

M/S.Coastal Consolidated Structures ... vs M/S.Karaikal Port Private Limited on 14 October, 2024

Author: C.Saravanan

Bench: C.Saravanan

Arb.O.P.(Com.Div.) Nos.1

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	27.03.2024
Pronounced On	14.10.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021
and
A.Nos.3167 and 4635 of 2021
and
A.Nos.4217 and 4219 of 2023

Arb.O.P.(Com.Div.) No.132 of 2021

M/s.Coastal Consolidated Structures Pvt. Ltd.,
Registered Office at
60-3-23/A , Coastal Building,
Near I.T.I.Bus Stop,
Ashok Nagar, Vijayawada,
Andhra Pradesh – 520 010.

... Pe

Vs.

1.M/s.Karaikal Port Private Limited,
Represented by its Chief Financial Officer,
Mr.B.Venkataraman,
Registered Office at
Kheezhavanjoor Village, T.R.Pattinam,
P.B.No.33, Karaikal – 609 606.

2.M/s.MARG Limited,
Registered Office at
“Marg Axis”, 4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai – 600 041.

<https://www.mhc.tn.gov.in/judis>
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Also at:
Sri Sai Subhodhaya Apartments,
Basement No.57/2B, East Coast Road,
Thiruvanmiyur,
Chennai – 600 041.

... Responder

Arb.O.P.(Com.Div.) No.138 of 2021

M/s.Karaikal Port Private Limited,
Represented by its Chief Financial Officer,
Mr.B.Venkataraman,
Registered Office at
Kheezhavanjoor Village, T.R.Pattinam,
P.B.No.33, Karaikal – 609 606.

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Vs.

1.M/s.Coastal Consolidated Structures Pvt. Ltd.,
Registered Office at
60-3-23/A , Coastal Building,
Near I.T.I.Bus Stop,
Ashok Nagar, Vijayawada,
Andhra Pradesh – 520 010.

2.M/s.MARG Limited,
Registered Office at
“Marg Axis”, 4/318, Rajiv Gandhi Salai,
Kottivakkam, Chennai – 600 041.
Also at:
Sri Sai Subhodhaya Apartments,
Basement No.57/2B, East Coast Road,
Thiruvanmiyur,
Chennai – 600 041.

... Respondents

Arb.O.P.(Com.Div.) No.275 of 2021

M/s.MARG Limited,
Registered Office at
“Marg Axis”, 4/318, Rajiv Gandhi Salai,
<https://www.mhc.tn.gov.in/judis>
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Arb.O.P.(Com.Div.) Nos.132

Kottivakkam, Chennai – 600 041.
Also at:
Sri Sai Subhodhaya Apartments,
Basement No.57/2B, East Coast Road,
Thiruvanmiyur,
Chennai – 600 041.

... Petitioner

Vs.

1.M/s.Coastal Consolidated Structures Pvt. Ltd.,
Registered Office at
60-3-23/A , Coastal Building,
Near I.T.I.Bus Stop,
Ashok Nagar, Vijayawada,
Andhra Pradesh – 520 010.

2.M/s.Karaikal Port Private Limited,
Represented by its Chief Financial Officer,
Mr.B.Venkataraman,
Registered Office at
Kheezhavanjoor Village, T.R.Pattinam,
P.B.No.33, Karaikal – 609 606.

... Respondent

Prayer in Arb.O.P.(Com.Div.) No.132 of 2021: Original Petition is filed Section 34 of the Arbitration and Conciliation Act, 1996, read with Rule the Madras High Court Arbitration Rules, 2021, to set aside the Award dated 17.02.2021 passed by the Sole Arbitrator insofar as rejecting the claims by the petitioner against the respondents to the tune of Rs.23,23,38,231 the amount awarded against the respondents.

Prayer in Arb.O.P.(Com.Div.) No.138 of 2021: Original Petition is filed Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 29.12.2020 which was corrected vide corrected Award dated 17.02.2021

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Arb.O.P.(Com.Div.) Nos.1

passed by the Sole Arbitrator insofar as it holds that the petitioner is to pay a sum of Rs.57,33,472/- to the first respondent towards the retention payment, within 3 months from the date of Award failing which to pay the sum with 18% interest per annum from the date of the Award till the date of payment and rejects the counter claim of the petitioner.

Prayer in Arb.O.P.(Com.Div.) No.275 of 2021: Original Petition is filed Section 34 of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 29.12.2020 and 17.02.2021 passed by the Sole Arbitrator in directing the petitioner to pay a sum of Rs.8,48,97,709/- with a period of 3 months from the date of award.

Arb.O.P.(Com.Div.) No.132 of 2021

For Petitioner : Mr.K.Elango

For Respondents :

For R1 : Mr.Vinod Kumar

For R2 : Mr.T.Mohan

Senior Counsel

for Mr.R.Sivaraman

Arb.O.P.(Com.Div.) No.138 of 2021

For Petitioner : Mr.Vinod Kumar

For Respondents :

For R1 : Mr.K.Elango

For R2 : Mr.T.Mohan
Senior Counsel
for Mr.R.Sivaraman

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Arb.O.P.(Com.Div.) No

Arb.O.P.(Com.Div.) No.275 of 2021

For Petitioner : Mr.T.Mohan
Senior Counsel
for Mr.R.Sivaraman

For Respondents :

For R1 : Mr.K.Elango

For R2 : Mr.Vinod Kumar

COMMON ORDER

By this common order, all the three original petitions filed under Section 34 of the Arbitration and Conciliation Act, 1996 are being disposed of.

2. These Original Petitions are directed against Common Award dated 29.12.2020 as corrected vide common order dated 17.02.2021 by the Arbitral Tribunal. Operative portion of the Impugned Award reads as under:-

In the result an Award is passed, * Directing the 1st respondent to pay to the claimant a sum of Rs.57,33,472/- being the retention amount within 3 months from the date of Award failing which to pay the same with 18% interest p.a. from the date of Award till the date of payment;

Directing the 2nd respondent to pay to the claimant a sum of Rs.8,48,97,709/- within 3 months from the date of Award failing which to pay the same with 18% interest p.a. from the date of Award till the date of payment.

<https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 # The 2nd respondent is directed to the claimant a sum of Rs.7,00,000/- within 3 months from the date of Award failing which to pay the same 18% p.a. from the date of Award till date of payment.

[Note :- *Award Debtor No.1 #Award Debtor No.2]

3. The learned Arbitrator was appointed pursuant to an order dated 18.12.2015 in O.P.No.592 of 2015. The Award Holder had earlier filed a consolidated claim for a sum of Rs.32,29,69,412/- together with interest against the respective Award Debtors (the petitioners in Arb.O.P.(Com.Div.) No.138 and Arb.O.P.(Com.Div.) No.275 of 2021).

4. For the sake of clarity, the protagonist in the respective Original Petitions are as under:-

TABLE-I Parties Before Original Petition Name Remarks Status The Tribunal Nos.

Claimant	592 of 2015 & 132 of 2021	Costal Consolidated Structures Pvt. Ltd. and Anr.	Claimant/Sub- Contractor
1st Respondent	138 of 2021	Karaikal Port Limited	Employer

<https://www.mhc.tn.gov.in/judis>

Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Parties Before Original Petition Name Remarks Status The Tribunal Nos.

2nd Respondent 275 of 2021 MARG Limited Main Contractor Award Debtor -2

5. As against the total claim of Rs.32,29,69,412/-, the Award Holder has secured a partial relief for a sum of Rs.9,06,31,181/- [Rs.57,33,472/- + Rs.8,48,97,709/-] as against Award Debtor No.1 and Award Debtor No.2. Thus, the challenge in Arb.O.P.(Com.Div.) No.132 of 2021 is for a balance amount of Rs.23,23,38,231/- (Rs.32,29,69,412/- - Rs.9,06,31,183/-).

6. Respective Award Debtor Nos.1 and 2 are the Petitioners in Arb.O.P.(Com.Div.) No.138 of 2021 and Arb.O.P.(Com.Div.) No.275 of 2021.

They have challenged the Impugned Award, insofar as it holds that the respective Award Debtors are liable to pay to the Award Holders viz., the Petitioner in Arb.O.P.(Com.Div.) No.132 of 2021, a sum of Rs.57,33,472/- and Rs.8,48,97,709/- respectively.

7. Before the Arbitral Tribunal, Award Debtor No.1 made a counter claim of Rs.98,98,830/-. It was later reduced to Rs.11,56,473/-. The Award Debtor No.2 filed a counter claim for Rs.10 Crores in the arbitration proceedings. The <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 counter claims of both the Award Debtors have been rejected by the Arbitral Tribunal. Before the Arbitral Tribunal, Award Debtor No.1 filed an application under Section 16 of the Arbitration and Conciliation Act, 1996, inter alia, to segregate the claims of the Award Holder.

8. The Arbitral Tribunal vide its Order dated 06.08.2018 allowed the application in favour of the Award Debtor No.1 and allowed the claimant to segregate the relief claimed against the Award Debtor No.1 and the Award Debtor No.2. Relevant portion of the Order dated 06.08.2018 of the learned Arbitrator as under:-

“19. On the face of this observation, it is very clear that between the Claimant and the 1st Respondent Port, the claims which are after the Tripartite Agreement dt.24.08.2012 alone can be decided through the process of Arbitration by his Tribunal. However, it is to be noted, such restriction is only between the Claimant and the 1st Respondent. Therefore, this issue is decided in favour of the 1st Respondent.

