S.Vasudevan vs G.N.Pandian on 21 August, 2024

Author: C.Saravanan

Bench: C.Saravanan

Arb.O.P(Com.Div)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On 28.03.2024
Pronounced On 21.08.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.) No.574 of 2023
and
E.P.No.82 of 2022
and
A.Nos.5749, 397, 398, 753, 4639 and 6616 of 2023 and 1853 of 2024

1.S.Vasudevan
2.Ozone Projects Private Limited,
No.63, G.N.Chetty Road,
T.Nagar, Chennai – 600 017. ... Petition

Vs.

G.N.Pandian ... Responde

Prayer: Original Petition is filed under Section 34(2)(iv) of the Arbitr
Conciliation Act, 1996, praying to set aside the Arbitral Award dated
12.03.2022 passed by the Hon'ble Tribunal and grant cost of the present
Original Petition.
Arb.O.P.(Com.Div.) No.574 of 2023:

For Petitioners : Mr.Nikhil Sakhardande
Senior Counsel
Assisted by Mr.Chandramouli Prabhaka

For Respondent : Mr.S.Thangasivan

A.No.5749 of 2023 in E.P.No.82 of 2022

For Applicant : Mr.T.Mohan
Senior Counsel
for Mr.R.Bharanidharan

For Respondents : Mr.Nikhil Sakhardande
Senior Counsel
Assisted by Mr.Chandramouli Prabhaka

ORDER

After the case was reserved on 28.03.2024, the Award Debtors have filed additional typed set of case laws consisting of 391 pages together with a written submissions/arguments both dated 09.08.2024 and was received by the Court on 16.08.2024. It also bears the signature of the counsel for the Award Holder.

2. There are multiple proceedings that are pending at the behest of the Award Debtors and the Award Holder. They are represented by their respective Senior Counsel and counsel.

3. These proceedings emanates from an Arbitral Award dated 12.03.2022 passed by the Arbitral Tribunal. E.P.No.82 of 2022 is prior in time. E.P.No.82 of 2022 has been filed for enforcing the Arbitral Award dated 12.03.2022. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

4. Arb.O.P.(Com.Div.) No.574 of 2023 has been filed under Section 34(2)(iv) of the Arbitration and Conciliation Act, 1996 by the Debtors to set aside the impugned Arbitral Award dated 12.03.2022 passed by the Arbitral Tribunal and for cost of the present Original Petition.

5. E.P.No.82 of 2022 has been filed under Order XXI Rules 30, 32 and 5 of the Code of Civil Procedure, 1908, to order arrest of the Award Debtors.

6. Applications have been filed both by the Award Holder, the petitioner in E.P.No.82 of 2022 and by the Award Debtors in Arb.O.P.(Com.Div.) No.574 of 2023. These applications are categorized as under:-

E.P.No.82 of 2022	Arb.O.P.(Com.Div.) No.574 of 2023	Award Holder	Award Debtor
A.No.753 of 2023 in A.No.397 of 2023	A.No.6616 of 2023 in in E.P.No.82 of 2022:		
Arb.O.P.(Com.Div.) No.574 of 2023:			
To vacate the interim order dated 25.01.2023 in A.No.397 of 2023 in E.P.No.82 of 2022	To grant stay of the Arbitral Award dated 12.03.2022 passed by the Tribunal.		

E.P.No.82 of 2022.

A.No.5749 of 2023 in A.No.753 of 2023 in E.P.No.82 of 2022:

To punish the respondent/Judgment Debtor for disobeying the order dated 20.04.2023 passed in A.No.753 of 2023 in E.P.No.82 of 2022.

A.No.1853 of 2024 in A.No.5749 of 2023 in A.No.397 of 2023 in E.P.No.82 of 2022:

https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 E.P.No.82 of 2022 Arb.O.P.(Com.Div.) No.574 of 2023 To order payment out of sum of Rs.4,00,00,000/- (Rupees four crores only) deposited by the respondents to the account of E.P.No.82 of 2022 as per the orders of this Court dated 02.01.2024 in Application Nos.5749 of 2023 etc., and to direct the Registry to release and pay the said sum of Rs.4,00,00,000/-

(Rupees four crores) in favour of the applicant.

A.No.4639 of 2023 in A.No.397 of 2023 in E.P.No.82 of 2022:

To grant prohibitory order prohibiting the respondents/Judgment Debtors from alienating or encumbering the petition schedule mentioned apartments/undivided share of land.

in E.P.No.82 of 2022:

To grant interim stay of all further proceedings in E.P.No.82 of 2022 pending disposal of A.No.397 of 2023.

A.No.398 of 2023 in E.P.No.82 of 2022:

To set aside the order dated 04.01.2023 passed by the learned Master in E.P.No.82 of 2022.

7. A.No.5749 of 2023 has been filed under Order XXXIX Rule 2A of the Code of Civil Procedure, 1908, to punish the Judgment Debtor for willfully disobeying the order dated 20.04.2023 passed by this Court in A.No.753 of 2023 in E.P.No.82 of 2022.

https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

8. A.No.397 of 2023 has been filed under Order XIV Rule 8 of the Original Side Rules read with Section 151 of the Code of Civil Procedure, 1908, to grant an order of interim stay of all further proceedings in E.P.No.82 of 2022 pending disposal of this application.

9. A.No.398 of 2023 has been filed under Order XIV Rule 12 of the Original Side Rules read with Section 151 of the Code of Civil Procedure, 1908, to set aside the order dated 04.01.2023 passed by the learned Master in E.P.No.82 of 2022.

10. A.No.753 of 2023 has been filed under Order XIV Rule 10 of the Original Side Rules read with Section 151 of the Code of Civil Procedure, 1908, to vacate the interim order dated 25.01.2023 granted in A.No.397 of 2023 in E.P.No.82 of 2022.

11. A.No.4639 of 2023 has been filed under Order XIV Rule 8 of the Original Side Rules read with Section 151 of the Code of Civil Procedure, 1908, to grant prohibitory order prohibiting the respondents/Judgment Debtors from alienating or encumbering the petition schedule mentioned apartments/undivided share of land.

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12. A.No.1031 of 2023 has been filed under Order XIV Rule 10(i) of the Original Side Rules, to condone the delay of 223 days in re-presenting the Arb.O.P.DR.No.58048 of 2022 and consequentially take the same on record.

13. A.No.6616 of 2023 has been filed under Order XIV Rule 8 of the Original Side Rules read with Section 36(2) and (3) of the Arbitration and Conciliation Act, 1996, to stay the Arbitral Award dated 12.03.2022 passed by the Arbitral Tribunal.

14. A.No.2251 of 2023 has been filed under Order XIV Rule 12 of the Original Side Rules read with Section 151 of the Code of Civil Procedure, 1908, to set aside the order dated 16.03.2023 passed by the learned Master in A.No.1031 of 2023 and to consequentially condone the delay of 223 days in re-presenting the O.P.DR.No.58048 of 2022. A.No.2251 of 2023 was allowed on 03.10.2023 pursuant to which Arb.O.P.(Com.Div.) No.574 of 2023 was numbered.

15. The challenge to the impugned Arbitral Award dated 12.03.2022 by the Award Debtors is primarily on the ground that the impugned Award passed by the Arbitral Tribunal is a nullity inasmuch as the impugned Arbitral Award https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 was passed by the learned Arbitrator appointed by the respondent/Award Holder/the petitioner in E.P.No.82 of 2022/the applicant in A.Nos.5749, 753, 4639 of 2023 contrary to the decision of the Hon'ble Supreme Court in TRF Limited Vs. Energo Engineering Projects Limited, (2017) 8 SCC 377 as reiterated by the Hon'ble Supreme Court in Perkins Eastman Architects DPC and another Vs. HSCC (India) Limited, (2020) 20 SCC 760.

16. In support of the above plea, the learned Counsel for the Award Debtors has placed reliance on the following decisions of the Hon'ble Supreme Court, Hon'ble Delhi High Court, Hon'ble Calcutta High Court, Hon'ble Bombay High Court and that of this Court:-

i. S.N.Prasad, Hitek Industries (Bihar) Limited Vs. Monnet Finance Limited and others, 2010 SCC Online SC 1202.

ii. Sushil Kumar Agarwal Vs. Meenakshi Sadhu and others, (2019) 2 SCC 241.

iii. M/s.Kailash Nath Associates Vs. Delhi Development Authority and another in Civil Appeal No.193 of 2015 (SLP (Civil) No.32039 of 2012) dated 09.01.2015.

iv. Sudhir Gopi Vs. Indira Gandhi National Open University and another in O.M.P.(Comm).No.22/2016 dated 16.05.2017.

v. Umaxe Projects Private Limited Vs. AIR Force Naval Housing Board in O.M.P.(Comm).No.469/2023 dated 01.12.2023.

vi. MAN Industries (India) Limited Vs. Indian Oil Corporation Limited https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 in O.M.P.(Comm).No.252/2018 and I.A.No.13103/2022 dated 01.06.2023.

vii. Cholamandalam Investment and Finance Company Limited Vs. Amrapali Enterprises and another in E.C.No.122 of 2022 dated 14.03.2023.

viii. Naresh Kanayalal Rajwani and others Vs. Kotak Mahindra Bank Limited and another in Comm.Arbitration Petition (L) No.1444 of 2019 dated 23.11.2022.

ix. Prime Store, Represented by its Partner, S.Kaarthi and others Vs. Sugam Vanijya Holdings Private Limited and others, 2023 SCC Online Mad 2898.

x. SCM Silks Private Limited, Represented by its Director, K.Sivalingam and another Vs. Sugam Vanijya Holdings Private Limited and others, 2023 SCC Online Mad 2898.

xi. K.K.S.Travels, Represented by its Proprietor and another Vs. M/s.Indus Ind Bank Limited, Represented by its Executive-Legal, T.Nagar, Chennai in Arb.O.P.(Com.Div.) No.66 of 2023 dated 13.06.2023.

xii.Moniva Sarkar Vs. M/s.Kotak Mahindra Bank Limited, Represented by its Authorised Signatory, Egmore, Chennai in Arb.O.P.(Com.Div.) No.84 of 2023 dated 21.06.2023.

xiii. Mrs.L.Thirupurasundari, Represented by her Power Agent Vs. Mrs.A.Devi in Arb.O.P.No.1 of 2023 dated 03.01.2024.

17. That apart, the learned Senior Counsel for the petitioners would submit that the impugned Arbitral Award dated 12.03.2022 making the Director of the Award Debtor/the second petitioner in Arb.O.P.(Com.Div.) No.574 of https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 2023 liable to Award Holder, is contrary to law.

18. The learned Senior Counsel for the Petitioner further submits that the Arbitral Tribunal has failed to consider that the Construction Agreement dated 02.03.2006 which contains an Arbitration Clause, which forms the basis of the arbitration initiated by the Award Holder. It is submitted that Mr.Vasudevan Award Debtor/first petitioner is not a party to the said Construction Agreement.

