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Arb.O.P.(Com.Div.)No.101 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	23.02.2024
Pronounced On	18.04.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.101 of 2023
and A.No.1375 of 2023

Matrix Labs
through its sole proprietor
Suresh Kulaindavel

... Petitioner

vs.

Aark Pharmaceuticals

.. Respondent

Prayer: Original Petition is filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, praying to set aside the Arbitral Award dated 31.10.2022 bearing No.ICC Case No.26492/HTG passed by Mr.Mahesh Rai in its entirety along with addendum dated 27.01.2023 and to direct the respondent to pay the costs and to grant such further reliefs.

For Petitioner : Mr.N.L.Rajah
Senior Counsel
for Mr.K.Senguttuvan

For Respondent : Mr.Vibu Nandhan



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Mr.Rahul Kumar
Mr.Deepak Raj & Rohan C.Govind

ORDER

The petitioner is aggrieved by the Impugned Award dated 31.10.2022 passed by the Arbitral Tribunal. By the Impugned Award, the Arbitral Tribunal has awarded the following amounts to the respondent/claimant to be paid by the petitioner/1st respondent :-

<i>Sl.No.</i>	<i>Amount</i>	<i>Particulars</i>
<i>a</i>	<i>Rs.6,24,96,000</i>	<i>toward Repayment of the advance paid by AARK PHARMACEUTICALS to MATRIX LABS for the Rejected Test Kits (that is 1,48,800 test kits) along with compound interest at the rate of 16% per annum for the period from 29 June 2020 until repayment in full</i>
<i>b</i>	<i>-</i>	<i>compound interest at the rate of 16% per annum on the sum of INR 95,80,000 for the period from 3 April 2020 to 3 February 2021</i>
<i>c</i>	<i>Rs.18,83,750</i>	<i>Total legal costs and disbursements</i>
<i>c</i>	<i>USD 60,000</i>	<i>MATRIX LABS to bear the total Costs of the Arbitration of USD 60,000 by way of reimbursement to AARK PHARMACEUTICALS of the sum of USD 60,000</i>
<i>d</i>	<i>MATRIX LABS and RARE METABOLICS LIFE SCINENCES PVT LTD are to bear their own costs and disbursements; and All other requests and claims are rejected.</i>	

2. Relevant Portion of the Arbitral Award reads as under:-



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“183. Having carefully considered all the evidence and submissions placed before it and for the reasons set out above,

the Tribunal hereby Determines and Orders that:

- a) MATRIX LABS to make payment of INR 6,29,46,000 (Rupees Sixty-Two Million Four Hundred and Ninety Six Thousand Only) to AARK PHARMACEUTICALS toward repayment of the advance paid by AARK PHARMACEUTICALS for the Rejected Test Kits (that is 148,800 test kits) along with compound interest at the rate of 16% per annum for the period from 29 June 2020 until repayment in full;*
- b) MATRIX LABS to pay AARK PHARMACEUTICALS compound interest at the rate of 16% per annum on the sum of INR 95,80,000 FOR THE PERIOD FROM 3 April 2020 to 3 February 2021;*
- c) MATRIX LABS pay AARK PHARMACEUTICALS' total legal costs and disbursements of INR 18,83,750 and to bear the total Costs of the Arbitration of USD 60,000 by way of reimbursement to AARK PHARMACEUTICALS of the sum of USD 60,000;*
- d) MATRIX LABS and RARE METABOLICS LIFE SCINENCES PVT LTD are to bear their own costs and disbursements; and All other requests and claims are rejected.*



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3. The petitioner herein was the first respondent before the Arbitral Tribunal in the Arbitral Proceeding in ICC Case No.626492/HGT which was instituted by the respondent / claimant before the said Arbitral Tribunal. The Arbitral Proceeding was conducted under the Rules of Arbitration of the International Chamber of Commerce in terms of Clause 12.2 of Ex.C2 Tripartite Master Distribution Agreement dated 23.03.2020 signed between the petitioner [the Importer], respondent - claimant [the Distributor] and M/s.Rare Metabolics Life Sciences Private Limited -[the Promoter], the 2nd Respondent before the Arbitral Tribunal. M/s.Rare Metabolics Life Sciences Private Limited is not a party to this proceeding under Section 34 of Arbitration and Conciliation Act,1996.