20. As rightly pointed out by the Learned Counsel for the 1st Respondent, Item No.1 in the amended Statement of Claimant namely clearance of pending bills to the tune of Rs.1,02,96,430/-

and claim of interest on the delayed payments could be a valid claim against the 1st Respondent post 24.08.2012. The other claims relate to reduction of work, compensation towards mobilization charges on the reduced work, <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 compensation for idling of machines and manpower and escalation claim are objected as prior to 24.08.2012. However, the Claimant seemed to have made those claims arising out of the Tripartite Agreement dt.24.08.2012 and the onus is on the Claimant to prove the said claims are post 24.08.2012 and the 1st Respondent is liable for such claims. Therefore, this Tribunal is of the view that Statement of Claim has to be amended to segregate such claims which could be made against the 1st Respondent and the Claimant has rightly come up with such amendment.

21. As far as the claims against the 2nd Respondent for a sum of Rs.19,92,69,561 /- is concerned, the 1st claim relates to non-payment of the agreed sum of Rs.8.49 Crores and interest thereon. The Claim No.4 and 5 relates to claim of compensation over idling of machines and manpower and also some escalation charges.

Again, the onus is on the Claimant to prove the Claim No.4 and 5 against the 2nd Respondent.

22. Whether the Claimant could club the claims against the 1st Respondent and the claims against the Respondent in this Arbitration proceeding is a question raised by the Learned Counsel for the 1st Respondent. When the Claimant has issued notice to the 1st Respondent at the first instance on 09.06.2014, he made all the claims against the 1st Respondent. The Claimant approached the

Hon'ble High Court, for the appointment of an Arbitrator to adjudicate the disputes between all the three parties to the Tripartite Agreement. The 1st Respondent was specific about the claims post 24.08.2012 and they cannot object the claims prior to 24.08.2012 against the 2nd Respondent. There is no objection <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 raised by the 1st Respondent that the claims against the other Respondent cannot be. When the Claimant has issued notice to the clubbed in one Arbitral proceeding. In fact, the 2nd Respondent who remained absent in the proceedings before the High Court has not raised any objection before this Tribunal. At this juncture, it is not appropriate for this Tribunal to de-link the disputes between the claimant and the 2nd Respondent and initiate separate Arbitral proceedings and that amounts to multiplicity of proceedings. This Tribunal has power to adjudicate the disputes between the Claimant and the 1st Respondent separately and adjudicate the dispute between the Claimant and the 2nd Respondent separately and can pass the Award suitably. Therefore, the amended Statement of Claim segregating the claims against the 1st Respondent and the claims against the 2nd Respondent is a proper course to adhere to the Orders passed by the Hon'ble High Court wherein as far as the 1st Respondent is concerned, the Claimant can make only those claims arising post 24.08.2012 and nothing prevents the Claimant from claiming those claims against the 2nd Respondent prior to 24.08.2012. In any event, in the prayer paragraph, the Claimant has to segregate the claim against the 1st Respondent and the claim against the 2nd Respondent and make suitable amendments by filing amended Statement of Claim. This issue is decided accordingly.

23) The Tripartite Agreement dt.24.08.2012 envisaged that the 2nd Respondent to pay a sum of Rs.8.49 Crores by way of postdated cheques. Since the 2nd Respondent failed to honour the cheques issued, they are liable to pay the amount <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 and as discussed earlier, the 2nd respondent was a party not only to the Tripartite Agreement and Arbitration clause therein but also a Party before the Hon'ble High Court which constituted this Tribunal to enter into reference. Though the Hon'ble High Court observed, that the learned Counsel for the Claimant and the 1st respondent agreed that the claim which is post 24.08.2012 be decided through the process of Arbitration while appointing this Tribunal, it has directed the Sole Arbitrator to enter upon the reference and adjudicate the disputes inter-se the parties which include the 2nd respondent also. Therefore, this Tribunal has jurisdiction to decide the dispute between the claimant and the 2nd respondent which is also under the Tripartite Agreement i.e. the payment of Rs.8.49 Crores."

9. By the aforesaid order, the Arbitral Tribunal also permitted the Award Holder to file a revised claim. Thus, the Award Holder filed a revised claim before the Arbitral Tribunal as detailed below:-

TABLE-II Claim Nature of Claim Against 1st Against 2nd Total Claim No.
Respondent Respondent 1(A) Clearance of Rs.1,02,96,430/- - Rs.9,51,94,139/-

	pending Bills Clearance of Dishonoured Cheques	-	Rs.8,48,97,709/-
1(B)	Interest on delayed payments	Rs.31,55,028/-	Rs.7,98,39,883/-

Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Claim Nature of Claim Against 1st
Against 2nd Total Claim No. Respondent Respondent over Reduced Part of work
(deprived) 3 Compensation Rs.70,16,161/- - Rs.70,16,161/-

towards Mobilization charges on deprived part of (saved) work 4 Compensation Rs.3,14,96,944/-
Rs.2,89,81,738/- Rs.6,04,78,682/-

over idling Machines and Personnel 5 Escalation on part Rs.2,29,70,259/- Rs.8,27,731/-
Rs.2,37,97,990/-

of work carried out after completion of original Agreement Period 6 Construction Rs.17,16,361/- -
Rs.17,16,361/-

materials lying at port Batching Plant 7 Bill for - Rs.47,22,500/- Rs.47,22,500/-

Transportation of Stones TOTAL Rs.12,36,99,851/- Rs.19,92,69,561/- Rs.32,29,69,412/-

10. In view of the above development, the Award Debtor No.2 in turn filed an application under
Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitral Tribunal on 04.04.2019
and prayed for the following relief as a preliminary objection:-

a) Adjudicate only those disputes and claims arising out of the tripartite agreement
<https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021
dated 24.08.2012;

b) Pass an order that the Claimant can make claims against the Applicant herein
arising post 24.08.2012;

c) Order that this tribunal does not have the jurisdiction to adjudicate disputes inter
se parties prior to 24.08.2012 as the same falls outside the jurisdiction of tripartite
agreement dated 24.08.2012 and goes contrary to the order dated 18.12.2015 in O.P
No. 592 of 2015 passed by the Hon'ble Madras High Court.

d) pass such further or other orders as this Hon'ble Tribunal may deems fit and
proper in the circumstances of the case.

11. In the Minutes of Meeting an Order dated 29.04.2019, the Arbitral Tribunal recorded as follows
insofar as the above application filed by the Award Debtor No.2:-

“Both side present. The application filed by 2nd Respondent to recall CW-1 is allowed
and CW-1- Mr. M. V. Ranga Prasad, is recalled for further cross examination by the

Learned counsel for the 2d Respondent. CW-1, cross examination completed. The Claimant side oral evidence closed. The 1st Respondent has no oral evidence. The 2nd Respondent has no oral evidence. Oral evidence completed. The matter stands adjourned to 13.06.2019 at 3.00 PM at the same venue for the arguments of the Learned counsel for the Claimant. As far as the application filed by the 2nd Respondent under section 16 of the Act praying to the Tribunal to adjudicate only those disputes and claims arising out of the Tripartite Agreement dt. 24.08.2012 and not the dispute or claims prior to the said dates is concerned, [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) orders will be passed in the main claims itself.”

12. After the pleadings were completed the Arbitral Tribunal had framed 10 issues. These 10 issues have been answered by the Arbitral Tribunal as follows: -

TABLE-III Issue Issues Relevant Extracts of the Award Nos.

1 and 2. What is the extent of liability Term No.19 relates to the and obligations of the 1 arbitration. Therefore, under this st respondent / Ms.Karaikal tripartite agreement as on Port Private Limited in 24.08.2012 it was agreed that the 2 nd OP.No.138 of 2021 under the respondent was due and liable to tripartite agreement dated pay a sum of Rs.8.49 Crores which is 24.08.2012? evidenced by issuing of 6 post, dated cheques. It was specifically admitted that the 1st respondent namely the Whether the 1 st respondent/ employer is not in any way liable or Ms.Karaikal Port Private under any obligation for any dues Limited had any liability between the parties prior to prior to the tripartite 24.08.2012. The only obligation agreement? against the 1st respondent is that the 1st respondent agreed to release and settle the due payments directly to the claimant which will be construed and deemed to constitute a valid discharge of the contractor namely the 2nd respondent.

3. Whether the 1 st respondent/ According to the claimant, the total Ms.Karaikal Port Private amount received for all the bills Limited had fulfilled their raised by the claimant towards the obligations and made all the work executed is Rs.13,24,90,404/-

payments due for the works as evidenced by Ex.C6 at Pg.66 of executed by the claimant Vol-3 and Pg.3 of Vol-10. According after the tripartite to the respondent, the total amount [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) Issue Issues Relevant Extracts of the Award Nos.

agreement? paid was Rs.13,24,91,196/- as per Ex.R.1. Therefore, the amount received by the claimant from the respondent is admitted with slight difference. The value of the work executed is also agreed as Rs.13,96,41,714/-. This figure appears in both the statement.

Similarly, on the heads of recoveries, TDS deducted is agreed as Rs.27,92,834/-; retention amount is agreed as Rs.57,33,472/-; work contract tax deducted is admitted as Rs.4,32,087/-; other heads at Rs.80,90,955/-. Therefore, out of total bill of Rs.13,96,41,714/- if the recovery of Rs.1,70,49,343/- is deducted the balance payable will be Rs.12,25,92,451/- which tallies with the statement filed by the 1st respondent under Ex.R1. However, according to the claimant there is a claim for the proportionate of recovered mobilisation charges to the tune of Rs.1,44,60,991/-. This amount is shown as 'Proportionate Release of Recovered Mobilisation Charges' at Pg.3 of Vol-10. This amount does not figure in the statement of account filed by the respondent under R1.