Therefore, Mr.Vasudevan Award Debtor/first petitioner was erroneously added as a party to the present arbitration Proceedings. It is therefore submitted that the arbitral proceedings ought to have been terminated for want of Arbitration Clause/Agreement between the parties to it.

19. It is submitted that the first petitioner/Award Debtor in Arb.O.P.(Com.Div.) No.574 of 2023 had signed Agreement dated 02.03.2006 only in his capacity as the Director of the second petitioner/Award Debtor and therefore, the impugned Arbitral Award holding as the first petitioner/Award Debtor the Director of the second petitioner/Award Debtor also liable to pay the Award Holder was liable to be interfered with.

20. The learned Senior Counsel for the Petitioner submits that the said https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Arbitral Award is therefore liable to be set aside as the same is against well settled principle held by the Hon'ble Supreme Court in Associate Builders Vs. Delhi Development Authority, (2015) 3 SCC 49 wherein, the Hon'ble Supreme Court had held that a Petition under Section 34 of the Arbitration and Conciliation Act is liable to be allowed upon when the conclusion is perverse or so irrational that no reasonable person would have arrived at the same.

21. The learned Senior Counsel for the Petitioner further submits that the Arbitral Tribunal failed to appreciate that there is no proof to show that the Tower-V in the subject Project will be constructed on a priority basis.

22. The learned Senior Counsel for the petitioner submits that the Arbitral Tribunal has omitted to provide a specific percentage to compute the Interest payable upon the alleged arrears of compensation from October 2016 to February 2018 i.e., Rs.4.62,00,000/- and stated that the alleged arrears of compensation payable by the second petitioner from October 2016 to February 2018 i.e., Rs.4,62,00,000/- had been satisfied by the substantial amounts remitted by the second petitioner to the respondent's account from the period after February 2018 up to November 2020.

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23. The learned Senior Counsel for the Petitioner relied on Section 61 of the Indian Contract Act, 1872 to observe that the payments made by the second petitioner for the period from February 2018 to November 2020 had satisfied any alleged arrears payable to the respondent for the period from October 2016 to February 2018. Any claim by the respondent beyond this period (October 2016 to February 2018) must necessarily come by way of a separate legal proceedings. Assuming but not conceding that the respondent is entitled to the crystallized amount of Rs.4,62,00,000/-, the learned Arbitrator ought not to have awarded further compensation to the respondent since such relief is violative of the second petitioner's right to challenge the subject matter of the Construction Agreement dated 02.03.2006 which is the very basis of the aforementioned relief.

24. The learned Senior Counsel for the petitioners submits that the Arbitral Tribunal failed to consider that Section 55 of the Transfer of Property Act, 1882 places an obligation on the seller of a property to disclose to the buyer any material defect in the property or in the seller's title thereto of

which the seller is, and the buyer is not, aware, and which, the buyer could not with ordinary care discover.

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25. He further states that the Arbitral Tribunal further failed to appreciate that the respondent in terms of Clause 4 and Clause 5 of the Construction Agreement dated 02.03.2006 has covenanted that the subject land was clear of any defects in title and undertook to indemnify the second petitioner against all/any claims, losses, damages, costs, charges and expenses suffered or may be occasioned or caused to the second petitioner on account of any encumbrance, claim or defect in title of the respondent to the subject land and it is a settled legal principle that a Director of a Company cannot be held liable for any alleged commission/omission of the Company when the said Director exercises fair and reasonable diligence, as reasonably expected from them in the discharge of their duty.

26. The first petitioner has neither (either expressly or impliedly) personally guaranteed the second petitioner's performance under the Construction Agreement nor undertaken to personally indemnify the respondent for any commission/omission of the second petitioner under the Construction Agreement. Hence, the subject arbitral proceedings is not at all maintainable as against the first petitioner.

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27. The Arbitral Tribunal has failed to consider that the second petitioner has made to pay an exorbitant sum of Rs.22,00,000/- as Compensation every month for over 10 years for delay in completion of construction, which delay is solely attributable to the transfer of defective title of the subject land by the respondent and certain other extraneous reasons beyond the control of the second petitioner. The said Clause is unconscionable on the face of it and deserves to be struck down.

28. The second petitioner would have completed the construction of the respondent's carpet area and would have been relieved of its obligation several years ago, if not for the unreasonable compensation payable to the respondent, in support of which, the learned Senior Counsel relies on the dictum laid down by the Hon'ble Supreme Court in Central Inland Water Transport Corporation Limited and Others Vs Brojo Nath Ganguly and Others, AIR 1986 SC 1571, wherein the Hon'ble Supreme Court has held that the Courts will not enforce and will, when called upon to do so, can strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract entered into between the parties who are not equal in bargaining power. The learned Senior Counsel for the petitioners also relied on the dictum laid down by the Hon'ble Punjab & Haryana High Court in M/s.Bharat Enterprises Vs https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Union of India and Others in FAO.No.4290 of 2013, wherein the Hon'ble High Court had followed the ratio laid down by the Hon'ble Supreme Court in Central Inland Water Transport Corporation Limited's case (referred to supra).

29. The learned Senior Counsel for the petitioner states that the Arbitral Tribunal has failed to consider that merely because the subject Construction Agreement makes a reference to the so-called Compensation of Rs.20/- per square feet per month towards the carpet area of 1,10,000 square feet and the respondent does not become straight away eligible or entitled to demand or receive such compensation, which is nothing but liquidated damages, unless the respondent leads evidence to prove the actual damage or loss suffered by him. In the arbitration proceedings, the respondent had not led any evidence whatsoever to prove the alleged loss suffered by him. Therefore, the liquidated damages as claimed by him is not crystallized and does not become payable.

30. The learned Senior Counsel for the petitioner states that the Hon'ble Tribunal has failed to consider that even the voluntary payment of the above Compensation by the second petitioner to the respondent for few years, cannot take away the burden on the respondent to prove the actual loss or damage suffered by him, to become entitled to the liquidated damages found in the https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 subject Construction Agreement.

31. In support of this contention, the learned Senior Counsel relies on the dictum laid down by the Bombay High Court in Raheja universal Pvt. Limited Vs. B.E.Billimoria and Co. Limited, 2016 (3) ABR 637 wherein, the Bombay High Court has held that, if the party, who makes a claim, fails to lead evidence in support of the same, particularly for claiming liquidated damages based upon agreement between the parties, grant of such claim by the Arbitrator, without considering the basic principle of granting such liquidated damages, in the Court's view, is clearly unacceptable.

32. The learned Senior Counsel further relies on the dictum laid down by the Bombay High Court in Hindusthan Petroleum Corporation Limited Vs. Offshore Infrastructure Limited, 2015 (6) Mh. L.J. 287, wherein the Bombay High Court has held that there cannot be any windfall in favour of the respondent to recover the liquidated damages even if no loss is suffered or proved.

33. The learned Senior Counsel for the petitioner submitted that the https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Arbitral Tribunal has failed to consider the dictum laid down by the Hon'ble Bombay High Court in ONGC Limited, Delhi Vs. Oil Country Tubular Limited, Hyderabad, 2011 Vol. 113 (3) L.R. 1417, in support of his contention, that the Court may also direct the parties to lead evidence to confirm that the action of delay amounts to breach of contract and which has caused the damages, and therefore, mere entitlement for a reasonable compensation cannot be equated with the fixed amount and/or maximum amount as per the liquidated damages clause in question and that the burden is always on the parties who claimed compensation to prove actual loss, even for the reasonable compensation.

34. The learned Senior Counsel for the Petitioner submits that the Arbitral Tribunal has failed to consider the dictum laid down by the Hon'ble Supreme Court in Ssangyong Engineering & Construction Co. Ltd. Vs National Highways Authority of India (NHAI), [2019] 7 SCR 522, wherein the Hon'ble Supreme Court has held that, if an Arbitrator gives no reasons for an Award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the Award. That, a finding based on no evidence at all or an Award which ignores vital

evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

35. The learned Senior Counsel for the petitioner submits that the Arbitral Tribunal has failed to consider the dictum laid down by the Hon'ble Supreme Court in Rangammal Vs. Kuppuswami, (2011) 12 SCC 220, wherein, the Hon'ble Supreme Court has held in its discussion involving Section 101 of the Indian Evidence Act, 1872 which defines 'burden of proof', that the burden of proving fact always lies upon the person who asserts and until such burden is discharged, the other party is not required to be called upon to prove his case.

36. The learned Senior Counsel for the petitioner submits that the Arbitral Tribunal has failed to consider the settled principles of law made in M/s.Dyna Technologies Private Limited Vs. M/s.Crompton Greaves Limited, [2019 SCC OnLine SC 1656 wherein, the Hon'ble Supreme Court of India had laid down three characteristics of a reasoned order as 'proper', 'intelligible' and 'adequate' and if the reasoning in the order are improper, they reveal a flaw in the decision making process. If the challenge to an Award is based on impropriety or perversity in the reasoning, then it can be challenged strictly on the grounds provided under Section 34 of the Arbitration Act. If the challenge to an Award is based on the ground that the same is unintelligible, the same would be equivalent of providing no reasons at all. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

37. The learned Senior Counsel for the petitioner submitted that the Arbitral Tribunal has failed to consider that the delay in construction and handover of 1,10,000 sq.ft. of carpet area to the respondent was solely on account of circumstances beyond the first petitioner and the second petitioner's control. It is an indisputable fact that after the second petitioner had purchased the subject property from the respondent, one Mr.Jaganatha Pandian had interfered at every stage of the approval and registration process pertaining to the subject property by filing multiple litigations as against the second petitioner. In support of his contention, the learned Senior Counsel for the petitioner relied on the dictum laid down by the Hon'ble Delhi High Court in Jaswanth Rai Vs Abnash Kaur, ILR 1974 Delhi 689 wherein, the Hon'ble Delhi High Court had held that it is the duty of the vendor to inform the intending purchaser that the property is subject to a claim which might result in a lawsuit or is the subject of a pending litigation and any fact calculated to keep the purchaser in ignorance of the real state of the property is a defect for which the vendor is liable.

38. In this connection, the learned Senior Counsel for the Award Debtors has placed reliance on the decision of the Hon'ble Supreme Court in https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 S.N.Prasad, Hitek Industries (Bihar) Limited Vs. Monnet Finance Limited and others, 2010 SCC Online SC 1202.

39. The learned Senior Counsel for the Award Debtors has also placed reliance on the decision of the Hon'ble Supreme Court in Bharat Broadband Network Limited Vs. United Telecoms Limited, (2019) 5 SCC 755, to state that there is no impediment for challenging an Award passed without jurisdiction as it is contrary to law laid down by the Hon'ble Supreme Court rendered in TRF Limited case (referred to supra) and Perkins Eastman's case (referred to supra).