4. Clause 12 of the Tripartite Master Distribution Agreement dated 23.03.2020 reads as under:-

“12. Choice of Law and Jurisdiction

12.1 This Agreement shall be governed by and construed in accordance with the laws of the Republic of India.

12.2 All disputes arising out of or in connection with this Agreement shall be settled by way of arbitration to be conducted in accordance with the rules of Arbitration of the International Chamber of Commerce



by an arbitrator appointed in accordance with the said rules. The language of arbitration shall be English and each Party shall have the right to have its legal advisers present throughout the arbitration. The venue of arbitration shall be Chennai, India. The arbitration award shall be final and binding on the Parties.

12.3 The Jurisdiction Chennai, Tamilnadu India.”

5. A dispute arose between the petitioner and the respondent under Ex.C3 Tripartite Master Distribution Agreement dated 23.03.2020 signed between the petitioner [the importer], respondent-claimant [the Distributor] and M/s.Rare Metabolics Life Sciences Private Limited-[the Promoter].

6. In Ex.C2 Tripartite Agreement dated 23.03.2020, the “Promoter” M/s.Rare Metabolics Life Sciences Private Limited was stated to be engaged in the business of promoting and marketing of a wide range of Diagnostic tests that required specialized handling, and was desirous of appointing a “Distributor” for distribution of Specified Products on an exclusive basis.

7. Ex.C2 Tripartite Agreement dated 23.03.2020 further records that



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the respondent herein had the requisite infrastructure, expertise and experience to organize the movement of the Specified Products and had obtained all the necessary approvals, licenses and clearances from the relevant authorities under the Applicable Laws including the Drugs and Cosmetics Act, 1940 and the rules made thereunder.

8. The respondent had thus expressed its desire to be appointed as the “Distributor” of the said M/s.Rare Metabolics Life Sciences Private Limited for the Specified Products, and the said M/s.Rare Metabolics Life Sciences Private Limited as the Promoter consented to appoint the respondent as the Distributor upon the terms and conditions in the Tripartite Agreement dated 23.03.2020.

9. The said M/s.Rare Metabolics Life Sciences Private Limited thus acted as the “Promoter” under the Ex.C2 Tripartite Agreement dated 23.03.2020. The respondent-claimant intum was appointed as the “Distributor” of M/s.Rare Metabolics Life Sciences Private Limited.



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10. Thus, under Ex.C2 Tripartite Agreement dated 23.03.2020, the petitioner as an “Importer”, imported testing kits for testing Covid 19 after the outbreak of Covid 19 pandemic in India.

11. Under the Ex.C2 Tripartite Agreement dated 23.03.2020, the respondent AARK Pharmaceuticals on being appointed as the “Sole Distributor” of the said Promoter M/s.Rare Metabolics Life Sciences Private Limited, placed order on the petitioner for supply of testing kits to ICMR (Indian Council of Medical Research).

12. Clause 7.1 of the Ex.C2 Tripartite Agreement dated 23.03.2020 insulates the respondent (Distributor) with respect to claims by any person who may incur injury or loss as a result of the manufacture and delivery of the Specified Products in violation of the agreement and on account of any Adverse Event Occurrence, Product Complaints or disputes raised by a customers with regard to the use of the Specified Products.

13. Further as per clause 7.1 of Ex.C2 Tripartite Agreement dated



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23.03.2020 both the promoter - M/s.Rare Metabolics Life Sciences Private Limited and the petitioner - importer notwithstanding anything to the contrary in the Agreement and in no event were liable to the respondent -distributor for any incidental, indirect, exemplary, special or consequential damages whatsoever (including, but not limited to, lost profits, loss of goodwill, or interruption of business) that may be suffered or incurred by the respondent-Distributor as a result of the violation of the covenants under Ex.C2 Tripartite Agreement dated 23.03.2020.

14. The petitioner claims to have imported **10,00,000** testing kits from a supplier/manufacturer from Republic of China. The imports were in two tranches i.e., **3,00,000** testing kits on 16.04.2020 and **7,00,000** testing kits on 23.04.2020.

15. A sum of **Rs.12,75,00,000/-** is said to have been paid to the petitioner-importer for supply of initial **5,00,000** testing kits. Out of **Rs.12,75,00,000/-** a sum of **Rs.9,60,00,000/-** was paid directly by the respondent (the claimant-distributor) to the petitioner (the importer). The balance of **Rs.3,15,00,000/-** is said to have been directly paid to the



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petitioner/ (the importer) by the promoter namely M/s.Rare Metabolics Life Sciences Private Limited.