There is no explanation from the claimant how they are entitled for this proportionate release of recovered mobilisation charges to the tune of Rs.1,44,60,991/-. The claimant has also filed a tabulation [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.)

with regard to claim of pending bills against the 1st respondent. This statement which is labelled as 'Statement after tripartite agreement', reflects the bill dated 13.10.2012 to the bill dated 22.01.2014. After the invoice amount there is an additional column under the heading 'Amount to be added to offset the balance amount (B)' and the total is shown as Rs.1,44,60,991/- which is the corresponding amount shown as 'Proportionate release of recovered mobilisation charge' at Pg.3 of Vol-

10. Adding this amount the 'New Gross Bill' of Rs.15,41,02,705/-, the total recoveries is shown as Rs.1,70,49,350/-, the amount receivable is shown as Rs.13,70,53,355/- and the amount received from 1st respondent is shown as Rs.9,42,91,093/- and the amount received from MARG is shown as Rs.3,81,99,311/- and the total outstanding is shown as Rs.45,62,951/-.

In any event, as per the bills submitted under Vol-2 which reflects in the statement provided under Ex.R1 the claim of proportionate release of mobilisation charges does not reflect and there is no obligation by the 1st respondent to pay this amount. There is no other correspondence or proof to show that the 1st respondent had agreed to [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.)

pay the proportionate release of recovered mobilisation charges at Rs.1,44,60,991/-. If that amount is ignored the statement of account filed by both parties shall reflect the total value of work executed after tripartite agreement was Rs.13,96,41,714/- and the amount recovered on various heads was Rs.1,70,49,343/- and the amount paid was Rs.13,24,90,404/- and there is no balance payment payable by the 1st respondent except the retention amount of Rs.57,33,472/-.

The claimant is entitled for the return of Rs.57,33,472/-. However, whether the 1st respondent has paid excess amount has to be seen while discussing the counter claim.

4. Whether the 2nd respondent / Admittedly, there were dues payable M/s.MARG Limited is not by the 2nd respondent to the claimant liable to make any payment and on the appointed dated the for the works executed after amount has been quantified. the tripartite agreement? Therefore, the payment obligation of the 2nd respondent to the claimant prior to the tripartite agreement was

admitted, agreed and the amount is also quantified and for the works to be executed the obligation is on the 1st respondent to make direct payment to the claimant and the 2nd respondent is not obliged to make any payment. Whether the 2nd respondent has honoured those cheques and whether they are liable to make payment will be dealt with separately. The issue is decided [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.)

accordingly.

5. Whether the 2nd respondent / By a letter dated 30.10.2012 under M/s.MARG Limited had Ex.C37 the 2nd respondent made all the payments due confirmed balance payable after for the works executed by the considering the post-dated cheques claimant prior to the as Rs.3,72,99,755/- and also stated tripartite agreement? that this amount will be released proportionately with the future running bills. Therefore, as far as the 2nd respondent is concerned there is an admitted payable of Rs.8.49 Crores and another amount of Rs.3,72,99,755/-.

As stated earlier, the claim of Rs.8,48,97,709/- is an agreed amount between the parties and the amount reflects in the tripartite agreement. Therefore, if any dispute arises on this agreed amount it shall be an arbitrable issue under the tripartite agreement. Though the liability was prior to the tripartite agreement covered under the work orders, the liabilities acknowledged, agreed and quantified only under the tripartite agreement. If this amount is not paid as agreed by the 2nd respondent then the claimant has the right to recover and raise an issue before this Tribunal. Therefore, as far as the claim of Rs.8,48,97,709/-

being an agreed amount which is reflected under the tripartite agreement is payable by the 2nd respondent to the claimant.

6. Whether the claimant is Under issue No.5 this Tribunal has [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.)

entitled for various claims already discussed the various claims made against the respondents raised by the claimant against the 1 and 2nd respondent. This Tribunal has held that the claimant is entitled to claim a sum of Rs.8,48,97,709/-

alone and other claims are not maintainable against the 2nd respondent. The issue is decided accordingly.

7. Whether the claims are As far as the admitted amount of barred by limitation? Rs.8.49 Crores is concerned, the cheques were returned as on 15.03.2013, the notice to initiate the arbitration proceeding was issued on 07.01.2015 within 3 years under Ex.C63. Therefore, the claim against the 2nd respondent is not barred by limitation. This issue is decided accordingly.

8. Whether the counter claims Ex.R1 contains the details of each made by the respondents 1 bill and the amount payable. The and 2 are maintainable and date of payment and the received whether the

claimant is liable amount is also shown. The received to pay any counter claim? amount are consolidated and do not have any relevance to the corresponding bills. There is no explanation from the 1st respondent why an excess amount has been paid as early as 15th March 2014.

Though the statement of account as filed by the 1st respondent shows an excess payment, having admitted a gross bill made lawful deductions and arrived at a net balance and having paid consolidated amounts on various dates and having failed to raise a claim at the first instance <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.

while replying to the notice issued by the claimant, the 1st respondent is not entitled for the alleged excess amount. But on the contrary, the claimant is entitled for the return of recovered retention amount of Rs.57,33,472/-.

The 2nd respondent on his part has claimed a sum of Rs.10 Crores as monetary loss for rectifying various defects committed by the claimant in execution of the work. What is applicable to the claimant is equally applicable to the 2nd respondent as the receivable by the parties were decided and finally agreed at Rs.8.49 Crores payable by the 2nd respondent. Therefore the 2nd respondent is not liable for any counter claim.

9. Whether the claimant is As far as the claims against the 1st entitled to any interest? respondent this Tribunal has already found that the claims are not maintainable but one of the claim namely payment of outstanding bills at Rs.8,48,97,709/- against the 2nd respondent as agreed in the tripartite agreement is liable to be paid by the 2nd respondent to the claimant. There is no agreement between the parties for payment of interest prior to or pendente lite.

However, the 2nd respondent is liable to pay default interest at 18% p.a if the 2nd respondent fails to pay within the time stipulated by this Tribunal.

<https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Issue Issues Relevant Extracts of the Award Nos.

10. To what relief the parties are In view of the issues decided upon, entitled to? the claimant is entitled only for the retention amount of Rs.57,33,472/-

from the 1st respondent and all other claims of the claimant against the 1st respondent are rejected. The claimant's claim against the 2nd respondent in respect of payment of pending bills to the tune of Rs.8,48,97,709/- is allowed and other claims are rejected. The counter claim of the 1st and the 2nd respondent are rejected. Since the 2nd respondent failed to pay the Arbitrator's fee of Rs.7,00,000/- and since the claimant has remitted the amount, the 2nd respondent is liable to pay to the claimant the said cost of the Arbitrator.

Submissions of the Award Holder

13. The learned counsel for the Award Holder, the petitioner in Arb.O.P.(Com.Div.) No.132 of 2021, would submit that the agreed work could not be completed due to certain lapses on the part of Award Debtors, 1st & 2nd Respondents [the Petitioner in Arb.O.P.(Com.Div.) No.138 of 2021 and Arb.O.P.(Com.Div.) No.275 of 2021] during execution under Contractor Principal Agreements and therefore, a Tripartite Agreement dated 24.08.2012 was executed in modification of the terms and conditions of the both Employer Principal Agreement between the Award Debtor No.1 and Award Debtor No.2 <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 and Contractor Principal Agreement between Award Holder and Award Debtor No.2.

14. The Tripartite Agreement dated 24.08.2012 covers Work Order No.1203876 dated 31.01.2011 and Work Order No. 1203877 dated 19.02.2011. Under the Tripartite Agreement dated 24.08.2012 the value of work that was completed up to 23.08.2012 by the Award Holder was arrived at Rs.39.06 crores. Thus the value of balance work that was to be completed was Rs.49.68 crores (Rs.50.16 crores in the Written Submissions filed by the Award Holder).

15. The learned counsel for the Award Holder submitted that after deducting a sum of Rs.26.84 crores towards payment made and after effecting other recoveries, the outstanding balance payment for work done prior to Tripartite Agreement dated 24.08.2012 was only Rs.12.22 crores [Rs.39.06 Crores – Rs.26.84 Crores].

16. The learned counsel for the Award Holder, further submits that the Award Debtor No.1, withheld a sum of Rs.3.73 Crores out of Rs.12.22 Crores payments by Award Debtor No.2 to Award Holder. Thus, secured execution of <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 balance work valued at Rs.49.68 Crores. Rs.3.73 Crores was meant to be released proportionately to the Award Holder later.

17. It is submitted that, post-dated cheques for Rs.8.49 Crores [Rs.12.22 Crores – Rs.3.73 Crores] were to be issued by the 2 nd Award Debtor. However, the Award Debtor No.2 issued only 5 cheques for a total sum of Rs.6.57 Crores and even these cheques were dishonored by Award Debtor No.2.

18. The Award Debtor No.2 letter enclosed 5 post-dated cheques. The details of the dishonor of these 5 cheques were marked as Exhibit C- 67. A Legal notice dated 12.04.2013 was also sent by Award Holder to the Award Debtor No.2 demanding money towards the dishonored cheques.

19. The Award Holder has filed two cases under Section 138 read with Section 142 of the Negotiable Instruments Act, 1882 against the Award Debtor No.2 which are said to be pending before the Chief Metropolitan Magistrate's Court in Vijayawada, Andhra Pradesh.

20. The Award Holder thus made a total claim for Rs.19,92,67,561/- against the Award Debtor No.2. Interest was calculated @ 18% per annum up to <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 31.03.2016. The Award Debtor No.2 did not file any proof to show that the money claimed against it were not due or that they had made the payment to Award Holder.

21. The Learned Counsel for the Award Holder submitted that the Arbitral Tribunal failed to apply its mind to the issue and considered the amount paid by the 2nd Respondent after Tripartite agreement in four spells amounting to Rs.3,81,99,311/- which was appropriated against the liability of the 2nd Respondent already incurred prior to the Tripartite Agreement dated 24.08.2012. It I submitted that the said amount was erroneously set off towards the liability of the Award Debtor No.1. This amount which was paid by the Award Debtor No.2 was for discharge of its liability towards work completed prior to the Tripartite Agreement dated 24.08.2012 which was admitted by the Award Debtor No.2 vide letter dated 30.10.2012.