40. Finally, the Arbitral Award has also challenged on the ground that the Arbitral Tribunal has awarded liquidated damages to the Award Holder contrary to the decision of the Hon'ble Supreme Court in Kailash Nath Associates case (referred to supra). Specifically, a reference was made to Paragraph 43. It reads as under:-

> "43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:-
>
> Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.
>
> 2. Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.
>
> 3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.
>
> 4. The Section applies whether a person is a plaintiff or a defendant in a suit.
>
> 5. The sum spoken of may already be paid or be payable in future.
>
> 6. The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.
>
> 7. Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 application."

41. The learned Senior Counsel for the Award Debtors would further submit that the Arbitral Tribunal has awarded liquidated damages of Rs.4,62,00,000/-. It is submitted that the liquidated

damages of Rs.4,62,00,000/- is not a reasonable compensation. The learned Senior Counsel for the Award Debtors further submitted that the impugned Arbitral Award is also contrary to Section 14(3)(c) of the Specific Relief Act, 1963. It is submitted that the Arbitral Tribunal has directed "specific performance of contract" when indeed on merits, the Arbitral Tribunal have ordered compensation. Specifically, a reference was made Proviso to Section 14(3)(c) of the Specific Relief Act, 1963, which reads as under:-

> "14. Contracts not specifically enforceable:
>
> (3) Notwithstanding anything contained in clause (a) or clause
>
> (c) or clause (d) of sub-section (1), the court may enforce specific performance in the following cases:-
>
> (a) .....
>
> (b) .....
>
> (c) where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land".

42. It is submitted that the conditions specified in Proviso to Section 14(3)(c) of the Specific Relief Act, 1963 was satisfied and therefore on this count also, the impugned Arbitral Award is liable to be set aside under Section https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 34 of the Arbitration and Conciliation Act, 1996.

43. Mr.T.Mohan, learned Senior Counsel for the Award Holder argued A.No.5749 of 2023. Learned Senior Counsel for the Award Holder submitted that the Award Debtors willfully violated order dated 20.04.2023 of this Court in A.No.753 of 2023 in E.P.No.82 of 2022. By the aforesaid order, this Court had directed the promoter to comply the order passed by the RERA and also directed that the remaining amount of the proceeds shall be utilized for the purpose of construction and completion of the plots including for interiors, which were already sold. It is further submitted that the Reply Affidavit filed on behalf of the Award Debtors in A.No.5749 of 2023 in E.P.No.82 of 2022 contains inaccurate facts.

44. It is submitted that the first petitioner in Arb.O.P.(Com.Div.) No.574 of 2023 signed an Agreement on 02.03.2006 with the Award Holder. The constructions on the land were to be completed within a period of 24 months. Block-V was to be developed and handed over to the Award Holder [the petitioner in E.P.No.82 of 2022 and the applicant in A.Nos.5749, 753, 4639 of 2023] by the Award Debtors.

https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

45. It is further submitted that the affidavit that has been filed by the Director of the Company is incorrect inasmuch as after the orders came to be passed on 20.04.2023 in A.No.753 of 2023 in E.P.No.82 of 2022, several Sale Deeds and Agreements have been executed in willful violation of the order passed by this Court and only a sum of Rs.4,00,00,000/- has been deposited so far pursuant to the latest order passed on 02.01.2024 while condoning the delay in filing Arb.O.P.(Com.Div.) No.574 of 2023.

46. It is submitted that the flat which was ear-marked for the Award Holder has been sold to one M/s.Arshit Housing Private Limited and a sum of Rs.3,01,627/- has been recovered. It is further submitted that a sum of Rs.50,54,50,675/- has been recovered whereas in the affidavit filed on 29.11.2023, it has been stated that only a sum of Rs.2,59,97,823/- has been received. It is further submitted that the Award Debtors who are contemnors have not only willfully violated the order passed by this Court on 20.04.2023 in A.No.753 of 2023 in E.P.No.82 of 2022 but has also resorted to falsehood by giving inaccurate details in the affidavit filed by the first respondent in A.No.5749 of 2023 in E.P.No.82 of 2022.

47. The learned Senior Counsel for the Award Holder would further https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 submit that none of the arguments raised on the validity of the Award quay the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) violating the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) and the decisions of the other High Courts relied on behalf of the Award Debtors are applicable to the facts of the case as the Arbitral Tribunal was constituted with the consent of the parties as is evident from the impugned Arbitral Award dated 12.03.2022.

48. The learned Senior Counsel would draw attention to Paragraph 1 of the Arbitral Award. The learned Senior Counsel for the Award Holder would therefore submit that none of the decisions cited by the learned Senior Counsel for the Award Debtors are irrelevant and therefore would submit that the first respondent in A.No.5749 of 2023 should be held liable for contempt not only for filing a false affidavit but also violating the order of this Court passed on an earlier occasion i.e., on 20.04.2023.

49. It is further submitted that Agreement dated 02.03.2006 was signed by the first Award Debtor namely the first respondent in A.No.5749 of 2023/first petitioner in Arb.O.P.(Com.Div.) No.574 of 2023 [the 1st Award Debtor] and had given an undertaking whereby he agreed to ensure that the validity of the Agreement will not be challenged either by the Award Debtors or https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 its successors and that he and other Directors are jointly and severally be responsible for full compliance of the Terms and Conditions agreed by thereto. It is submitted that the Arbitral Tribunal has also captured Clause 21 of the Agreement dated 02.03.2006. Paragraph 51 of the Arbitral Award dated 12.03.2022 reads as under:-

> “51. Yet another contention that has been raised by the 2nd respondent is that the Agreement dated 02.03.2006 (Ex.C2) contains an Arbitration Clause, which forms the basis of the present Arbitration initiated the Claimant, wherein the 1 st

respondent is not a party. Hence, no relief could be sought from the 1st respondent and he has to be deleted from the proceedings.

To which the claimant contend that the 1st respondent is the Managing Director of the 2nd respondent and in the Agreement dated 02.03.2006 (Ex.C2) it is specifically stated all Directors of the 2nd respondent are jointly responsible for compliance of the terms of contract and hence the relief against the 1 st respondent is maintainable.

This Tribunal considered the rival claims. First of all, the 1 st respondent being the Managing Director of the 2nd respondent has signed (Ex.C2) Agreement. In all further communication between the parties, the 1st respondent signed for 2nd respondent.

That apart Clause 21 of the Agreement (Ex.C2) reads:

"The party of the first part shall ensure that the validity of this agreement shall not be challenged by them or their successors and that the party of the first part and its Directors shall be jointly and severally responsible for the full compliance of all terms and conditions agreed hereto." The 1st respondent being Managing Director of the 2nd respondent who signed the agreement cannot be now heard to say that he has been erroneously added and he should be deleted from the present Arbitration proceedings."

50. It is further submitted that the Award Holder who is the applicant in https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 A.No.5749 of 2023 petitioner in E.P.No.82 of 2022/respondent in Arb.O.P.(Com.Div.) No.574 of 2023 has been deprived of the fruits of the Agreement. It is submitted that the land measuring about 6.16 Acres of the Award Holder was taken over for developing the project and in return the built up area comprised under the Agreement/Ex.C2 dated 02.03.2006 has been given to the respondent/Award Holder.

51. That apart, it is submitted that Tower-V is yet to be completed while other towers are being developed and sold and monitized by the Award Debtors and therefore the Award Debtors are liable to be punished for willful disobedience of the Court's order dated 20.04.2023.

52. Mr.T.Mohan, learned Senior Counsel has explained the history of the case. He would submit that there is no merits in the submission of the Award Debtors in Arb.O.P.(Com.Div.)No.574 of 2023. It is further submitted that the impugned Arbitral Award dated 12.03.2022 is preceded by an earlier Award/Final Award dated 07.12.2016 under the Agreement dated 02.03.2006.

It is further submitted that the aforesaid Agreement is admittedly prior to the amendment to Section 12 of the Arbitration and Conciliation Act, 1996. https://www.mhc.tn.gov.in/judis

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53. Under the Agreement, the Award Debtors agreed to sell the proportionate undivided share for 1,10,000 sq.ft of built up area of a residential carpet area to the Award Holder. It is further submitted that the Award Debtors had however transferred and utilized the entire extent of 6.16 Acres of land of the Award Holder. The Award Debtors were required to pay the balance sale consideration of Rs.30,00,00,000/- (Thirty Crores only). The Award Debtors were required to pay a sum of Rs.37,50,00,000/- but had paid only a sum of Rs.7,50,00,000/- and still there was a balance of Rs.30,00,00,000/- in the form of 1,18,000/- sq.ft of built up area in the proposed building in 2006 in terms of the Agreement dated 02.03.2006.

54. It is further submitted that the petitioners/Judgment Debtors had consolidated approximately Rs.3.7 Crores over 6.16 Acres of land of the Award Holder, but failed to execute the Sale Deed conveying the proportionate land/undivided share of land for 1,10,000 sq.ft., and therefore the Award Holder was constrained to invoke Arbitration Clause which led to Award dated 07.12.2016. It is further submitted that the aforesaid Award was passed with the consent of the parties hereto.

55. Pursuant to the aforesaid Award, the Award Debtors have also https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 executed a Sale Deed dated 18.08.2017 whereby the Award Holder conveying 43,000 sq.ft of UDS of land for Tower-V and had further agreed to convey Tower-F in favour of the petitioners/Judgment Debtors for two flats in Tower-F and Tower-Z.

56. It is further submitted that pursuant to the above, a Joint Memo was also filed before the learned Arbitrator by the parties on 04.10.2018 for an undertaking to take steps to pay Rs.30,00,000/- every month from September 2018 (payable for the month of August 2018) onwards till the obligation of the respondents under the Agreement dated 02.03.2006 were met.

57. The second Award Debtor have handed over a Cheque for Rs.27,00,000/- bearing Cheque No.174493 dated 29.09.2018 drawn on Yes Bank favouring the Claimant (Rs.3,00,000/- has been deducted towards 10% TDS on Rs.30,00,000/-), receipt of which is admitted and acknowledged by the Award Holder the claimant; the second Award Debtor also undertook to initiate steps to mobilize contractors and labourers to expedite the construction of Tower-V within next two months, complete and hand over the Tower-V and other two units to the Award Holder/claimant within 15 months from August 2018 with a further grace period of 3 months, subject to force majeure https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 exceptions. The Award Debtors undertook to give a detailed schedule of work within 6 weeks from this date.

58. The second Award Debtor undertook to construct Tower-V as per the specifications already mutually agreed upon between the parties and set out in the Agreement. Further the Award Debtors undertook to provide proportionate car parking slots to the Award Holder/claimant; The second Award Debtor undertook to execute the sale deed for undivided share of land for Unit F 1603 and Z 1603, the metrozone i.e., M/s.Metrozone Phase 4 Apartment Buyers Association, on or before 30th November 2018. The Award Holder/claimant has extended his co-operation for defending the pending frivolous litigations touching upon the extent of land conveyed by the Award

Holder/claimant to ensure that the Award Debtors were not affected/restricted by any court order in legal proceedings.

