thereto, it was not necessary to opine upon the rights of the parties flowing from the TKHA as the same had expired and at any rate stood superseded by the IPLA. However, in view of the fact that a substantial amount of time had been dedicated to this issue during the proceedings and expert evidence had been led by the parties, the Tribunal chose to render its findings on this aspect of the matter. We may observe that this was the correct course to adopt for another reason. If a Court exercising jurisdiction under Section 34/37 of the Act, 1996 were to ultimately hold that the IPLA was not a concluded contract, then the issue of nature of rights as emerging from the TKHA (as amended by the STKHA) would naturally assume significance and the findings of the trier of fact on such an issue would be desirable.

393. It had been contended before us by Mr. Andhyarujina that the TKHA resulted in outright transfer of rights in perpetuity. Emphasis was laid upon the meaning of the term 'transfer' as contained under Article 3.1 of the TKHA and the

regulatory backdrop of RBI in which it was required to be interpreted. It was submitted that the approvals accorded by the RBI were predicated on the premise that the transfer of technology was in perpetuity and the same would stand absorbed/indigenized. Thus, the Appellants-herein were entitled to manufacture WTG's comprised under the TKHA/STKHA and no longer be required to pay royalty to the Claimants (Respondents-herein) upon the expiry of the agreement or in the case of reaching the ceiling cap of two million five hundred thousand Deutsche Mark; which limit had reached in the year 2002 itself.

394. It would be pertinent to highlight that despite a pointed query from the Mr. Andhyarujina in this regard, no clear policy document could be produced which would establish that one-time transfer of technology in perpetuity was a sine qua non for obtaining the approvals from the RBI. Similar was the position before the learned Tribunal.

395. We may pause for a moment and note that the debate on this count is essentially academic for the reason that Tribunal has already held, by a different interpretative process, that the TKHA contemplated a license to use the technical know-how of the technology comprised therein, however, the same was not limited for a period of 10 years as was suggested by the Claimants (Respondents-herein). It was observed that that the right to utilise the technical know-how transcended beyond the period of expiry of the TKHA. The process of reasoning chartered by the Tribunal to arrive at these conclusions has already been alluded to by us above in paragraphs 63 to 66 and is unassailable. The Respondents-herein have not sought to challenge these observations or pointed any infirmity in the said findings.

396. The real issue sought to be urged by Mr. Andhyarujina is that the transfer of technology of the various models of WTG's in favour of the Appellants-herein was pursuant to the stipulated contractual obligations upon the Claimants (Respondents-herein) under the TKHA (as amended by the STKHA). It was thus contended that no royalties in their respect were payable any longer as the ceiling limit of 2.5 million Deutsche Mark had been reached in the year 2002 itself.

397. We note that this contention was also raised before the Tribunal. The Tribunal, however, repelled the contention of the Appellants-herein that the TKHA (as amended by the STKHA) enwombed within its fold the right to manufacture E-48 and E-53 models of the WTG's.

398. It had been contended on behalf of the Appellants- herein that the STKHA had contemplated supply of atleast two other ranges/models in addition to E-26, E-30 and E-40. It was on strength of this recital comprised in STKHA that Mr. Andhyarujina submitted that the Appellants manufactured E-48 and E-33 WTG's as a matter of right under the TKHA regime (as amended by STKHA) itself. In this context, it was submitted that it was inconceivable that Enercon GmbH would transfer confidential and valuable Technical Know-How of WTG's in mere

anticipation of a formal agreement. We note that before the Tribunal a slightly different claim seems to have been staked, in as much as the Tribunal records that it was urged that in addition to E-26, E-30 and E-40 WTG's, the right to manufacture E-48 and E-53 WTG's was claimed under the TKHA regime (as amended by STKHA) and not E-33 WTG as contended by Mr. Andhyarujinja.