22. It is submitted that this payment of Rs.3,81,99,311/- by Award Debtor No.2 was no way connected with the liability of Award Debtor No.1 Tripartite Agreement dated 24.08.2012 and was outside the scope of the instant Arbitration proceedings, Minutes of Meeting dated 29.04.2019 had observed that the Arbitral Tribunal will adjudicate those disputes and claims <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 arising out of the Tripartite Agreement dated 24.08.2012 and decide finally in the main claims.

23. It is therefore submitted that the aforesaid amount of Rs.3,81,99,311/- ought not to have been set-off against Award Debtor No.1's liability of Rs.12,25,92,364/- for the work done after Tripartite Agreement dated 24.08.2012.

24. The Award Holder would further submit that the Arbitral Tribunal while answering issue Nos.1 and 2 has come to an erroneous conclusion that the Award Debtor No.2 was liable to pay only a sum of Rs.8.49 crores to the Petitioner and that the Award Debtor No.1 was not liable to pay for any amounts to Award Holder for the period prior to Tripartite Agreement dated 24.08.2012 which is the date of the Tripartite Agreement.

25. The Award Holder further submits that the Arbitral Tribunal while deciding issue No. 4 has given a categorical finding that the amount of Rs.3.73 crores was payable by the 2nd Respondent. However, without any basis, the Arbitral Tribunal has come to a conclusion that the aforesaid amount of Rs.3.73 crores actually Rs.3,81,99,311/- admitted by the Award Debtor No.2 in Ex.C.86 has been paid by the Award Debtor No.2 for the Award Debtor No.1. <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 The sum of Rs.3,81,99,311/- paid by the Award Debtor No.2 was wrongly claimed and credit was given for the work executed after the Tripartite Agreement dated 24.08.2012. The Arbitral Tribunal has given credit to this sum twice.

26. It is submitted that the money in (Ex.C86) was for the work completed prior to the work executed before Tripartite Agreement dated 24.08.2012, and said payment is sought to be adjusted as against past dues and also subsequent dues (Dues before and after 24.08.2012). It is submitted that this finding of the Arbitral Tribunal is wholly without jurisdiction and is a patent illegality.

27. It is submitted that the Arbitral Tribunal has failed to see that the Award Debtors did not make the payments on time. The work orders have specified time limits for making intermediary payments. Even in the legal notice issued on behalf of the Award Holder to the Award Debtors on

07.01.2015, the Award Holder had claimed interest for the delayed payment of money.

28. It is submitted that it is not the case of the Award Debtors that they had made the intermediary payments on time. Moreover, the contract which <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 ought to have been completed in 15 months took more than 2 years for the defaults committed by the Award Debtors. The Tribunal however failed to apply its mind while rejecting the interest claimed by the Award Holder for the delayed intermediary payments.

29. It is further submitted that the Arbitral Tribunal failed to see the provision for interest in Section 31 (7) (a) of the Arbitration and Conciliation Act, 1996 which gives right to claim interest from the date of cause of action till the date of the Award. The Tribunal ought to have awarded interest.

Submission of Award Debtor No.1

30. It is submitted that the case against Award Debtor No.1 is liable to be dismissed as Award Debtor No.1 was proceeded under the Insolvency and Bankruptcy Code, 2016 and Scheme for CIRP was sanctioned by the National Company Law Tribunal (NCLT), Chennai.

31. It is submitted that after the above Original Petitions were filed before this Court, an insolvency and resolution proceedings were initiated against the <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Award Debtor No.1 (the Petitioner in Arb.O.P.(Com.Div.) No.138 of 2021) by M/s.Omkara Assets Reconstruction Private Limited under the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal (NCLT), Chennai, Division Bench-I in CP.(IB)/85/(CHE) 2022.

32. It is submitted that by the aforesaid order, the petition filed by the financial creditors namely M/s.Omkara Assets Reconstruction Private Limited was admitted in terms of the Section 7 of the Insolvency and Bankruptcy Code, 2016. By an order dated 29.04.2022, the NCLT had appointed Mr.Rajesh Sureshchandra Sheth, as an Interim Resolution Professional (IRP) as proposed by financing creditors/petitioner before the NCLT. A Moratorium for the purpose of Section 14 of the Insolvency and Bankruptcy Code, 2016 thus came into force from 29.04.2022 and all proceedings were to be suspended.

33. It is submitted that pending the Order dated 29.04.2022 of NCLT in CP.(IB)/85/(CHE) 2022, these Original Petitions were kept in abeyance.

34. It is submitted that the Insolvency Resolution Professional thereafter issued a public A announcement under Section 15 of the Insolvency and Bankruptcy Code, 2016 read with Regulation 6 of the Insolvency and <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 on 02.05.2022 and called upon the creditors to file their claim statement on or before 13.05.2022.

35. It is submitted that though the learned counsel who appears for Award Debtor No.1 (the petitioner in Arb.O.P.(Com.Div.) No.138 of 2021 namely Karaikal Port Private Limited) claims to have mentioned before the Court about the above developments only at stage of final hearing and temporarily withdrawn from the case stating that the case was to be represented by the said IRP. It appears that the said IRP has later authorized the counsel for Award Debtor No.1 to represent the interest of the Award Debtor No.1 in these Original Petitions.

36. It is submitted that since the Award Holder, failed to file a claim statement, pursuant to the aforesaid advertisement dated 02.05.2022, the claim if any has to abate.

37. It is submitted that meanwhile, the two resolution plans were submitted by the M/s.Adani Port, Special Economic Zone, Ahmedabad, Gujarat and M/s. Vedanta Ltd. The resolution placed by the M/s.Adani Port, <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Special Economic Zone, Ahmedabad was approved by the Committee of Creditors [COC] which was later approved by the NCLT vide its Order dated 31.03.2023. Thereafter, NCLT terminated the proceedings against the Award Debtor No.1 (the petitioner in Arb.O.P.(Com.Div.) No.138 of 2021).

38. It is submitted that in the light of the above development, it is the preliminary objection of the Award Debtor No.1 viz., (Petitioner in Arb.O.P.(Com.Div.) No.138 of 2021/ 1st Respondent in Arb.O.P.(Com.Div.) No.132 of 2021) that the Arb.O.P.(Com.Div.) No.132 of 2021 should stand abated as the Award Holder, (Petitioner in Arb.O.P.(Com.Div.) No.132 of 2021) failed to file a claim statement before the Interim Resolution Professional appointed by the NCLT on 29.04.2021.

39. The learned counsel for the Award Debtor No.1, has drawn the attention to the decision of the Hon'ble Supreme Court reported in Ghanshyam Mishra and Sons Private Ltd., through the authorised signatory Vs. Edelweiss Asset Reconstruction Company Ltd., through the Director and others [(2021) 9 SCC 657].

40. It is submitted that Calcutta High Court while dealing with an <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 identical situation where an Award was challenged in A.P.No.550 of 2008 reported in (2021) SCC Online Cal 1601 in the case of Sirpur Paper Mills Limited Vs. I.K.Merchants Pvt Ltd (formerly Known as I.K.Merchants) held the claim abated/extinguished as the Award Holder failed to file the claim petition before the Resolution Professional as was required under the scheme of the Act.

41. The learned counsel for the Award Debtor No.1 has also relied on an unreported judgement of the Bombay High Court dated 14.06.2023 in Enviro Scientific Dredging and Water Projects Pvt. Ltd. Vs. Dighi port Limited and another, in which while dealing with an appeal against an order of the Arbitral Tribunal terminating the Arbitral Proceedings under Section 32(2)(c) of the Insolvency and Bankruptcy Code, 2016 on account of the approval of the Resolution Plan in respect of the Respondent in arbitration, which had not taken into account the claim filed by the claimant in arbitration, the High Court affirmed the order passed by the arbitral tribunal terminating the arbitration proceedings.

42. The learned counsel for the Award Debtor No.1 submits that it is the settled position of law that Courts must take cognizance of events/ developments <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 subsequent to the institution of proceedings. Reliance was also placed on the case of Pasupuleti Venkateswarlu Vs. The Motor & General Traders (1975) 1 SCC 770, followed in Om Prakash Gupta Vs. Ranbir B.Goyal (2002) 2 SCC 256, wherein it was held that if a fact arising after the lis has come to court and has a fundamental impact on the right to relief or the manner of moulding it, is brought diligently to the notice of the tribunal, it cannot blink at it or be blind to events which stultify or render inept the decretal remedy.

43. It is further submitted that it is the settled position of law that the Award Debtor No.1 is entitled to raise additional grounds in peculiar circumstances of the case under Section 34 of the Insolvency and Bankruptcy Code, 2016. Reliance was placed in the case of State of Maharashtra Vs. Hindustan Construction Company Limited, (2010) (4) SCC (518), wherein it was held that the Courts are entitled to allow a party to amend the application filed under Section 34 of the Insolvency and Bankruptcy Code, 2016 or to raise additional grounds in a Section 34 petition, if the peculiar circumstances of the case so warrant and it is so required in the interest of justice.

44. It is therefore submitted, the relief sought for in Arb.O.P.(Com.Div.) No.132 of 2021 to set aside the Award dated 29.12.2020 as modified/corrected <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 on 17.02.2021 has to be dismissed as the proceedings against Award Debtor No.1 are deemed to have been extinguished/abated as against the Award Debtor No.1 in view of the proceeding initiated under the Insolvency and Bankruptcy Code, 2016.

45. The learned counsel would therefore submit that the aforesaid Award to the extent that it directs the Award Debtor No.1 to pay a sum of Rs.57,37,471/- to the Award Holder is to be closed.