59. The said M/s.Metrozone Phase 4 Apartment Buyers Association was impleaded by this Court by an order dated 27.03.2023 in A.No.1473 of 2023 in E.P.No.82 of 2022. There are parallel proceedings initiated by the third respondent namely M/s.Metrozone Phase 4 Apartment Buyers Association under the provisions of the Tamil Nadu Real Estate Regulatory Authority (TNRERA).

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60. Earlier, by an order dated 21.06.2021, the TNRERA was pleased to direct the review meetings would be conducted once in two months until the construction of the project is completed and the apartments are handed over to the respective homebuyers. Following several review meetings over a period of six months thereafter, during which no progress was made on the construction of the Project, the TNRERA Authority directed the third respondent in E.P.No.82 of 2022 and the Award Debtors to arrive at a strategy for completing the construction.

61. Pursuant to the above, the third respondent in E.P.No.82 of 2022 and the Award Debtors submitted a draft Memorandum of Understanding (MoU) with the TNRERA Authority seeking for its approval which was then agreed to as per the Order dated 28.02.2022. Further, the TNRERA Authority had not only sanctioned the MoU, but also directed the Award Debtors to establish a 'no lien' escrow account designated for Phase IV of the Project and to provide the TNRERA Authority with a bank letter confirming the opening of such account. However, the Award Debtors blatantly disregarded the mutually agreed-upon terms of the MoU and acted in an unresponsive manner, which was resulted in persistent delay in the completion of Phase IV of the Project. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

62. With no other recourse available, the third respondent in E.P.No.82 of 2022 was compelled to approach the TNRERA Authority by filing I.A.No.50 of 2022, seeking appointment of a Receiver under Sections 37, 38(2) and 88 of the Real Estate (Regulation and Development) Act, 2016 read with the terms of Order 40 of the Civil Procedure Code, 1980, for the sale of unsold inventories of the Project with the express direction that all proceeds from such sale would be utilized, on a priority basis, for completion of Phase IV of the Project.

63. The TNRERA Authority, on hearing the submissions of the respective counsels appearing for the third respondent in E.P.No.82 of 2022 and the Award Debtor No.2 on 11.01.2023, had directed the parties to file their Written Arguments and the said I.A.No.50 of 2022 was reserved for orders. Further, the TNRERA Authority on the aforementioned date of hearing, had directed the third respondent in E.P.No.82 of 2022 to provide the names of three suitable individuals for the role of a 'Receiver'. As directed, the third respondent in E.P.No.82 of 2022 provided the names of the proposed Receiver to be appointed by the TNRERA Authority, to take charge of the unsold inventories and undertake necessary measures for their sale and to utilize the proceeds for the completion of Phase IV of the Project. The order for I.A.No.50 of 2022 is yet to https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 be released by the TNRERA

Authority.

64. The Judgment Debtors filed A.No.397 of 2023 in subject E.P challenging the order dated 04.01.2023 and sought for an order of interim stay of all further proceedings, pending disposal of A.No.397 of 2023. On 25.01.2023, this Court granted stay and also directed the Award Debtors to earmark a portion of funds whenever flats are sold by them until the payment of the Arbitration Award of Rs.11.85 Crores is made to the Award Holder.

65. Pursuant to the above-mentioned order, the Award Holder filed A.No.753 of 2023 in subject E.P, seeking to vacate the interim stay order. On 08.02.2023, an order was passed by this Court stating as follows:

> "This Court while passing the order on 25.01.2023, based on the submissions made by the Award Debtor, has recorded that the entire property has been mortgaged and no un-encumbered assets are available with the respondent and the learned Master, without taking into consideration of this aspect passed the pro-order. Now, it has been clarified that even though the property has been mortgaged, in terms of Section 55(4) of the Transfer of Properties Act, 1882, the applicant/decree holder will have the first charge over the property with regard to the un-paid sale consideration by the buyer. Under such circumstances, the applicant seeks to vacate the stay order passed against the order of the learned Master on 04.01.2022.
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> 4. In reply, learned counsel appearing for the respondent/judgment debtor would submit that his client will https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 not sell the property. In the event, they intent to sell the property, the 50% of the sale consideration will be kept in a escrow account. He would further submit that, since the property is mortgaged, the entire amount will go to the Bank."
>
> 66. As the Award Debtors deliberately failed to disclose the proceedings before the TNRERA Authority to this Court, the order dated 08.02.2023 passed by this Court was directly affecting the rights granted to the members of third respondent in E.P.82 of 2022 and was contradictory to the order dated 28.02.2022 passed by the TNRERA Authority. To the extent of safeguarding the rights granted to the members of the third respondent in E.P.No.82 of 2022, the third respondent in E.P.No.82 of 2022 approached this Court to implead itself in the subject E.P. On hearing the submissions made by the third respondent in E.P.No.82 of 2022, this Court was pleased to allow the subject application and further directed the Award Holder to amend the cause title of the subject E.P.
>
> 67. During the hearing dated 20.04.2023, the third respondent in E.P.No.82 of 2022 disclosed to this Court regarding the events that had occurred before the TNRERA Authority and the entitlements conferred upon them with respect to the proceeds derived from the sale of the 54 unsold inventories, by referring to the order dated 28.02.2022 passed by the TNRERE Authority. Furthermore, the complied list of 54

unsold inventories present in the https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Project was provided to this Court for ease of reference.

68. On hearing the submissions of the third respondent in E.P.No.82 of 2022, this Court was pleased to affirm the order dated 28.02.2022 passed by the TNRERA Authority. Without any prejudice to the rights of the Award Holder, this Court expressly mentioned that the sale proceeds up to Rs.11.85 Crores derived from the sale of the 54 unsold inventories would be kept separately in a designated escrow account for the purpose of settling the claim amount with the Award Holder and the remaining sale proceeds from the sale of 54 unsold inventories would be utilized for completing construction of the Phase 4 of the project. The operative portion of the order is extracted herein below for this Court's ease of reference.

"3. The above order came to be passed by this Court, since either the applicant or the respondent has failed to bring to the knowledge of this Court about the RERA order dated 28.02.2022. Hence, this Court has passed an order to stay of 50% in escrow until the clearance of a sum of Rs.11.85 cores. In view of the above, it is made clear that 11.85 crores shall be kept separately in escrow account. With regard to the remaining sale proceeds whatever out of 59 flats, the order passed by the RERA would apply and the promoter has to comply the said order and the remaining amount of the proceeds shall be utilized for the purpose of construction and completion of the plots including for interiors which were already sold."

69. Therefore, the Award Holder's rights are confined to the sale proceeds https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 that will be generated from the sale of 54 unsold inventories in the Project and not those that have already been sold by the Award Debtors and paid for by the members of the third respondent.

70. It is pertinent to mention that the flats sold to the members of the third respondent in E.P.No.82 of 2022, who have paid 90-95% of the total consideration, do not fall under the unsold portion of the schedule property as mentioned in the subject E.P and the order dated 20.04.2023 issued by this Court. The sale proceeds derived from the execution of Sale Deeds with the members of the third respondent in E.P.No.82 of 2022 are to be deposited in the 'no lien' escrow account as agreed to by the Award Debtors and the third respondent in E.P.No.82 of 202 in the approved Memorandum of Understanding (MoU) dated 01.03.2022.

71. At this juncture, it is submitted that the third respondent in E.P.No.82 of 2022 does not have any objections towards the portion of the order passed by this Court dated 20.04.2023 in A.No.753 of 2023 concerning the utilisation of 50% of the proceeds from the sale of 54 unsold inventories towards enforcement of the arbitral award i.e., the subject matter of E.P.No.82 of 2022. The balance 50% of receivable from the unsold inventory shall be deposited to the 'no lien' https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 escrow account created under the order dated 28.02.2022 by the TNRERA Authority, which shall be exclusively used for construction and completion of the Project.

72. The contentions were filed in the Memo dated 10.08.2023, to clarify that the order dated 20.04.2023 passed by this Court in A.No.753 of 2023 in E.P.No.82 of 2022 and the order dated 28.02.2022 passed by the TNRERA Authority would not have any bearing or implication with respect to the sold units in favour of the members of the third respondent in E.P.No.82 of 2022. It is imperative to note that these apartments that have been sold a decade ago and shall not be construed as a part of the 54 unsold inventories and the receivables out of the said sold apartments are to be utilised only for the purpose of completion of construction.

73. Mr.T.Mohan, learned Senior Counsel for the Award Holder would submit that under Ex.C2-Agreement dated 02.03.2006, the Award Debtors had agreed to compensate the Award Holder, Rs.20 per sq.ft. for every month for the delay in handing over the built up area beyond the period of 24 months.

74. It is submitted that after expiry of 24 months, the Award Holder was entitled to Rs.22,00,000/- per month in terms of Clause 11 of Ex.C2 Agreement https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 dated 02.03.2006.

75. It is further submitted that pursuant to 1 st Award dated 07.12.2016 and a Joint Memo filed by the parties on 04.10.2018, the aforesaid sum of Rs.22,00,000/- was increased to Rs.30,00,000/- per month from September 2018.

76. However, there were dues for the period prior to signing of the aforesaid Joint Memo before the learned Arbitrator on 04.10.2018 and thus the Award passed by the learned Arbitrator does not call for any interference.

77. As far as the main objection on jurisdiction of the Arbitral Tribunal/learned Arbitrator who passed the Award in the light of the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) in purported violation of the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) and the decisions of the other High Courts are concerned, Mr.S.Thangasivan, learned counsel submits that not only the 1st Award dated 07.12.2016 but also the impugned Arbitral Award dated 12.03.2022 were passed with the consent of the parties. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

78. That apart, it is submitted that in the ground that has been raised before this Court under Section 34 of the Arbitration and Conciliation Act, 1996, there are no grounds raised questioning the jurisdiction of the Arbitration Tribunal in the light of the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) violating the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) and the decisions of the other High Courts as mentioned above.

79. That apart, it is submitted that the Award passed by the learned Arbitrator does not suffer from any of the vices which would entail the Award Debtors to challenge the Award under Section 34 of the Arbitration and Conciliation Act, 1996.

80. It is further submitted that the Agreement-Ex.C2 dated 02.03.2006 containing the Arbitration Clause is prior to amendment to the Arbitration and Conciliation Act, 1996 on 23.10.2015. It is further submitted that the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) is dated 03.07.2017. The 1st Award of the learned Arbitrator is dated 07.12.2016. It is submitted that the said Award dated 07.12.2016 was ultimately passed after the amendment to Section 12 of the Arbitration and Conciliation Act, 1996 with https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 effect from 23.10.2015.