16. The negotiated price of each testing kits between the respondent (Claimant-Distributor) and ICMR was Rs.600 + 23.2% towards GST and import duty. Thus, the effective price of the supplies by the respondent (Claimant-Distributor) to the Director General of Medical Research was Rs.739.20 per testing kit.

17. Out of **3,00,000** testing kits imported earlier by the petitioner on 16.04.2020 after the outbreak of Covid 19 pandemic, the petitioner appears to have supplied **2,76,000** testing kits to ICMR through the respondent herein. Balance **24,000** testing kits are stated to have been supplied to the Government of Tamil Nadu.

18. A dispute is said to have in arise between the petitioner and the respondent and the promoter namely M/s.Rare Metabolics Life Scienses Private Limited. Under these circumstances, the promoter namely M/s.Rare Metabolics Life Sciences Private Limited along with the respondent,



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AARK Pharmaceuticals had filed O.M.P.(I)(COMM) 93 of 2020 against the petitioner/(importer) before the Delhi High Court for a direction for release of 7.24 Lakhs Covid 19 Rapid Test Kit and other Covid-19 related materials which were imported and/or are being imported from the People's Republic of China.

19. By an order dated **24.04.2020** in O.M.P.(I)(COMM) 93 of 2020, the Delhi High Court had passed the following order:-

7. Be that as it may, since the kits/tests are required in the country on urgent basis in view of the worldwide pandemic, it is ordered as under:

(i) 2.24 lakh tests shall be delivered to ICMR, the moment it lands into India.

(ii) The total invoice value raised by the respondent-importer[petitioner herein] upon petitioner no. 1[respondent herein] is Rs. 20 crores plus GST i.e. Rs. 21 crore. The respondent has received Rs. 12.75 crores. The balance amount of Rs. 8.25 crores shall be first paid to the importer before any monies received from ICMR by Petitioner no. 1/ Petitioner no. 2 is adjusted for any other purpose. Such monies shall be paid to the respondent [petitioner herein] within 24 hours of it coming into the petitioner's bank account.

8. The respondent [petitioner herein] submits that it has received an order for supply of 50,000 kits/tests,



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*from the Government of Tamil Nadu, through an intermediary dealer viz. M/s Shan Biotech and Diagnostics, at the ICMR approved rate of @ **Rs.600/-** per test. Of this order, 24,000 has been supplied and 26,000 more are to be supplied. Let the same be supplied, the moment the kits/tests reach India, directly to the State Government of Tamil Nadu.*

*9. The Court is of the view that a profit mark-up of Rs. 155/-i.e 61% on the landed cost price of Rs. 245/- is much on the higher side and in any case more than sufficient for the seller, for the kits/tests to be made available in India for urgent extensive tests through the country, especially in these present extraordinary circumstances of the worldwide pandemic. The country is going through an unprecedented medical crisis affecting public order. People have been cloistered in their homes or constrained to stay wherever they were on 24th March 2020. The economy is virtually at a standstill for the last one month. There is an element of disquiet apropos one's safety. For people to be assured that the pandemic is under control and for governments to ensure and for agencies engaged in the frontline battle to safeguard people's health, more kits/tests should be made available urgently at the lowest cost, for carrying out extensive tests throughout the country. Public interest must outweigh private gain. The lis between the parties should give way to the larger public good. In view of the above, the kits/test should be sold at a price not beyond **Rs. 400/-** per kit/test inclusive of GST. 10. Mr. Jayant Mehta, the learned counsel for the petitioners, states upon instructions, that in the interest of the country he would not pursue the matter any further and would give up all further claims, in the case if the importer undertakes to sell the product at not more than Rs.400/- each, inclusive of GST. Indeed, both parties agree to the principle public interest should be*



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paramount and the tests should be made available to the general public at the lowest cost possible Mr Nagrath, the learned counsel for the respondent submits, that the respondent is ready to and undertakes to supply the kits/tests at Rs.400/- each, plus GST i.e. at 40% lesser than the ICMR approved rate, directly to any Government or its agency or private entity duly approved to carry out these tests.