46. The learned counsel for the Award Debtor No.1 submits that while dealing with Issue No.4, the Arbitrator's Tribunal conclusion that Award Debtor No.2 has no obligation to pay the Award Holder for the work executed after the Tripartite Agreement (in short TPA) is contrary to the terms of the TPA. It is submitted that Clause 1 of the TPA clearly records that payment made by Award Debtor No.1 to Award Holder, will constitute a valid discharge and satisfaction of the payment obligation of Award Debtor No.2 towards Award Holder under the Contractor Principal Agreement.

47. It is therefore submitted that clause 1 of the TPA, which records that Award Debtor No.2 will be discharged of its obligation to pay Award Holder, on <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Award Debtor No.1 making payment to Award Holder, clearly means that Award Debtor No.2 was under obligation to pay Award Holder, for the work executed after the TPA.

48. It is submitted that the Arbitrator has at internal pages 10-12 of the Impugned Award, while dealing with Issue Nos.1 and 2 clearly recorded at paras 1 and 5, that payment made by the Award Debtor No.1 to the Award Holder was to discharge Award Debtor No.2's obligation to Award Holder. Having held so, the Arbitrator could not have while dealing with Issue no. 4, come to a contrary

conclusion that after the execution of the TPA, Award Debtor No.2 has no obligation to pay Award Holder for the work executed after the TPA. It is submitted that such conclusion being contrary to the TPA is liable to be set aside under section 34 of the Arbitration and Conciliation Act, 1996.

49. The learned counsel for the Award Debtor No.1 submits that the Arbitral Tribunal's conclusion that Award Debtor No.1 was liable to pay Rs.57,33,472/- to Award Holder is contrary to the terms of the TPA and also contrary to the Arbitrator's own finding. It is submitted that under clause 1 of the TPA, Award Debtor No.1 undertook to pay Award Holder only such amounts which are certified by Award Debtor No.2 to Award Holder. Under [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) clause 7 of the TPA the obligations of Award Debtor No.2 and Award Holder towards each other under the Contractor Principal Agreement were to continue to subsist.

50. It is submitted that Clause 5 of the Work Order No.1203876 and Work Order No.1203877, in respect of which the Tripartite Agreement (TPA) was made, clearly records that Award Debtor No.2 was entitled to deduct 5% of the amount as Retention Money. Since, under the TPA, Award Debtor No.1 has undertaken to pay only amounts which are certified by Award Debtor No.2, any amount which was deducted by Award Debtor No.2 at the time of certification, based on the terms of its work order (which in terms of clause 7 of the TPA, continued to subsist), was not required to be paid by Award Debtor No.1. Further, in terms of clause 7 of the TPA, the work orders between Award Debtor No.2 and Award Holder, continued to subsist, it was only Award Debtor No.2 who liable to make any payment for any amounts which it has not certified or which it has deducted.

51. The learned counsel for the Award Debtor No.1 submits that while dealing with Issue No.3, the Arbitrator has recorded that the in the statement filed by Award Holder as well as Award Debtor No.1, Rs.1,70,49,343/- is the [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) total deduction, including Rs.57,33,472/- deducted as retention amount. Having held so, the Arbitrator erred in treating the retention amount of Rs.57,33,472/- as a separate item, while also holding that no balance amount is payable by Award Debtor No.1.

52. It is submitted that the Arbitral Tribunal has correctly held that Award Debtor No.1 was only required to pay the amount which was certified by Award Debtor No.2 and nothing more and that there was no contractual obligation on Award Debtor No.1 to pay for the value of the work. Having held so, the Arbitral Tribunal could not have held Award Debtor No.1 liable for Rs.57,33,472/-, which even as per the statement filed by Award Holder was part of the amounts deducted by Award Debtor No.2 and hence not certified.

53. It is submitted that this amount not being part of the amount certified by Award Debtor No.2, is not required to be paid by Award Debtor No.1 and can only be a liability of Award Debtor No.2. The Arbitrator correctly concluded under Issue No.3 that the Award Debtor No.1 had fulfilled its obligation and made all the payments and that the claims by Award Holder against Award Debtor No.1 is not maintainable.

[https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021)

54. The learned counsel for the Award Debtor No.1 further submits that the Arbitral Tribunal's conclusion that Award Debtor No.1 is liable to pay Rs.57,33,472/- is without any reason whatsoever as the Arbitral Tribunal has held that, in the respective statements filed by Award Holder and Award Debtor No.1, the value of the work executed after the TPA and the amount paid to Award Holder, tally, except for a marginal difference.

55. It was further recorded in the said Award that the heads of recoveries are the same in both the statements, including a sum of Rs.57,33,472/- as retention amount. However, at paragraph 23 at internal page 21 of the Award, the Arbitral Tribunal has treated the retention amount of Rs.57,33,472/- as a separate item and without giving any reason held that Award Holder is entitled to the said sum.

56. The learned counsel for the Petitioner in Arb.OP.No.138 of 2021 submits that, while dealing with Issue no. 8, which pertained to the counter claim made by Award Debtor No.1, the Arbitrator reiterated that Award Holder has admitted total recoveries at Rs.1,70,49,343/- (which includes Rs.57,33,472/- towards retention amount, as stated above). After recording the same, without giving any reason, the Arbitrator concluded that Award Holder is <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 entitled to Rs.57,33,472/-. Reliance is placed on the judgement of the Supreme Court in Delhi Airport Metro Express Private Limited Vs. Delhi Metro Rail Corporation Ltd., (2022) 1 SCC 131, para 29, where it has been held that an award stating no reasons for its findings would make it susceptible to challenge on the ground patent illegality.

57. The learned counsel for the Award Debtor No.1 submits that the rejection of Award Debtor No.1's Counter Claim by the Arbitrator is erroneous and is also contrary to the Arbitral Tribunal's finding. The Arbitrator completely failed to take note of the written submission of Award Debtor No.1, where in Award Debtor No.1 had reduced its counter claim to Rs.11,56,473/-. This was based on the workings and documents submitted by Award Holder.

58. It is submitted that, while dealing with Issue No.8 relating to counter claim, the Arbitral Tribunal rejected the counter claim for the sole reason that in Award Debtor No.1's letter dated 08.07.2014 issued by Award Debtor No.1 in response to Award Holder notice dated 09.06.2014 invoking the arbitration clause, Award Debtor No.1 had not made any claim for excess payment and had stated that there is no subsisting dispute. It is submitted that, the response of Award Debtor No.1 to the notice of arbitration issued by Award Holder, that <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 there is no dispute, could not have been the basis for rejecting the counter claim.

59. It is submitted that in Award Holder's notice dated 09.06.2014, under Section 21 of the Act, it was alleged that Award Debtor No.1 was jointly and severally liable in respect of amounts payable by Award Debtor No.2. It is in this context and in response to the said notice, that Award Debtor No.1 had stated that there is no subsisting dispute between Award Debtor No.1 and Award Holder.

60. It is further submitted that, the Award Debtor No.1 had in its said letter dated 08.07.2014 stated that the same was without prejudice. The Arbitral Tribunal failed to note that Award Debtor No.1

had never waived its right to raise a counter claim. It is well settled that a counter claim is an independent action, which a party is entitled to make, if the counter party raises a claim. Hence, the conclusion of the Arbitrator is manifestly illegal and liable to be set aside.

61. The learned counsel for the Award Debtor No.1 submits that the Arbitral Tribunal failed to note that Award Holder 's claims against Award <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Debtor No.1 were untenable as they included matters which were outside the scope of the Tripartite Agreement. Under the TPA, Award Debtor No.1 had to pay Award Holder the amounts certified by Award Debtor No.2 in respect of the works relating to work order Nos. 1203876 and 1203877, but the Award Holder while making its claim had included claims relating to other work orders also.

62. It is submitted that Exhibit R1, which has been relied upon by the Arbitrator, identifies the value of work done by Award Holder after the Tripartite Agreement, in respect of various work orders, including Work Order No.1203876 and Work Order No.1203877, which were subject matter of the Tripartite Agreement. The value of certified amounts for these two relevant work orders added up to Rs.11,32,12,531/-. Against this Award Debtor No.1 had admittedly paid a total sum of Rs.11,43,69,004/- as seen from Exhibit C 62 and the various entries in Exhibit C 65. It is based on these that Award Debtor No.1 had reduced its counter claim to Rs.11,56,473/-. This aspect has been completely ignored by the Arbitrator. The award having failed to take into account this crucial aspect suffers from patent illegality.

Submission of Award Debtor No.2

63. The learned counsel for the Award Debtor No.2 submits that the Arbitral <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Tribunal has failed to note that, out of Rs.8,48,97,709/- he has already paid a sum of Rs.5,82,77,222/- and therefore, the claim, if any, should be confined only to the balance amount which is Rs.2,66,20,487/- (Rs.8,48,97,709/- - Rs.5,82,77,222/-). It is therefore submitted that the learned arbitrator committed a grave error in awarding a sum of Rs.8,48,97,709/- to the Award Holder.

64. It is submitted that despite Order dated 18.12.2015 passed by the Hon'ble High Court in O.P.No.592 of 2015, Award Holder sought a claim which was contrary to the order. Award Holder in its claim Statement has stated that as per the accounts/ledger of the Award Holder, an amount of Rs.8.49 Crores was due and payable by Award Debtor No.2 to Award Holder as on 24.08.2012.

65. It is submitted that Award Debtor No.2's liability under the Tripartite Agreement was crystal clear and has been captured in Clause 3 which states that Award Debtor No.2 was obligated to make the payments to the Award Holder only to the tune of Rs. 8,48,97,709/- alone. Even in O.P.No.592 of 2015, Award Holder had agreed that it would confine the claim before the Arbitral Tribunal only in respect of claims subsequent to 24.08.2012. Contrary to the above undertaking, the Award Holder has sought the relief for period prior to 24.08.2012 which is way beyond the scope of reference made by this Hon'ble Court under Section 11 of the <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Arbitration & Conciliation Act, 1996.