81. It is further submitted that the Jurisdiction of the learned Arbitrator who passed Award dated 07.12.2016 has not been challenged and therefore even on this count also, the challenge to the impugned Award dated 12.03.2022 on the submission made by the learned Senior Counsel for the Award Debtors cannot be countenanced.

82. Mr.T.Mohan, learned Senior Counsel would draw attention to the decision of the Hon'ble Supreme Court in Chennai Metro Rail Administrative Building Vs. Transtonnelstroy Afcons (JV) and another, 2023 SCC Online SC 1370. Specifically, an attention was drawn to Paragraphs 30 and 31, which reproduced below:-

> "30. It is, therefore, evident that the rules for disqualification or ineligibility are fairly clear. The ineligibility which attaches to the appointment is the first category : it is contained in Section 12(1) read with the Explanation and the Fifth Schedule to the Act. As recounted earlier this schedule has 34 items. In the event any of these circumstances exist, the appointment of the arbitrator is barred. The second category is where the arbitrator to start with is eligible but after appointment incurs any, or becomes subject, to any of the conditions, as enumerated in the Fifth Schedule. In that event, it is open to the party to claim that there could be justifiable doubts about his independence or https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 impartiality. The remedy even then, would be that the party has to seek recourse and apply to the arbitrator in the first stance by virtue of Section 13(2). The wording of Section 13(2) clarifies that a party who intends to challenge the arbitrator, after becoming aware of certain circumstances which lead to justifiable doubts, that party has to within 15 days (of becoming aware) approach the Tribunal and seek a ruling. In the event the party is not successful under Section 13(4), the Tribunal is duty-bound to continue with the proceedings. When the award is made, it can be subjected to challenge under Section 34, by operation of Section 13(5). Clearly, then the substantive grounds and the procedure applicable in relation to situations where justifiable reasons exist or arise, for questioning the eligibility of an Arbitral Tribunal to decide the reference are enumerated in Sections 12 and 13.
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> 31. As clarified in HRD [HRD Corpn. v. GAIL, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] , the grounds of ineligibility which would apply at the appointment stage, would also continue during the proceedings by virtue of Section 12(2). In other words, if during the continuance of the proceedings, the arbitrator becomes subject to any eligibility condition outlying in the Fifth Schedule, the application for his removal on

> the grounds of justifiable doubts about his impartiality and independence, can be made.

According to the procedure outlined in Section 13(2) read with Section 12, such a procedure has to first be followed which means that the party should first appear before the arbitrator and object to his continuance. In case of ineligibility which goes to the root of the appointment — and this is the consequence of the introduction of Section 12(5) (which is in emphatic terms and overrides other previous agreements), the arbitrator's relationship with the parties or counsel or the subject-matter of the dispute or the existence of any of the categories of the Seventh Schedule (which are 19 specific enumerated grounds) render that Tribunal ineligible to even continue. The only exception is if the party https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 waives that ineligibility expressly in writing in terms of the proviso to Section 12(5). Per HRD [HRD Corpn. v. GAIL, (2018) 12 SCC 471 : (2018) 5 SCC (Civ) 401] , in that event, the Arbitral Tribunal becomes dejure, unable to perform its functions."

83. It is further submitted that if at all, it was open for the Award Debtors to have filed appropriate application under Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 on the ground that the appointment of the Arbitrator was hit by the ratio of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) and violation of the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) and the decisions of the other High Courts as mentioned above.

84. A reference was also made to the decision of the Hon'ble Supreme Court in Swadesh Kumar Agarwal Vs. Dinesh Kumar Agarwal and others, (2022) 10 SCC 235. A specific reference was made to Paragraph 21, wherein, the Court held as under:-

> "21. Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(a) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 other reasons fails to act without undue delay, the aggrieved party has to approach the "court" concerned as defined under Section 2(1)(e) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act."

85. It is therefore submitted that there is no merits to challenge the Award in Arb.O.P.(Com.Div.) No.574 of 2023.

86. Heard the learned Senior Counsel for the Award Debtors (applicants in A.Nos.397, 398, 6616, 1031, 2251 of 2023) and the learned Senior Counsel for the Award Holder (applicant in A.Nos.4639, 5749, 753 of 2023 and A.No.1853 of 2024).

87. I have also heard Mr.N.L.Rajah, learned counsel for the intervenors/M/s.Metrozone Phase 4 Apartment Buyers Association/applicant, who were impleaded as the third respondent in E.P.No.82 of 2022 vide order dated 27.03.2023 in A.No.1473 of 2023.

88. Before I proceed to deal with E.P.No.82 of 2022 and the other https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 applications for the alleged violation and willful disobedience of the Court's Order dated 20.04.2023 in A.No.5749 of 2023 in A.No.753 of 2023 in E.P.No.82 of 2022, I shall proceed to dispose Arb.O.P.(Com.Div.) No.574 of 2023.

89. An interesting question arises for consideration in this case as to:-

> (1)Whether the learned Arbitrator was ineligible to be appointed as an arbitrator in view of the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra)?
>
> (2)Whether a consent was recorded for constitution of the Arbitral Tribunal?
>
> (3)Whether proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996 was required to be complied with in the peculiar facts of the case?

90. At the outset, it may be useful to keep in mind the decision of Dimes Vs. Proprietors of Grand Junction Canal (1852) 3 H.L. Cas. 759 of the House of Lords. In Dimes case (referred to supra), the then Lord Chancellor, Lord Cottenham, owned a substantial shareholding in the defendant canal which was an incorporated body. In an action, the Lord Chancellor sat on appeal from the Vice-Chancellor, whose judgment in favour of the company he affirmed. There was an appeal to House of Lords on the grounds that the Lord Chancellor was disqualified. Their Lordships consulted the judges who advised https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 that Lord Cottenham was disqualified from sitting as a judge in the cause because he had an interest in the suit. This advice was unanimously accepted by House of Lords. There was no inquiry by the court as to whether a reasonable man would consider Lord Cottenham to be biased and no inquiry as to the circumstances which led to Lord Cottenham sitting. Lord Campbell observed as under, at p. 793:-

> "No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but

applies to a cause in which he has an interest." (Emphasis added)

91. It may also be useful to keep in mind the decision of the House of Lords in IN RE PINOCHET., [1999] UKHL 1. In that case, the issue initially revolved around whether Senator Augusto Pinochet, the former Head of State of Chile, could be extradited to Spain to face charges for human rights violations allegedly committed during his regime in Chile. However, the case became notable for addressing the issue of automatic disqualification of a judge due to potential bias, which ultimately led to the setting aside of the House of Lords' original decision. Concerns were raised about potential bias due to Lord Hoffmann's links with Amnesty International (AI), leading Senator Pinochet to https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 petition to set aside the 25 November 1998 order of the House of Lords. On 17 December 1998, the House of Lords annulled its order, with reasons provided later.

92. Senator Pinochet was the Head of State of Chile from 11 September 1973 until 11 March 1990, during which time crimes against humanity, including torture, hostage-taking, and murder, were alleged to have occurred under his regime. In October 1998, while Pinochet was in the UK for medical treatment, Spanish authorities issued international warrants for his arrest to facilitate extradition.

93. Pursuant to those international warrants, on 16 and 23 October 1998, Metropolitan Stipendiary Magistrates issued two provisional warrants for his arrest under section 8(1)(b) of the Extradition Act 1989. Senator Pinochet was arrested and immediately applied to the Queen's Bench Divisional Court to quash the warrants. The warrant of 16 October was quashed. The warrant of 23 October 1998 was also quashed by an order of the Divisional Court of the Queen's Bench Division (Lord Bingham of Cornhill C.J., Collins, and Richards JJ.).

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94. However, the quashing of the second warrant was stayed to enable an appeal to be taken to the House of Lords on the question certified by the Divisional Court as to "the proper interpretation and scope of the immunity enjoyed by a former Head of State from arrest and extradition proceedings in the United Kingdom in respect of acts committed while he was Head of State."

95. The Crown Prosecution Service, representing Spain, argued that Pinochet's immunity ceased once he was no longer Head of State, allowing prosecution for crimes committed during his tenure. Pinochet countered that his immunity persisted even after demitting for actions taken while in office.

96. Following the quashing of the second warrant, the Divisional Court allowed an appeal to the House of Lords. The case was heard by a committee including Lord Slynn, Lord Lloyd, Lord Nicholls, Lord Steyn, and Lord Hoffmann in November 1998. Before the hearing, Amnesty International (AI) and other human rights organizations were granted leave to intervene. They were the active participants in the appeals before the House of Lords.

97. The House of Lords delivered its judgment on 25th November, 1998. By its judgment dated 25 th November, 1998 the House of Lords by a majority https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 of three to two ruled in favor of extradition, thereby restoring the second warrant. The majority's decision was ostensibly influenced by the presence of Lord Hoffmann that Pinochet could be extradited as he was not entitled to immunity for acts of torture committed while he was Head of State.

98. Later it was revealed that Lord Hoffmann had undisclosed connection with Amnesty International (AI), a party which had intervened in the case, which compromised the perceived impartiality of the ruling dated 25th November, 1998.

99. AI was an unincorporated Association, and a constituent part of that Association was Amnesty International Charity Limited (AICL), of which Lord Hoffmann was a Director and Chairperson.

100. Since 1990, Lord Hoffmann and Peter Duffy Q.C. were two Directors of AICL. They were neither employed nor remunerated by either AICL or AIL. They were also not consulted and did not have any other role in Amnesty International's interventions in the Pinochet case. However, Lord Hoffmann had assisted in organizing a fundraising appeal for a new building for https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Amnesty International UK in 1997, alongside other senior legal figures, including the Lord Chief Justice, Lord Bingham.

101. AICL, was a registered charity, incorporated on 7 April 1986 and undertook those aspects of Amnesty International Limited's (AIL) work that were charitable under UK law. AICL filed its report with Companies' House and the Charity Commissioners as required by UK law and funded a proportion of the charitable activities undertaken independently by AIL.

102. AICL was established, for tax purposes, to carry out the charitable functions of AI, previously undertaken by AI itself or by AIL. AICL was wholly controlled by AI, as its members, who ultimately controlled it, were all members of AI's International Executive Committee. AI, AICL, and AIL were a close-knit group carrying on the work of AI.

103. The main issue in the appeal was whether Lord Hoffmann, as a member of the Appellate Committee that decided the matter on 25 th November, 1998, should have recused himself due to his close ties with Amnesty International (AI). Lord Hoffmann was a director of Amnesty International Charity Limited (AICL), which was closely associated with AI, one of the https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 interveners in the appeal.

104. The close relationship between AI and AICL raised concerns about the impartiality of the judgment, prompting a review of the decision dated 25 th November, 1998 of the House of Lords.