399. Upon advertng our thoughtful consideration to the rival submissions in this regard and having perused the correspondence exchanged between the parties we are of the considered view that the findings of the Tribunal are based upon sound appreciation of evidence. The Tribunal aptly observed that the transfer of technology for E-33, E-48 and E-53 models of WTG's was initiated by Enercon GmbH only after the expiry of the TKHA and STKHA in January 2004. The said transfer was made in anticipation of a fresh agreement that would be shortly formalised between the parties after negotiations. At this stage, we may observe that Enercon GmbH was not dealing with a stranger but with a corporate entity in which it itself had a 56% controlling stake. The relations between Enercon GmbH and Mehra's had not embittered as yet. Sale of the new WTG's in the Indian market would have fetched further revenue for Enercon GmbH, and as a matter of commercial prudence, Enercon GmbH would not have wanted to defer the opportunity of exploiting the Indian market by awaiting formalization of an agreement. Viewed in the light of these attending circumstances, we do not find it unbelievable that the technology was passed on to the Appellants without having first entered a formal agreement. It assumes significance that a perusal of the correspondence exchanged between the parties during the course of negotiations nowhere reflects that Mr. Yogesh Mehra claimed that he was as a matter of right entitled to the technology of E-33, E-48 and E-53 WTG's in terms of the TKHA (as amended by the STKHA) and thus there would be no question of payment of royalties. The Tribunal correctly held that the right to receive technical know-how and manufacture atleast two other ranges/models stood satisfied upon the receipt of technical know- how of E-40/644/E2, E-40/644/E3B and E-40/644/E2B, as explained by Mr. Kettwig in his evidence. In order to fortify its conclusions, the Tribunal placed reliance upon the communication addressed by Mr. Yogesh Mehra dated 17-10- 2008 wherein he listed each of the E-40's separately as a model for which technology had been supplied to WWIL. The position was similarly stated by him in the draft of the new TKHA prepared by him and shared with Enercon GmbH on 14-10-2004.

400. The conclusions reached by the Arbitral Tribunal are supported by reasons, and the reasons are anchored on the material available on record. No perversity is palpable in the approach of the learned Arbitrators on this count. The Court is bound by the arbitrator's finding of fact and cannot review them unless they are unsupported by evidence or it appears that there is no evidence to support it. As long as the view taken by the Tribunal is plausible, it is not open to the Court to examine the adequacy of the evidence.

401. On the issue of restitution of royalties, it had been submitted by Mr.

Andhyarujina that the said amounts were transferred under bona fide mistake and no further royalties were payable. In view of the fact that we have already held that the IPLA had been entered into as a concluded contract and royalties were payable thereunder, the question of directing restitution would not arise. All consequences that flow from the execution of the IPLA are liable to be enforced. The said consequences include return of documents and materials containing confidential technology in terms of Clause 2.11 of the IPLA. In this context, we note that we have also negated the contention that the Appellant's-herein were entitled to E-33, E-48 and E-53 WTG's under the TKHA regime (as amended by the STKHA) and that no further royalties in their respect were payable.

WHETHER THE MAJORITY AWARD IS VITIATED BY BIAS/PREJUDICE

402. Dr. Saraf, learned Counsel appearing on behalf of the Appellants, contended during the course of arguments that the majority Award stood vitiated from the root to the fruit in view of the underlying bias permeating the Award.

403. At the outset, we may observe that bias/prejudice was sought to be inferred merely on the basis of certain observations expressed by the majority Arbitrators while appreciating evidence the evidence of Mr. Yogesh Mehra. We have already reproduced the observations of the learned Arbitrators in paragraphs 185 and 187 of our judgment while extensively noting the submissions of Dr. Saraf on this aspect. Dr. Saraf further submitted that Mr. Yogesh Mehra on the other hand had been observed to be a truthful witness in the minority Award.

404. We are unable to accept the contention canvassed by Dr. Saraf on this score. The very premise for inferring bias seems rather tenuous and on a slippery slope. Every adjudicator has his own distinct style of penning his views that in turn is shaped by a conundrum of considerations including the legal system he belongs. It is indeed a stark reality that the language employed by a Judge/ Arbitrator does, at times, gets influenced by the glaring facts of the case and the evidence led before him. However, the use of strong language or deprecating the conduct of a litigant by itself does not necessarily furnish a firm basis to infer bias/prejudice.

405. Similarly, the fact that it was observed that there were delays in disposal of certain proceedings in Indian Courts can also not lead to the conclusion of a "general territorial bias", as suggested by Dr. Saraf. The said observations were made by the Tribunal in the context of dealing with a contention raised by the Appellant's-herein requesting the Tribunal not to exercise jurisdiction with respect to disputes relatable to the SHA as the same were pending consideration of the CLB. We find that no umbrage can be taken from the observations that are factually correct and this Court is unable to perceive bias of any nature from the Tribunal having ventured to narrate the naked truth.