66. Learned counsel for the Award Debtor No.2 has referred to the following dates on which payment for Rs.5,82,77,222/- was made to Award Holder.

a) In volume 9, page 8, under the tabulation – Statement of Payment received.

TABLE - IV

Date	Amount
10.09.2012	Rs.2,00,77,911/-

b) In volume 3, Page 68 – Under the tabulation the amount received from Award Debtor No.2.

TABLE - V

Date	Amount
18.05.2013	Rs.8,63,981/-
18.05.2013	Rs.1,06,80,266/-
20.06.2013	Rs.1,39,06,517/-
16.07.2013	Rs.1,27,48,547/-
Total	Rs.3,81,99,311/-

67. It is submitted that though receipt of this amount has been acknowledged by Award Holder in its documents, Award Holder has continued to seek a sum of Rs. 8.49 Crores instead of the balance sum of Rs.2,66,20,487/- only, after deducting the aforementioned payments made by the Award Debtor No.2. <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021

68. It is submitted that Sections 59 to 61 of the Indian Contract Act, 1872 would categorically reveal that if a claim has been made by a Debtor, with respect to a particular payment, then the amount should be appropriated towards the dues for which it has been paid. In the present case, Award Debtor No.2 has clearly claimed that the entire amount has been paid towards the payments pursuant to the liability on entering the Tripartite Agreement. Award Holder has not even claimed much less proved that it appropriated the payments made to another debt. Such being the case, the Learned Arbitrator ought not to have passed an award stating that the amount payable by Award Debtor No.2 is Rs.8.49 Crores without any appreciation of facts brought before him.

69. It is submitted that further to substantiate the same, the examination of CW1 and CW2 would make it clear that instead of seeking the balance sum, Award Holder has sought for Rs. 8.49 crores which was impermissible, both under law and in equity.

70. It is submitted that the Arbitral Tribunal at any event ought to have taken note of above payments made. This admission is of significance because, Award Debtor No.2 has made payments directly to Award Holder. However, Award Holder has not taken the same into account and such

payments, it is submitted, assuming without admitting, if at all, the Award Holder, can restrict the claim, only <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 to the actual amount payable. It is submitted that there is no discussion on the same in the impugned Award.

71. It is further submitted that it would not be out of place to mention that it has been held by courts that the Arbitral Tribunal is duty bound to pass an award with due application of mind and after affording adequate reasons. Reliance was placed on the decision of the Hon'ble Calcutta High Court in the case of Soorajmull Nagarmull Vs. Jute Corporation of India Ltd., (2001) SCC OnLine Cal 382.

72. On behalf of the Award Debtor No.2, it was further submitted that the award has been passed beyond the period after the mandate of the learned Arbitrator expired. It is submitted that on the date of reference, Section 29 A of the Arbitration and Conciliation Act, 1996 had been amended and an award had to be passed within 12 months.

73. It is therefore submitted that the impugned Award ought to have been passed within a period of 12 months of the date of reference as per the provision as it stood then. It is further submitted that, subsequent extension of the mandate by orders of the court after the mandate had expired or further extension due to <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 outbreak of Covid-19 Pandemic and the decision of the Hon'ble Supreme Court would not cure the irregularity as no order was obtained for extending the mandate of the learned Arbitrator after the expiry of 12 months as per the provisions of Section 29A of the Arbitration and Conciliation Act, 1996.

Discussion on merits

74. I have considered the arguments advanced by the learned counsel for the Award Holder, Award Debtor No.1 and learned Senior Counsel for the Award Debtor No.2. I have also perused the Impugned Order passed by the Arbitral Tribunal on 29.12.2020 as corrected vide Order dated 17.02.2021 and the pleadings and the documents.

75. Although this Court is not sitting as an Appellate Court under Section 34 of the Arbitration and Conciliation Act, 1996 against an Award impugned before it and is not expected to re-appreciate the evidence, however to arrive at a conclusion as to whether the Award Holder had made out a case or whether the respective Award Debtors had made out a case, Court also has to examine all the exhibits including the pleadings and the orders that came to be passed both by the Arbitral Tribunal and by this Court during the long course of litigation <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 between the parties hereto starting with filing of O.P.No.592 of 2015 by the Award Holder for appointment of an Arbitrator.

76. Impugned Award records that an Order was passed on 31.12.2015 in O.P.No.592 of 2015, whereby the learned Arbitrator was appointed as the Sole Arbitrator. However, the pleadings and documents indicate that the said Order was passed on 18.12.2015, which stands confirmed in Order dated 17.12.2019 in A.No.9670 of 2019 in O.P.No.592 of 2015 extending the mandate of the Arbitral

Tribunal. The Impugned Award also records that the first and the preliminary meeting of the Arbitral Tribunal was held on 23.02.2016.

77. By the time first and the preliminary meeting of the Arbitral Tribunal was held on 23.02.2016, Section 29A of the Arbitration and Conciliation Act, 1996 had been inserted by Act 3 of 2016 with retrospective effect from 23.10.2015.

78. As per Explanation to Section 29A of the Arbitration and Conciliation Act, 1996, as it stood then, the Arbitral Tribunal is deemed to have entered upon reference on the date on which the Arbitrator or all the Arbitrators as the case may be have received the notice in writing all their appointment. Thus, it would be in fact prior to 23.02.2016, the said date being the first date of sitting before [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) the Arbitral Tribunal.

79. As per Section 29A(1) of the Arbitration and Conciliation Act, 1996, inserted by Act 3 of 2016 with retrospective effect from 23.10.2015, the impugned Award ought to have been passed within 12 months from the date of reference. The records also reveal that the pleadings were completed on 23.12.2017 long after the period of limitation prescribed for making an award had expired. Pursuant to Order dated 06.08.2018 of the Arbitral Tribunal, amended claim was filed on 20.08.2018 by the Award Holder splitting the consolidated claim of Rs.32,29,69,412/- against Award Debtor No.1 and Award Debtor No.2 into Rs.12,36,99,851/- and Rs.19,92,69,561/- respectively as mentioned in Table II of this Order.

80. Even when the amended claim dated 20.08.2018 was filed before the Arbitral Tribunal, the limitation for passing the Award in terms of Section 29A of the Arbitration and Conciliation Act, 1996, as inserted for the first time vide Section 15 of the Act 3 of 2016 with retrospective effect from 23.10.2015 had expired.

[https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021)

81. However, unmindful of the same, all the parties including the Arbitral Tribunal continued with the arbitral proceedings without expressly extending the mandate as is contemplated under Sub-Section (3) to Section 29A of the Arbitration and Conciliation Act, 1996 as inserted vide Section 15 of the Act 3 of 2016 with retrospective effect from 23.10.2015.

82. Since, the Arbitral Tribunal had also failed to note the same and continued with the arbitral proceedings, it has to be therefore construed that there was an implied consent to the Arbitral Tribunal to continue with the Arbitral Proceedings by all the parties.

83. During the interregnum, Section 29A of the Arbitration and Conciliation Act, 1996 was also amended vide Section 6A(1) of the Act 33 of 2019 with effect from 30.08.2019.

84. As per the amended Section 29A of the Arbitration and Conciliation Act, 1996 with effect from 30.09.2019, an Award had to be made within a period of 12 months from the date of completion of

the pleadings under Section 23(4) of the Arbitration and Conciliation Act, 1996. [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021)

85. Earlier the outer limit for passing the Award was 12 months from the date of Arbitral Tribunal entering upon reference. After the Arbitral Tribunal allowed the Award Holder to file a revised claim vide Order dated 06.08.2018, it has to be construed that the delay in making of the Award, if any, was condoned by all the parties as the trials commenced after the revised claim was filed 20.08.2018.

86. Thereafter, the Award Holder also filed A.No.9670 of 2019 in O.P.No.592 of 2015 for extending the mandate of the Arbitral Tribunal. The Court passed its Order on 17.12.2019 in A.No.9670 of 2019 in O.P.No.592 of 2015. Relevant portion of the said Order dated 17.12.2019 is extracted as follows:-

“3. There is no dispute or contestation between the three learned counsel that the arbitral proceedings by the sole Arbitrator is underway and that there was already one extension of time by six months (Post 12+6=18 months) vide order dated 21.02.2019 made in A.No.1425 of 2019.

4. Notwithstanding the consensus amongst the three learned counsel, for the sake of stating the correct legal position, this Court deems it appropriate to make it clear that this petition is predicated on the basis that 23.02.2016 is the [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) reckoning date for computing the timelines statutorily prescribed in Section 29A. A perusal of the affidavit filed in support of the instant application, more particularly Paragraph 3, reveals that 23.02.2016 is the date on which Hon'ble sole Arbitrator held a preliminary meeting. This is plainly incorrect owing to the language in which Section 29A(1) is couched.

Section 29A (1) as it stood prior to 30.08.2019 makes it clear that the reckoning date is the date on which the Arbitral Tribunal enters upon reference. The expression 'arbitral tribunal entered upon reference' has also been explained by way of an explanation to sub-section (1) of Section 29A and the explanation makes it clear that the date on which the arbitrator receives in writing notice of his appointment will be the reckoning date. In the instant case, the date on which the Hon'ble Arbitrator received the order dated 18.12.2015 made by this Court in O.P.No.592 of 2015 is the reckoning date. That date is not readily available with all the three learned counsel, but there is no dispute that 18 months, even if computed from that date has elapsed and six months extension also has elapsed necessitating the instant application. It is submitted that arbitration was elaborate and this reason for seeking extension is articulated in the affidavit by inter alia adverting to intervening collateral proceedings.