105. The court found that although Lord Hoffmann was not directly involved with AI, as his role as a director of AICL, a charity closely linked to AI, created a situation where his impartiality could reasonably be questioned and this connection was sufficient to trigger automatic disqualification, even though there was no evidence of actual bias. However, in this case, this Court is not concerned

with such case of bias.

106. The decision highlights that the mere appearance of bias, particularly in a case involving human rights and international law, was sufficient to undermine the fairness of the proceedings. Consequently, the House of Lords set aside its earlier decision dated 25th November, 1998 due to the appearance of bias and ordered a rehearing of the appeal before a differently constituted Committee. The court emphasized the importance of maintaining public confidence in the impartiality of the judiciary, especially in cases with https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 significant international implications.

107. Relevant paragraphs from the decision in IN RE PINOCHET was observed as follows:-

> As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.
>
> The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 impartial.
>
> In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial, (1976), p. 303; De Smith, Woolf & Jowel, Judicial Review of Administrative Action, 5th ed. (1995), p.

525. I will call this "automatic disqualification." ..... In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case,

the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.

108. The House of Lords observed that "the fundamental legal principle is that 'a man cannot be a judge in his own cause.' This principle applies not only when a judge has a direct financial interest in a case but also when there is a non-pecuniary interest that could lead to an appearance of bias." https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

109. Although Pinochet Case is not similar, it is clear that any decision of a judicial/quasi judicial should be without bias. There should not be a shadow of doubt raising question of the impartiality of an arbitrator or a judge. Justice should not only be done but seen to be done. Judges like Caesar's wife should be above suspicion. This also applies to an arbitrator. This aspect was also factored by Law Commission of India in its 256th Report, which is the precursor to Arbitration and Conciliation (Amendment) Act, 2015. Relevant para from the 256th Report of the Law Commission of India is extracted as follows:-

> “Neutrality of Arbitrators:
>
> 53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.
>
> 59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his possible appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA guidelines on conflicts of interest in international arbitration, and which would be treated as a “guide” to determine whether circumstances exist which give rise to such justifiable doubts. On the other hand, in terms of the proposed S. 12(5) of the Act and the Fifth Schedule https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 which incorporates the categories from the red list of the IBA guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary. In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed explanation to S. 14. Therefore, while the disclosure is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA guidelines), the ineligibility to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious sub-set of situations (as set out in the Fifth Schedule, and as based on the red list of

the IBA guidelines).

> 60. The Commission, however, feels that real and genuine party autonomy must be respected, and, in certain situations, parties should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to S. 12(5), where parties may, subsequent to disputes having arisen between them, waive the applicability of the proposed S. 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed S. 12(5) must be followed.

In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of S. 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator." https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

110. "Note" in the said Report as far as Section 12(5) of the Arbitration and Conciliation Act, 1996 is concerned reads as under:-

> Note: This amendment is in consonance with the principles of natural justice, that an interested person cannot be an adjudicator. The Fifth Schedule incorporates the provisions of the waivable and non-waivable red list of the IBA guidelines on conflict of interest. However, given that this clause would be applicable to arbitrations in all contexts (including in family settings), it is advisable to make this provision waivable, provided that parties specifically agree to do so after the disputes have arisen between them.

111. Thus, proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996 was incorporated for waiver by express agreement. Section 12(5) of the Arbitration and Conciliation Act, 1996 and its Proviso clause reads as under:-

> "Section 12(5):
>
> "Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
>
> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

112. As per Clause 16 to the Seventh Schedule to the Arbitration and Conciliation Act, 1996 there is a bar on a person who has already acted as an https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Arbitrator previously. Clause 16 to the Seventh Schedule to the Arbitration and Conciliation Act, 1996 reads as under:-

> "Relationship of the Arbitrator to the dispute:
>
> 15...
>
> 16. The Arbitrator has previous involvement in the case."

113. Thus, the Learned Arbitrator was disqualified to be appointed as an arbitrator in view of Clause 16 to the seventh schedule of the Arbitration and Conciliation Act, 1996. However, such disqualification can be waived as per proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996. In this case, there is waiver as the Award Debtor participated in the proceeding and acquiesced in the Arbitral Proceedings.

114. Thus, the Challenge to the impugned award on the ground of bias cannot be countenanced in the present case.

115. The Principal ground of attack in the impugned Arbitral Award dated 12.03.2022 of the Arbitral Tribunal by the Award Debtors which is sought to be enforced by the Award Holder in E.P.No.82 of 2022 is primarily on the ground of jurisdiction of the learned Arbitrator, who has passed the impugned Award. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

116. It is submitted that the impugned Arbitral Award 12.03.2022 of the Arbitral Tribunal has been passed in violation of the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) dated 03.07.2017and the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) dated 26.11.2019.

117. In support of the above proposition, the learned Senior Counsel for the Award Debtors in Arb.O.P.(Com.Div.) No.574 of 2023 has placed strong reliance on the decisions of the above Court cited decisions.

118. Both the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) and Perkins Eastman's case (referred to supra) were rendered under Section 11(6) of the Arbitration and Conciliation Act, 1996.

119. Awards i.e., both Award dated 07.12.2016 and the impugned Arbitral Award dated 12.03.2022 are after the amendment to Section 11 and Section 12 of the Arbitration and Conciliation Act, 1996, vide Act, 3 of 2016 with retrospective effect from 23.10.2015.

120. In this case, a reference to the same Arbitrator in the second round https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 of litigation has culminated in

the impugned Arbitral Award dated 12.03.2022, which was pursuant to the constitution of the Arbitral Tribunal with the same Arbitrator. It was with the consent of both the parties. The opening paragraph of the impugned Arbitral Award dated 12.03.2022 reads as under:-

> "1. This Tribunal was constituted by consent of both parties. Preliminary notice was issued to both parties to appear before the Arbitrator to fix the dates for filing claim statement etc. In the first Meeting the dates for filing claim statement, reply statement etc., were fixed. Pursuant to the same, the parties have filed their pleadings. The parties could not complete the matter within one year and 6 months since the matter was adjourned for few occasions for arriving at compromise. An application in A.No.9007 of 2019 was filed for extension of the Tribunal before the Hon'ble High Court Madras which has by its Order dated 3.12.2019 extended the period of Arbitration till 3.6.2020. In the meanwhile, because of Covid-19, the Hon'ble Supreme Court of India extended the period of Arbitration Proceedings also. As per last one of such order, the Hon'ble Supreme Court of India excluded the period between 15.3.2020 and 28.2.2022. Thus, the Award could be passed on or before 19.5.2022 which fact has been accepted by both side Advocates by sending e-mail dated 10.3.2022. Hence, the Award passed by this Tribunal is in time."

121.The consent was after the dispute arose and before the appointment of the Arbitrator. Therefore, it can be said waiver under proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996.

122. Earlier an Award dated 07.12.2016 came to be passed by the same https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 arbitrator prior to passing of the impugned Arbitral Award dated 12.03.2022. Both Awards dated 07.12.2016 and the impugned Award dated 12.03.2022 were passed by the same Arbitrator. Award dated 07.12.2016 came to be passed by the same arbitrator, after amendment to Section 12(5) of the Arbitration and Conciliation Act, 1996 in 2015 which came to effect from 23.10.2015. It was however prior to the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) on 03.07.2017.

123. As per proviso to Section 12(5) of the Arbitration and Conciliation Act, 1996, an "express agreement" is required for waiving the applicability of Section 12(5) of the Arbitration and Conciliation Act, 1996, since appointment of the learned Arbitrator was made by a person who is "ineligible" to be appointed as an Arbitrator in terms of the decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) and in Perkins Eastman's case (referred to supra).

124. The decision in TRF Limited case (referred to supra) was rendered on 03.07.2017. It dealt with a situation where the dispute was to be referred for sole arbitration by the Managing Director of the buyer/nominee. Relevant resolution of dispute/ Arbitration clause in the General Terms and Conditions of https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 the Purchase Order(GTCPO) of that Case reads as under:-

> "33. Resolution of dispute/arbitration :

(a) .....

(b) .....

(c) .....

(d) Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall be referred to sole arbitration of the Managing Director of buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language."

125. The appointment of the Managing Director as the Sole Arbitrator in TRF Limited case (referred to supra) was clearly in violation of Section 12(5) of the Arbitration and Conciliation Act, 1996 read with Clause 1 to the Seventh Schedule, which reads as under:-

" The Seventh Schedule [See section 12(5)]

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party."

126. The Hon'ble Supreme Court in TRF Limited case (referred to supra) was dealing with the situation as to whether a person who was ineligible to be appointed as an Arbitrator, could nominate another person as an Arbitrator. It was in that context, in Paragraph 53, the Hon'ble Supreme Court held as follows:-

"53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by an nominee."

127. It was in this context, Paragraph 54 in TRF Limited case (referred to supra), the Hon'ble Supreme Court held as under:-

"54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the

> infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

128. It was in that context, the Hon'ble Supreme Court came to a definite conclusion that neither the Managing Director can be an Arbitrator nor could the Managing Director, who was ineligible to act as an Arbitrator could nominate another person as an Arbitrator. The ratio in the above decision was https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 further amplified by the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra).

129. The decision of the Hon'ble Supreme Court in TRF Limited case (referred to supra) which was amplified in Perkins Eastman's case (referred to supra) dealt also with a clause which is quiet similar to the clause in the present case, wherein, the power was vested with the Chief Managing Director of the second respondent.

130. In Perkins Eastman's case (referred to supra), the arbitration clause in Agreement dated 22.05.2017 read as under:-

> "24.0 DISPUTE RESOLUTION:
>
> 24.1 Except as otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of services rendered for the works or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, design, drawings, specifications estimates instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof thereof shall be dealt with as mentioned hereinafter:
>
> (i) If the Design Consultant considers any work demanded of him to be outside the requirements of the contract or disputes https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 on any drawings, record or decision given in writing by HSCC on any matter in connection with arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request CGM, HSCC in writing for written instruction or decision. There upon, the CGM, HSCC shall give his written instructions or decision within a period of one month from the receipt of the Design Consultant's letter. If the CGM, HSCC fails to give his instructions or decision in writing within the aforesaid period or if the Design Consultant(s) is dissatisfied with the instructions or decision of the CGM, HSCC, the Design Consultants(s) may, within 15 days of the receipt of decision, appeal to the Director (Engg.) HSCC who shall offer an opportunity to the Design Consultant to be

heard, if the latter so desires, and to offer evidence in support of his appeal. The Director (Engg.), HSCC shall give his decision within 30 days of receipt of Design Consultant's appeal. If the Design Consultant is dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of sub-Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD HSCC within 30 days form the receipt of request from the Design Consultant. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason, whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the reference from the stage at which it was left by his predecessor. It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the CMD, https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 HSCC of the appeal. It is also a term of this contract that no person other than a person appointed by such CMD, HSCC as aforesaid should act as arbitrator. It is also a term of the contract that if the Design Consultant does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from HSCC that the final bill is ready for payment, the claim of the Design Consultant shall be deemed to have been waived and absolutely barred and HSCC shall be discharged and released of all liabilities under the contract and in respect of these claims. The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

131. The arbitration clause in Agreement dated 02.03.2006 between the Award Holder and the Award Debtors in the present case read as under:-

"23. Arbitration:

Any dispute that may arise between the parties hereto or their successors concerning the obligations under this agreement, such disputes shall be referred to the arbitration of the Sole Arbitrator, who may be nominated by the party of the second part. Such arbitrator shall not be a person below the rank of retired High Court Judge or a practicing designated Senior Counsel in Madras High Court. In the event of the claim being valued at less than one crore rupees, the qualification of the Sole Arbitrator shall be not less than the rank of a retired district judge or a practicing

> lawyer of the Madras High Court. The venue of Arbitration shall be at Chennai only and the language shall be in English. The provisions of the Arbitration and Conciliation Act, 1996 shall apply to the proceedings."