406. The Supreme Court, in its decision reported as (1976) 1 SCC 800 - Gulam Mustafa and Others v. The State of Maharashtra and Others in a slightly different context of allegations of malafide exercise of powers by a public authority, aptly

observed that such a plea is the easiest to make and the most difficult in law to make out. It was further observed that it is the last refuge of a losing litigant. To our mind, these luminous observations of Krishna Iyer, J apply with equal force to the allegations of bias/prejudice cast against adjudicators. There is no quarrel with the general principles of law enunciated in the decisions pressed into service by Dr. Saraf. However, the factual conspectus of inferring bias is naturally different in every case under consideration.

407. The fact that a witness was found unworthy of credit by the majority Arbitrators whereas the minority found such a witness to be truthful are matters which in substance pertain to the realm of appreciation of evidence.

408. Mr. Kamdar highlighted before us that in Paragraph 22 of the Affidavit in Rejoinder (in Notice of Motion (L) No. 84 of 2019 dated 20.02.2019 filed by Ajay Mehra it had been averred that the Appellant was already apprehensive of the alleged prejudice and personal bias of the majority of the Arbitral Tribunal by 11.12.2015 i.e. during the pendency of the arbitral proceedings itself. In this context it was submitted that in terms of Section 13(2) of the Act, 1996 such a challenge ought to have been raised at that stage itself before the Arbitrators, failing which such a challenge is deemed to have been waived. Reliance was placed upon the decision of this Court reported as (2015) 7 BomCR 141 - M/s Visakha Petroleum Products Pvt. Ltd. v. B.L Bansal and Ors.

409. Per Contra, Dr. Saraf in his rejoinder submissions sought to clarify this aspect by submitting that the perception of bias/prejudice that had started germinating in the minds of the Appellants in the month of December 2015 ultimately crystallized after having read the Final Award. It is in this view of the matter that such a plea was never raised before the Tribunal. Reliance was placed by Dr. Saraf to a decision of this Court reported as 2015 2 Mah LJ 38 - Inox Leisure Ltd. v. Goa State Infrastructure Corporation Ltd.

410. We find that it would no longer be necessary for us to decide upon the objection raised by Mr. Kamdar in view of the fact that we have held that there is no reasonable basis to infer any bias/prejudice in the case at hand.

WHETHER THE DIRECTIONS AGAINST THE MEHRA'S FOR PAYMENT OF COSTS OF PROCEEDINGS ARE PERVERSE

411. Dr. Saraf, learned Counsel appearing on behalf of the Appellants did not raise challenge to the quantum of costs of proceedings assessed by the Tribunal. It was however contended that the majority Arbitrators fell in error by directing the Mehra brothers instead of WWIL to expend the costs of proceedings. Our attention was drawn to the observations in paragraphs 306-307 of the majority Award wherein it was observed by the learned Arbitrators themselves that there was no personal liability of Mehra brothers with regard to the debts of WWIL.

412. It is true that the learned Arbitrators did opine in paragraphs 306-307 of their Award that there was no personal liability of the Mehra brothers. However,

we find that the said observations were in the context of payment of the debts owed by WWIL viz. payment of royalties and failure to pay for the goods that had been supplied to WWIL. Under the agreements, including the IPLA the obligation to pay royalties and make payment for the components etc. was upon WWIL. Thus, the said liability could not have been shifted upon the Mehra brothers.

413. Apropos, the issue of payment of costs of proceedings the majority Arbitrators fell in no error to direct the Mehra brothers to expend such costs rather than foisting such liability upon WWIL. We say so because the directions issued by the majority Arbitrators directing the Mehra brothers to bear the costs of proceedings was logical in as much as they were in the de-facto control of the management of WWIL during period of actionable breaches. Further, a direction to WWIL to expend the costs of proceedings would in effect imply saddling Enercon GmbH (the successful Claimant) with such liability as it owns shareholding in WWIL to the tune of 56%. No exception can be taken to the approach of the majority Arbitrators in this regard.

414. In view of the discussion comprised in the preceding paragraphs, we are of the considered view that the appeals are liable to be dismissed and are dismissed accordingly. The majority Award is liable to be upheld in its entirety.

415. There shall be no order as to costs.

416. After decision was pronounced in open Court, dismissing the three captioned appeals, at an oral request made by the counsel for the parties, with consent, it is directed that the interim order dated 24.04.2018, as modified by the order dated 27.04.2018 passed by the learned Single Judge in Notice of Motion (L) No. 1035 of 2018 in Arbitration Petition No. 205 of 2016, shall continue for a period of further six weeks from today.