5. Having perused the affidavit filed in support of the instant application, having heard all three learned counsel and having been [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) satisfied that there is a case for extension of time for Arbitral Tribunal to make the

award, instant application is ordered extending the time upto 30.06.2020 for the Hon'ble Arbitrator to make award"

87. The above Order dated 17.12.2019 was also not challenged before the Division Bench of this Court by the Award Holder No.2. Further, not only the Award Debtor No.2 but also Award Debtor No.1 and Award Holder had acquiesced into arbitral Proceedings, unmindful of the amendments brought to the Arbitration and Conciliation Act, 1996 vide Section 6A(1) of the Act 33 of 2019 with effect from 30.08.2019. Thus, the impugned Award was to be passed later by 30.06.2020. However, lockdown was imposed with effect 24.03.2020 due to outbreak of Covid-19 pandemic.

88. The Hon'ble Supreme Court suo moto came to the rescue of all concerned by passing its Order in Writ Petition No.(Civil No.3 of 2020) first on 23.03.2020. The said Order was extended from time to time. Thus, the time for passing the Award stood extended by a series of Orders of the Hon'ble Supreme <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Court. The last Order was passed on 10.01.2022 by the Hon'ble Supreme Court, which extended the time up to 28.02.2022.

89. The Arbitral Tribunal had also specifically observed at Para 4 in Pages 9-10 (Corrected Award) that by an Order dated 10.07.2020, the Hon'ble Supreme Court had specifically extended the time limit for passing an Arbitral Award under Section 29(A). Thereafter, the Impugned Award was passed on 29.12.2020. The said Award was corrected under Section 33(3) of the Arbitration and Conciliation Act, 1996 on 17.02.2021.

90. Thus, it is not open for Award Debtor No.2 to state that the Arbitral Tribunal has passed the Award long after its mandate had expired in accordance with Section 29A of the Arbitration and Conciliation Act, 1996 as it stood.

91. It has to be construed that the proceedings before the Arbitral Tribunal were regular and within the four corners of law and therefore, to that extent the challenge to the Impugned Award by the Award Debtor No.2 viz., Petitioner in Arb.O.P.(Com.Div.) No.275 of 2021 is liable to be rejected. Therefore, the preliminary objection of the Award Debtor No.2 to the Impugned <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Award is overruled.

92. I shall now deal with the merits and the preliminary objection of the Award Debtor No.1 viz., Petitioner in Arb.O.P.(Com.Div.) No.138 of 2021.

93. As mentioned above, the claim of the Award Holder before the Arbitral Tribunal was bifurcated into two separate claims for a sum of Rs.12,36,99,851/- against Award Debtor No.1 and Rs.19,92,69,561/- against Award Debtor No.2, for a total claim of Rs.32,29,69,412/- pursuant to the Order dated 06.08.2018 of the Arbitral Tribunal.

94. The claim of the Award Holder under the revised claim itself on the principal amount was for a sum of Rs.9,51,41,139/- against Award Debtors No.1 and 2 are detailed below:-

TABLE-VI Claim Nature of Claim Against 1st Against 2nd Total Claim No.
Respondent Respondent 1(A) Clearance of pending Bills Rs.1,02,96,430/- -

Clearance Dishonoured Cheques	of	-	Rs.8,48,97,70
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<https://www.mhc.tn.gov.in/judis>

Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021

95. Rest of the claims are towards interest on delayed payments, compensation over reduced part of work, compensation towards mobilization charges on deprived part of work etc.

96. As per Tripartite Agreement for the work already completed by Award Holder, Award Debtor No.2 agreed to pay the following amounts:-

TABLE-VII Month August October November December January February March
April 2012 2012 2012 2012 2013 2013 2013 2013 Amount 1.31 1.31 1.31 1.31 1.33 1.92
payable by PDCs (Rs.Cr) Tranche 2.00 Corresponding to the progress of work and
value of work done; payments Basis terms of the Contractor Principal Agreement
payable on invoicing

97. Table VII contemplates a payment of Rs.2,00,00,000/- to be paid as tranche payment, on invoicing by the Award Holder. On 10.09.2012, a sum of Rs.2,00,77,911/- was also transferred to the Award Holder by Award Debtor No.2.

98. Notwithstanding the aforesaid amount of Rs. 2,00,77,911/-, the Table <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 VII also specifies payment of a sum of Rs.8.49 Crores (1.31+1.31+1.31+1.31+1.33+1.92) as contemplated by Clause 3 of the Tripartite Agreement dated 24.08.2012.

99. It is an admitted fact that the Award Debtor No.2 has also issued the following five post dated cheques under Ex.66 Covering Letter dated 06.09.2012 drawn on Union Bank of India to the Award Holder.

TABLE-VIII Sl.No. Date Cheque No. Name of Bank Amount (In Rs.) 1 15.11.2012 167911 United Bank of 13,100,000 India 2 15.12.2012 167912 United Bank of 13,100,000 India 3 15.01.2013 167913 United Bank of 13,100,100 India 4 15.02.2013 167914 United Bank of 13,100,000 India 5 15.03.2013 167915 United Bank of 13,300,000 India

100. These cheques were dishonored by Award Debtor No.2. There is no dispute that no payments have been made on these dishonored cheques from Award Debtor No.2 to Award Holder.

101. Independent of the above, a sum of Rs.3,81,99,311/- as mentioned <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 in Table No.V were paid on various dates by the Award Debtor No.2 to Award Holder. The amount of Rs.3,81,99,311/- was the amount withheld by the Award Debtor No.1 and was paid by the Award Debtor No.2. It matches with the total amount that was due as on the date of Tripartite Agreement dated 24.08.2012 from the Award Debtor No.2 in terms of Ex C37/86 dated 30.10.2012. In Ex C37/86 dated 30.10.2012, the Award Debtor No.2 had categorically admitted that the balance payment after considering the post dated cheques was Rs.3,72,99,775/-. Payment of Rs.3,81,99,311/- were made thereafter on various dates as in Table V.

102. Attempt of the Award Debtor No.2 before this Court that it has paid a sum of Rs.5,82,77,222/- (Rs.2,00,77,911/- + Rs.3,81,99,311/-) thus has to fail. The amount of Rs.3,81,99,311/- was paid by Award Debtor No.2 to the Award Holder towards the amount withheld from the billed work up to the date of signing of the Tripartite Agreement dated 24.08.2012. However, the contention of the Award Debtor No.2 that there is no discussion in the Impugned Award regarding the payment of Rs.2,00,77,911/- to the Award Holder for a sum of Rs.2,00,77,911/-, is valid.

103. That apart, at Para 18 in Page 20 of the Impugned Award (Corrected Award), the Arbitral Tribunal had computed the amount receivable as <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Rs.13,70,53,355/- ('Due amount' under Ex C-87) from Award Debtor No.1. The Arbitral Tribunal has proceeded to adjust an amount of Rs.9,42,91,093/- paid by Award Debtor No.1 to Award Holder. The Arbitral Tribunal has further adjusted a sum of Rs.3,81,99,311/- paid by the Award Debtor No.2, to arrive at the balance payable to the Award Holder. Relevant portion of Para 18 in Page 20 of the impugned Award (Corrected Award) reads as under:-

18.....The claimant has also filed a tabulation with regard to claim of pending bills against the 1s respondent. This statement which is labelled as 'Statement after tripartite agreement', reflects the bill dated 13.10.2012 to the bill dated 22.01.2014. After the invoice amount there is an additional column under the heading 'Amount to be added to offset the balance amount(B)' and the total is shown as Rs. 1,44,60,991/- which is the corresponding amount shown as 'Proportionate release of recovered mobilisation charge' at Pg.3 of Vol-10. Adding this amount the 'New Gross Bill' of Rs. 15,41,02,705/-, the total recoveries is shown as Rs. 1,70,49,350/-, the amount receivable is shown as Rs.13,70,53,355/- and the amount received from 1st respondent is shown as Rs.9,42,91,093/- and the amount received from MARG is shown as Rs.3,81,99,311/- and the total outstanding is shown as Rs.45,62,951/-. In the bottom of the statement the total outstanding is shown as Rs. 45,62,951+Rs.57,33,472/-, which is the retention amount and the total Rs.1,02,96,423/-. This amount is claimed under Claim No.1 as Clearance of pending bills against the 1st respondent.....

<https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021

104. If the total adjustment of Rs.13,24,90,404/- (Rs.9,42,91,093/- + Rs.3,81,99,311/-) was correct, the balance to be paid by the Award Debtor No.1 towards the Award Holder should have been restricted to only Rs.45,62,951/-. However, the Arbitral Tribunal has awarded a sum of Rs.57,33,472/-. The explanation in Paragraph 18 at Page 20 is completely misleading and fallacious. The Arbitral Tribunal has fallen to the trap of Confirmation Bias at Para 18 in page 20 of the Award.

105. Thus, a sum of Rs.3,81,99,311/- paid by the Award Debtor No.2 to Award Holder which was paid outside of the scope of Tripartite Agreement dated 24.08.2012 has been set off in the Impugned Award against the amount due from the Award Debtor No.1 to the Award Holder by the Arbitral Tribunal in the Impugned Award.

106. Thus, there is no consistency in the impugned Award and the Impugned Award passed by the Arbitral Tribunal is unintelligible. The impugned Award has also failed to discuss the payment of Rs.2,00,77,911/- received by the Award Holder from the Award Debtor No.2. The impugned Award appears to have wrongly set off the aforesaid amount of Rs.3,81,99,311/- paid by the Award Debtor No.2 to Award Holder outside the Tripartite <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 Agreement dated 24.08.2012 against the liability of Award Debtor No.1. The aforesaid amount of Rs.3,81,99,311/- was due to Award Holder from Award Debtor No.2 under Contract Principal Agreement signed between them and was outside the Tripartite Agreement dated 24.08.2012.