132. Thus, both the clauses in Agreement dated 02.03.2006 between the https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Award Holder and the Award Debtors in the present case and in Agreement dated 22.05.2017 in Perkins Eastman's case (referred to supra), are similar.

133. In Perkins Eastman's case (referred to supra), if the Design Consultant was dissatisfied with the decision, the Design Consultant shall within a period of 30 days from receipt of this decision, give notice to the CMD, HSCC for appointment of arbitrator failing which the said decision shall be final, binding and conclusive and not referable to adjudication by the arbitrator. In case, the dispute or difference was to be referred for Arbitration, Arbitrator shall be appointed by the CMD HSCC within 30 days form the receipt of request from the Design Consultant.

134. In Perkins Eastman's case (referred to supra), the above clause was under an Agreement dated 22.05.2017. There, the Chairman-cum- Managing Director of HSCC (India) Limited appointed Major General K.T.Gajria as the Sole Arbitrator vide Letter dated 30.07.2019. Under these circumstances, Perkin's Eastman Architects DPC approached the Hon'ble Supreme Court under Section 11(6) read with sub-section 11(12)(b) of the Arbitration and Conciliation Act, 1996.

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135. After referring to the decision of the Hon'ble Supreme Court in Walter Bau AG Vs. Municipal Corporation of Greater Mumbai, (2015) 3 SCC 800 and in TRF Limited Vs. Energo Engineering Projects Limited, (2017) 8 SCC 377, the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) held that in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. It further observed that naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. It further observed that it has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognized by the decision of this Court in TRF Limited".

136. In Perkins Eastman's case (referred to supra), the Hon'ble Supreme Court observed as under:-

> "20. We thus have two categories of cases. The first, similar to the one dealth with in TRF Ltd., where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 If, in the first category of cases, the Managing Director was found incompetent, it was

because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Ltd, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an arbitrator.

21. But, in our view that has to be the logical deduction from TRF Limited, Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

137. The Hon'ble Supreme Court in in Paragraph 10 of Walter Bau AG Vs. Municipal Corporation of Greater Mumbai, (2015) 3 SCC 800, observed that unless the appointment of the arbitrator was ex facie valid and such appointment satisfied the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law.

138. The Hon'ble Supreme Court referred to the decision in Antrix Corporation Limited Vs. Devas Multimedia (P) Ltd., (2014) 11 SCC 560 and Pricol Limited Vs. Johnson Controls Enterprise Limited, (2015) 4 SCC 177, wherein it was opined that after appointment of an arbitrator is made,

the remedy of the aggrieved party is not under Section 11(6) but such remedy lies elsewhere and under different provisions of the Arbitration Act (Sections 12 and Section 13). In the present Case, the remedy under Sections 12 and Section 13 https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 of the Arbitration and Conciliation Act, 1996 was not availed off by the Award Debtor.

139. In Antrix Corporation Limited case (referred to supra), appointment of the arbitrator, as per the ICC Rules, was as per the alternative procedure agreed upon, whereas in Pricol Limited case (referred to supra), the party which had filed the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 had already submitted to the jurisdiction of the arbitrator.

140. In Antrix Corporation Limited case (referred to supra), which is prior in time, the Hon'ble Supreme Court formulated the following question of law in Paragraph 24, while entertaining application under Section 24 of the Arbitration and Conciliation Act, 1996.

"24. As indicated hereinbefore, the question which we are called upon to decide is whether when one of the parties has invoked the jurisdiction of the International Chamber of Commerce and pursuant thereto an arbitrator has already been appointed, the other party to the dispute would be entitled to proceed in terms of Section 11(6) of the 1996 Act."

141. The Hon'ble Supreme Court concurred with the view of the Hon'ble https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Punjab and Haryana High Court in Som Datt Builders Private Limited Vs. State of Punjab, AIR 2006 P&H 124, observed as under:-

> "34. The law is well settled that where an arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an arbitrator is not maintainable. Once the power has been exercised under the arbitration agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In Som Datt Builders (P) Ltd. v. State of Punjab [AIR 2006 P&H 124 : (2006) 3 RAJ 144] , the Division Bench of the Punjab and Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the parties to the arbitration agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction."

142. However, in Walter Bau AG's case (referred to supra), the situation was otherwise. In Pricol Limited case (referred to supra), the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 was rejected as Pricol limited had submitted to the jurisdiction of the Arbitrator appointed by Singapore International Arbitration Centre (SIAC). In the present Case also both the Award Holder and Award Debtor had submitted to the jurisdiction of https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 the Arbitrator.

143. The decision of the Hon'ble Supreme Court in Bharat Broadband Network Limited's case (referred to supra) which was rendered on 16.04.2019 was prior to the decision in Perkins Eastman's case (referred to supra) on 22.05.2017 which dealt with a case of a person who was de jure ineligible to be appointed as an Arbitrator in view of Section 12(5) read with Clause(1) to the seventh schedule under the Arbitration and Conciliation Act, 1996.

144. In Bharat Broadband Network Limited's case (referred to supra), the relevant clause for resolution of dispute through arbitration in the General (Commercial) Conditions of Contract (GCC) read as under:-

> "III.20 ARBITRATION III.20.1 In the event of any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CMD, BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BBNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD or the said officer is unable or willing to act as such, then to the sole arbitration of some other person appointed by the CMD or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Act 1996. There will be no object to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant/PSU Employee he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CMD, BBNL or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors."

145. There, CMD of BBNL or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted with the functions of the CMD, BBNL or by whatever designation such an officer may be called or could be the Arbitrator or any other person appointed by the CMD or the said officer. Thus, the CMD was de jure incapable of acting as an Arbitrator. Therefore, the appointment was held bad.

146. Paragraphs 17 to 20 of Bharat Broadband Network Limited's case (referred to supra) reads as under:-

"17. The scheme of Sections 12, 13, and 14, therefore, is that where an arbitrator makes a disclosure in writing which is likely to give justifiable doubts as to his independence or https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 impartiality, the appointment of such arbitrator may be challenged under Sections 12(1) to 12(4) read with Section 13. However, where such person becomes "ineligible" to be appointed as an arbitrator, there is no question of challenge to such arbitrator, before such arbitrator. In such a case, i.e., a case which falls under Section 12(5), Section 14(1)(a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e., de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator. This being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator under Section 14(1) itself. It is only if a controversy occurs concerning whether he has become de jure unable to perform his functions as such, that a party has to apply to the Court to decide on the termination of the mandate, unless otherwise agreed by the parties. Thus, in all Section 12(5) cases, there is no challenge procedure to be availed of. If an arbitrator continues as such, being de jure unable to perform his functions, as he falls within any of the categories mentioned in Section 12(5), read with the Seventh Schedule, a party may apply to the Court, which will then decide on whether his mandate has terminated. Questions which may typically arise under Section 14 may be as to whether such person falls within any of the categories mentioned in the Seventh Schedule, or whether there is a waiver as provided in the proviso to Section 12(5) of the Act. As a matter of law, it is important to note that the proviso to Section 12(5) must be contrasted with Section 4 of the Act. Section 4 deals with cases of deemed waiver by conduct; whereas the proviso to Section 12(5) deals with waiver by express agreement in writing between the parties only if made subsequent to disputes having arisen between them.

18. On the facts of the present case, it is clear that the Managing Director of the appellant could not have acted as an arbitrator himself, being rendered ineligible to act as arbitrator under Item 5 of the Seventh Schedule, which reads as under:

https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 "Arbitrator's relationship with the parties or counsel

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration" Whether such ineligible person could himself appoint another arbitrator was only made clear by this Court's judgment in TRF Ltd. (supra) on 03.07.2017, this Court holding that an appointment made by an ineligible person is itself void ab initio. Thus, it was only on 03.07.2017, that it became clear beyond doubt that the appointment of Shri Khan would be void ab initio. Since such appointment goes to "eligibility", i.e., to the root of the matter, it is obvious that Shri Khan's appointment would be void. There is no doubt in this case that disputes arose only after the introduction of Section 12(5) into the statute book,

and Shri Khan was appointed long after 23.10.2015. The judgment in TRF Ltd.

(supra) nowhere states that it will apply only prospectively, i.e., the appointments that have been made of persons such as Shri Khan would be valid if made before the date of the judgment. Section 26 of the Amendment Act, 2015 makes it clear that the Amendment Act, 2015 shall apply in relation to arbitral proceedings commenced on or after 23.10.2015. Indeed, the judgment itself set aside the order appointing the arbitrator, which was an order dated 27.01.2016, by which the Managing Director of the respondent nominated a former Judge of this Court as sole arbitrator in terms of clause 33(d) of the Purchase Order dated 10.05.2014. It will be noticed that the facts in the present case are somewhat similar. The APO itself is of the year 2014, whereas the appointment by the Managing Director is after the Amendment Act, 2015, just as in the case of TRF Ltd. (supra). Considering that the appointment in the case of TRF Ltd. (supra) of a retired Judge of this Court was set aside as being non-est in law, the appointment of Shri Khan in the present case must follow suit.

https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

19. However, the learned Senior Advocate appearing on behalf of the respondent has argued that Section 12(4) would bar the appellant's application before the Court. Section 12(4) will only apply when a challenge is made to an arbitrator, inter alia, by the same party who has appointed such arbitrator. This then refers to the challenge procedure set out in Section 13 of the Act. Section 12(4) has no applicability to an application made to the Court under Section 14(2) to determine whether the mandate of an arbitrator has terminated as he has, in law, become unable to perform his functions because he is ineligible to be appointed as such under Section 12(5) of the Act.

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:

> "9. Promises, express and implied.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied." It is thus necessary that there be an "express" https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still

go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also incorrect in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 mandate."

147. It is in that context, the Hon'ble Supreme Court in Bharat Broadband Network Limited's case (referred to supra) held that unlike Section 4 of the Arbitration and Conciliation Act, 1996 which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing.

148. The Hon'ble Supreme Court had rendered its first decision in TRF Limited case (referred to supra) was on 03.07.2017. As mentioned above, it was in the context of Section 12(5) of the Arbitration and Conciliation Act, 1996. On the date when the first Award was rendered on 07.12.2016 in the present case, it was pursuant to a reference made after the amendment to Section 12(5) of the Arbitration and Conciliation Act, 1996 with effect from 23.10.2015.

149. The first Award which was passed on 07.12.2016 was with the consent of both the parties. The said Award was neither questioned by the Award Debtors nor

questioned by the Award Holder. By the aforesaid Award https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 dated 07.12.2017, the learned Arbitrator had directed the Award Debtors to execute the undivided share of the land. The learned Arbitrator had also directed the Award Debtors to execute and register the Sale Deed at the jurisdictional Sub Registrar Office, within two months from the date of passing of the Award. It was also complied by the Award Debtors.

150. The Award which was passed by the same Arbitrator on 07.12.2016 was acted upon with the execution of a registered Sale Deed dated 18.08.2017 registered as Document No.3446 of 2017 in the Office of the Sub Registrar, Anna Nagar by the Award Debtors.

151. Before the Arbitral Tribunal, neither the Award Debtors nor the Award Holder have questioned the jurisdiction of the learned Arbitrator to enter upon reference and to pass the impugned Arbitral Award dated 12.03.2022.

Both have agreed with nomination of the learned Arbitrator not once but twice.

152. The decisions of this Court rendered in Prime Store's case (referred to supra) and SCM Silks Private Limited's case (referred to supra), in L.Thirupurasundari's case (referred to supra), and in K.K.S.Travels case https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 (referred to supra), nullifying the Awards under Section 34 applying the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) cannot be applied in the peculiar facts of the case as the learned Arbitrator was appointed not once but twice and the appointment was not challenged earlier after the Learned Arbitrator entered upon reference. There was a consent to the constitution of the Arbitral Tribunal with the same arbitrator, not once but twice.

153. The Award Debtor cannot approbate and reprobate the jurisdiction of the Arbitrator. Further the Award Debtor itself had also consented for extension of mandate of the Learned Arbitrator at the time of disposal of A.No.9007 of 2019 filed under Section 29 A of the Arbitration and Conciliation Act, 1996.

154. Consequently, the other decisions referred by the Hon'ble Delhi High Court, Hon'ble Calcutta High Court and Hon'ble Bombay High Court, which were cited by the learned Senior Counsel for the Award Debtors to assail the Award under Section 34 of the Arbitration and Conciliation Act, 1996 are irrelevant.

155. Had the Award Debtor challenged the appointment either under https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Section 14 or approached this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, the things would have been different. In the present case, the Award Debtor acquiesced in the arbitral proceedings as mentioned above. The same Arbitrator who passed the first Award dated 07.12.2016 was called upon to enter upon reference and to resolve the dispute was appointed again.

156. That apart, challenge to the appointment was also not made soon after the decision of the Hon'ble Supreme Court in Perkins Eastman's case (referred to supra) was rendered on 26.11.2019, by filing an application under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996 to terminate the mandate of the learned Arbitrator. Therefore, although a strong reliance was placed on the decisions referred in the above cases, they cannot be applied as they are of no avail to the petitioners/Judgment Debtors.

157. As mentioned above both the TRF Limited case (referred to supra) and the Perkins Eastman's case (referred to supra) were rendered in the context of Section 11(6) and Section 12(5) of the Arbitration and Conciliation Act, 1996. In TRF Limited case (referred to supra), the Hon'ble Supreme https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Court annulled the appointment of an Arbitrator made by the High Court and appointed a former Judge of the Hon'ble Supreme Court as the Sole Arbitrator to decide all the issues arising out of Agreement dated 22.05.2017.

158. In fact, the mandate of the Arbitral Tribunal had also expired after the pleadings were completed. After the mandate expired at the end of 12 months + six months the parties were still attempting to arrive at a private compromise and had reposed faith in the impartiality of the learned Arbitrator. A.No.9007 of 2019 was also filed by the Award Holder for extending the mandate of the learned Arbitrator. The said application was ordered on 03.12.2019. Relevant portion of the said order reads as under:-

> “15. Notwithstanding the aforesaid position, both learned counsel by consent submit that it would be desirable to extend the time by six months from today or in other words, both learned counsel request that the time shall be extended upto 03.06.2020.
>
> 16. This application is ordered extending the time limit for Hon'ble Arbitrator constituting the Arbitral Tribunal qua Arbitration No.5 of 2018 for a period of 6 months from today i.e., upto 03.06.2020.

This application is ordered and disposed of on above terms. As already alluded to supra, both learned counsel undertake to communicate the contents of this order as well as a copy of this order to the Hon'ble Arbitrator.” https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023

159. Therefore, merely because the Award is against the Award Debtors, it cannot be said that the impugned Award was a nullity on account of Section 12(5) of the Arbitration and Conciliation Act, 1996.

160. As far as challenge to the Award on the ground that the damages have been awarded contrary to the decision of the Hon'ble Supreme Court in Kailash Nath Associates case (referred to supra) also cannot be countenanced as the compensation that has been awarded is not only a reasonable compensation which has been awarded to the respondent/Award Holder in the light of the decision of the Hon'ble Supreme Court in Kailash Nath Associates case (referred to supra) but also in

accordance with the Agreement between the parties.

161. The Contract signed between the parties contemplate construction of a built up area within a period of 24 months from the date of Agreement dated 02.03.2006. Since the construction was not completed, the Debtor had also agreed to pay the compensation at the rate of Rs.20 per sq.ft., for 1,10,000 built up area which was contemplated under the aforesaid Agreement to Award Holder. This amount was also paid up to a particular point of time and thereafter revised pursuant to 1st Award dated 07.12.2016/Joint Memo filed https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 before the learned Arbitrator on 04.10.2018 and a Letter dated 20.03.2017. There is no patent illegality in the Arbitral Award passed by the learned Arbitrator on 12.03.2022. The amount awarded by the Arbitral Tribunal is reasonable and therefore it does not called for any interference.

162. The other ground that the Arbitral Tribunal ought to have ordered specific performance and that the Award was contrary to Section 14(3)(c) of the Specific Relief Act, 1963, is concerned, also cannot be countenanced as the contract was for construction of a built up area of 1,10,000 sq.ft in the township developed by the Award Debtors.

163. The facts on record indicate that 6.16 Acres of land of the respondent/Award Holder was amalgamated for the township along with 34 Acres of land purchased by the Award Debtors and almost 90% of the land was utilized by the Award Debtor for getting approval from Chennai Metropolitan Development Authority (CMDA) by gifting the land to the local authority for OSR purpose.

164. It is in this background, the 1st Award came to be passed on 07.12.2016 pursuant to which, the Award Debtors have also executed a Sale https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Deed dated 18.08.2017 whereby the Award Debtors have conveyed 43,000 sq.ft of UDS of land for Tower-V and further 1556 sq.ft of UDS of land for Tower-F (Flat No.F1603 and Flat No.Z1603).

165. The objection to the Award that it is contrary to the Fundamental Policy of Law on account of the alleged violation of Section 14(3)(c)(3) of the Specific Relief Act, 1963 in the light of the decision of the Hon'ble Supreme Court in Sushil Kumar Agarwal's case (referred to supra) also cannot be countenanced as the compensation that was awarded was for non-performance of contract by the Award Debtors. The 1st Award Debtor signed Agreement binding not only himself but also the director of the 2nd Award Debtor.

166. That apart, the facts on record also indicates that the Award Debtors have failed to pay the amount due to the Award Holder under the Agreement dated 02.03.2006 as modified by Joint Memo dated 04.10.2018 filed before the learned Arbitrator and a Letter dated 20.03.2017. Therefore, the challenge to the impugned Arbitral Award dated 12.03.2022 in Arb.O.P.(Com.Div.)No.574 of 2023 is liable to be dismissed and therefore, it is accordingly dismissed.

167. In view of the dismissal of Arb.O.P.(Com.Div.)No.574 of 2023, there https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 can be no impediment for enforcing the Award in E.P.No.82 of 2022. Therefore, the Execution Petition has to be allowed to be proceeded.

168. The remaining issue to be considered is whether the failure of the Award Debtors to comply with the conditions of order dated 20.04.2023 in A.No.753 of 2023 in E.P.No.82 of 2022, warrants punishment and whether the failure of the petitioners/Judgment Debtors to comply with the terms of the order would dis-entitle the intervenors represented by Mr.N.L.Rajah, learned counsel for M/s.Metrozone Phase 4 Apartments Buyers Association.

169. The facts on record indicate that the Reply affidavit filed by the petitioners/Judgment Debtors in response to A.No.5749 of 2023 has not given full particulars. Several sales have taken place after the orders were passed and almost a sum of Rs.50,54,50,675/- has been generated and only a sum of Rs.4,00,00,000/- was deposited that too pursuant to order dated 02.01.2024.

170. In the affidavit filed before this Court in A.No.5749 of 2023, the Award Holder has merely stated that only a sum of Rs.4,00,00,000/- was paid by the Award Debtors, which shows that the Award Debtors have taken proceedings of this Court too casually and lightly. This behavior of the Award https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 Debtors is contumacious and contemptuous and warrants not only rebuke, reprimand but also punishment. However, there is compliance of the Order dated 02.01.2024 of this Court. Under these circumstances, the Award Debtors are directed to complete the construction within a period of twelve months from the date of receipt of a copy of this order.

171. In the light of the above discussion, Arb.O.P.(Com.Div.) No.574 of 2023 is dismissed. The Applications filed by the Award Holder in E.P.No.82 of 2022 are allowed to be proceeded. Arbitration Applications filed by the Award Debtors both in E.P.No.82 of 2022 and in Arb.O.P.(Com.Div.) No.574 of 2023 are dismissed. The third respondent in E.P.No.82 of 2022 is permitted to workout the remedy independently. A.No.5749 of 2023 is closed with liberty to initiate fresh proceedings against the Award Debtor. No costs.

C.SARAVANAN, J.

https://www.mhc.tn.gov.in/judis Arb.O.P(Com.Div) No.574 of 2023 arb

172. List the Execution Petition before this Court for further orders.

21.08.2024 Index : Yes/No Internet : Yes/No Speaking Order/Non-Speaking Order Neutral Citation : Yes/No arb Pre-Delivery Order in Arb.O.P.(Com.Div.) No.574 of 2023 and and A.Nos.5749, 397, 398, 753, 4639 and 6616 of 2023 and 1853 of 2024 https://www.mhc.tn.gov.in/judis