107. That apart, the Arbitral Tribunal in response to Section 16 Application filed by the Award debtor No.2 in its order dated 29.04.2019 had stated that Orders will be passed in the main claims itself as to whether it will decide claims arising out of the Tripartite Agreement date 24.08.2012 and/or claims prior to the said date. However, it has not given a clear finding on merits in the Impugned Award on this issue.

108. These aspects ought to have been properly discussed chronologically in the Impugned Award. Therefore, the conclusion in the Impugned Award that a sum of Rs.3,81,99,311/- paid by the Award Debtor No.2 towards the liability of Award Debtor No.1 appears to be an incorrect and an improbable conclusion on facts and this would amount to patent illegality in terms of the decision of the Hon'ble Supreme Court in Ssangyong Engineering & Construction Co. Ltd Vs. National Highway Authority of India (NHAI) AIR 2019 SC 5041. <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021

109. Since, the Arbitral Tribunal has also failed to note that the Award Debtor No.2 had also paid a sum of Rs.2,00,77,911/- on 10.09.2012 immediately after Tripartite Agreement was signed on 24.08.2012, which ought to have been discussed in the Impugned Award, the challenge to the Impugned Award by the Award Debtor No.2 is meritorious to that extent. Thus, Arb.O.P.(Com.Div.) No.275 of 2021 qua Award Holder, is liable to be allowed to that extent.

110. The Arbitral Tribunal had dismissed Claim 1(B) of the Award Holder in Table II, against the Award Debtor No.2, towards interest on delayed payments for lack of stipulation to that effect under the terms of the Tripartite Agreement dated 24.08.2012. However, in terms of section 31(7) of the Arbitration and Conciliation Act, 1996 only in absence of a contract to the contrary, the Arbitral Tribunal would not be inhibited from granting interest on delayed payments.

111. The Arbitral Tribunal had also dismissed claims 4, 5 & 7 of the Award Holder in Table II, against the Award Debtor No.2, towards compensation under the relevant heads. However, in terms of Section 73 of the Indian Contract Act, 1872, the Arbitral Tribunal is well within its powers to <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 grant compensation for any loss or damage which are neither remote nor indirect.

112. These aspects have not been considered by the Arbitral Tribunal. Therefore, to that extent, the Impugned Award of the Arbitral Tribunal has to be held in conflict with the fundamental policy of Indian law and liable to be set aside. Thus, Arb.O.P.(Com.Div.) No.132 of 2021 qua Award Debtor No.2 is liable to be allowed to that extent.

113. All though, the Award Debtor No.1 has been directed to pay a sum of Rs.57,33,472/-, the Court is of the view that in the light of the subsequent development under the Insolvency and Bankruptcy Code, 2016 before the NCLT, content of which has been mentioned above, the claim of the Award Holder against Award Debtor No.1 has to fail, in terms of the decision of the Hon'ble Supreme Court in Ghanshyam Mishra and Sons Private Ltd through the authorised signatory Vs. Edelweiss Asset Reconstruction Company Ltd through the Director and others, (2021) 9 SCC 657.

114. The Hon'ble Supreme Court in Ghanshyam Mishra (supra) held that on the date of approval of resolution plan by the adjudicating authority, all <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan. Relevant part of the decision of the Hon'ble Supreme Court of India reads as under:-

"61. It could thus be seen that one of the dominant objects of the I&B Code is to see to it that an attempt has to be made to revive the corporate debtor and make it a running concern. For that, a resolution applicant has to prepare a resolution plan on the basis of the information memorandum. The information memorandum, which is required to be prepared in accordance with Section 29 of the I&B Code along with Regulation 36 of the Regulations, is required to contain various details, which have been gathered by RP after receipt of various claims in response to the statutorily mandated public notice. The resolution plan is required to provide for the payment of insolvency resolution process costs, management of the affairs of the corporate debtor after approval of the resolution plan; the implementation and supervision of the resolution plan. It is only after the adjudicating authority satisfies itself that the plan as approved by CoC with the requisite voting share of financial creditors meets the requirement as referred to in sub-section (2) of Section 30, grants its approval to

it. It is only thereafter that the said plan is binding on the corporate debtor as well as its employees, members, creditors, guarantors and [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) other stakeholders involved in the resolution plan. The moratorium order passed by the adjudicating authority under Section 14 shall cease to operate once the adjudicating authority approves the resolution plan. The scheme of the I&B Code therefore is, to make an attempt, by divesting the erstwhile management of its powers and vesting it in a professional agency to continue the business of the corporate debtor as a going concern until a resolution plan is drawn up. Once the resolution plan is approved, the management is handed over under the plan to the successful applicant so that the corporate debtor is able to pay back its debts and get back on its feet.

67. Perusal of Section 29 of the I&B Code read with Regulation 36 of the Regulations would reveal that it requires RP to prepare an information memorandum containing various details of the corporate debtor so that the resolution applicant submitting a plan is aware of the assets and liabilities of the corporate debtor, including the details about the creditors and the amounts claimed by them. It is also required to contain the details of guarantees that have been given in relation to the debts of the corporate debtor by other persons. The details with regard to all material litigation and an ongoing investigation or proceeding initiated by the Government and statutory authorities are also required to be contained in the information memorandum. So also the details regarding the number of workers and employees and liabilities [https://www.mhc.tn.gov.in/judis Arb.O.P.\(Com.Div.\) Nos.132, 138 and 275 of 2021](https://www.mhc.tn.gov.in/judis Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021) of the corporate debtor towards them are required to be contained in the information memorandum.

68. All these details are required to be contained in the information memorandum so that the resolution applicant is aware as to what are the liabilities that he may have to face and provide for a plan, which apart from satisfying a part of such liabilities would also ensure, that the corporate debtor is revived and made a running establishment. The legislative intent of making the resolution plan binding on all the stakeholders after it gets the seal of approval from the adjudicating authority upon its satisfaction, that the resolution plan approved by CoC meets the requirement as referred to in sub- section (2) of Section 30 is that after the approval of the resolution plan, no surprise claims should be flung on the successful resolution applicant. The dominant purpose is that he should start with fresh slate on the basis of the resolution plan approved.

90. The law laid down in Zile Singh [Zile Singh v. State of Haryana, (2004) 8 SCC 1] has been subsequently followed in various judgments of this Court, including in CIT v. Gold Coin Health Food (P) Ltd. [CIT v. Gold Coin Health Food (P) Ltd., (2008) 9 SCC 622] (three-Judge Bench).

102.1. That once a resolution plan is duly approved by the adjudicating authority under sub-section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 and will be binding on the corporate debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other stakeholders. On the date of approval of resolution plan by the adjudicating authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan."

115. In fact, earlier also, the Hon'ble Supreme Court in Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta and Ors., (2020) 8 SCC 531, held that a successful resolution applicant cannot suddenly be faced with undecided claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. Relevant portion of the decision of the Hon'ble Supreme Court reads as under:-

"107. For the same reason, the impugned NCLAT judgment in holding that a claim that may exist apart from those decided on merits by the resolution professional and by the Adjudicating Authority/Appellate Tribunal can now be decided by an appropriate forum in terms of Section 60 <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 (6) of the Code, also militates against the rationale of Section 31 of the Code. A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor.

This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. For these reasons, NCLAT judgment must also be set aside on this count."

116. The Calcutta High Court in the case of Sirpur Paper Mills Limited Vs. I.K.Merchants Pvt Ltd (formerly Known as I.K.Merchants) has also followed the above views of the Hon'ble Supreme Court of India.

117. The Arbitral Tribunal although may have restricted the Award amount to Rs.57,33,472/- against Award Holder No.1, instead of Rs.1,02,96,430/-, the claims are not enforceable against Award Holder No.1, in the light of the provisions of the Insolvency and Bankruptcy Code, 2016 and the <https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 interpretation of Hon'ble Supreme Court in Ghanshyam Mishra (supra) and Essar Steel India Limited (supra). Thus, Arb.O.P.(Com.Div.) No.132 of 2021 qua Award Debtor No.1 is liable to be dismissed to that

extent.

118. Thus, the conclusions in the Impugned Award are both incorrect and improbable on the facts of the case, and have therefore resulted in patent illegality susceptible to a valid challenge by all the parties hereto.

119. In the result:-

i. Arb.O.P.(Com.Div.) No.132 of 2021 is allowed to the extent it ignores various amounts claimed by the claimant against Award Debtor No.2 in Claim Nos.1(A), 4, 5 & 7 in Table II.

ii. Arb.O.P.(Com.Div.) No.275 of 2021 is allowed as the Impugned Award suffers from patent illegality insofar as it fails to discuss the fallout of the Order dated 29.04.2019 under Section 16 application and the payment of Rs.2,00,77,911/- made by the Award Debtor No.2 to the Award Holder.

<https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021

iii. Arb.O.P.(Com.Div.) No.138 of 2021 is allowed in the light of the subsequent development under the provisions of the Insolvency and Bankruptcy Code, 2016 and in the light of the judgments of the Hon'ble Supreme Court in Essar Steel India Limited (Supra) and Ghanshyam Mishra and Sons Private Limited (Supra).

iv. No costs. All the connected applications are closed.

14.10.2024 Index : Yes/No Internet : Yes/No Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No rgm/nst C.SARAVANAN, J.

<https://www.mhc.tn.gov.in/judis> Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 rgm/nst
Pre-Delivery Order in Arb.O.P.(Com.Div.) Nos.132, 138 and 275 of 2021 and A.Nos.3167 and 4635 of
2021 and A.Nos.4217 and 4219 of 2023 14.10.2024 <https://www.mhc.tn.gov.in/judis>