11. So, from the other 5 lakhs kits/tests, 50,000 shall be excluded for the State of Tamil Nadu and the remaining 450,000 would be available to the respondent to be disposed-off in terms of the above, directly to any Government or governmental agency or any private entity which has received due approval to carry out such tests.

“12. In view of the above, the petitioners agree not to pursue any claim apropos the other 5 lakh kits/tests.

13. The petition is disposed-off in terms of the above.

14. The order be uploaded on the website forthwith. Copy of the order be also intimated to the learned counsel for the parties through email.”

20. Pursuant to the directions of the Delhi High Court in O.M.P.(I)(COMM) 93 of 2020 dated 24.04.2020, the effective price of the testing kit was reduced.



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21. From **7,00,000** testing kits that were later imported on 23.04.2020, about **2,24,000** testing kits were directly supplied to ICMR pursuant to the order dated 24.04.2020 of Delhi High Court in O.M.P.(I)(COMM) 93 of 2020. They were however later returned immediately.

22. According to the petitioner, the petitioner also re-exported **2,24,000** testing kits along with the balance **4,76,000** (7,00,000-2,24,000) back with difficulties to a buyer from **Hong Kong** on 15.05.2020 and on 29.05.2020 respectively.

23. As far as supply of **2,76,000** testing kits out of **3,00,000** testing kits (24,000 testing kits supplied directly to Government of Tamil Nadu) is concerned, ICMR returned only **1,48,800** testing kits.

24. It is the case of the petitioner that since 1,48,800 testing kits were returned after the seals were broken, and therefore the petitioner could not re-export the consignments to the supplier.



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25. Thus, a dispute had arisen between the petitioner and the respondent in respect of **2,76,000** testing kits out of **3,00,000** testing kits that were imported by the petitioner imported earlier on 16.04.2020 prior to Order dated 24.04.2020 of the Delhi High Court in O.M.P.(I)(COMM) 93 of 2020. This was the subject matter of the arbitration by the Arbitral Tribunal under the Rules of Arbitration of the International Chamber of Commerce in ICC Case No.626492/HGT.

26. The grievance of the petitioner is that the petitioner could not re-export **1,48,800** testing kits as the seals of these testing kits had been tampered/broken. Hence, it is the case of the petitioner that the Arbitral Tribunal has erred in awarding the amounts to the respondent by confusing the averments of the petitioner in the counter filed before the Arbitral Tribunal.

27. That apart, it is submitted that paragraph 22 of the counter filed by the petitioner before the Arbitral Tribunal was mis-interpreted by the



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Arbitral Tribunal as a result of which, a patent illegality has been committed by the Arbitral Tribunal while passing the Impugned Award in favour of the respondent/ (the claimant).

28. It is further submitted that in Paragraph 22 of the counter, the petitioner has only mentioned about the re-export of **2,24,000** testing kits out of **7,00,000** testing kits imported later on 23.04.2020.

29. It is further case of the petitioner that the petitioner had returned a sum of **Rs.1,15,80,000/-** to the respondent and to the promoter namely M/s.Rare Metabolics Life Sciences Private Limited. Despite the same, the Tribunal has awarded the amount claimed by the respondent.

30. It is further submitted that there was no scope for confusing the re-exports made during the month of May of all **7,00,000** [**4,76,000+ 2,24,000**] testing kits imported by the petitioner after the Delhi High Court order.



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31. That apart, the timeline between the import of the consignments covering **2,76,000** testing kits supplied to ICMR and eventual return on 29.06.2020 made it impossible for the petitioner to re-export the consignment in the conditions in which they were returned. It is submitted that **1,48,800** testing kits out of **2,76,000** were returned by ICMR only on 29.06.2020 and were received by the petitioner only on 04.07.2020.

32. It is therefore submitted that the Arbitral Tribunal committed a grave error in awarding compensation to the respondent for 1,48,800 testing kits that were returned to the petitioner after breaking open the seal.

33. It is submitted that the Arbitral Tribunal ought to have considered the proviso to Section 16(1) of the Sale of Goods Act, 1930. It is submitted that the goods sold through the respondent/ distributor could have not been returned by the respondent (claimant) to the petitioner.

34. Section 16(1) of the Sale of Goods Act, 1930 reads as under:-

"16(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for



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which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose."

35. It is submitted that the respondent placed order of the testing kit by its patent trade name. That apart, it is submitted that the Arbitral Tribunal did not have any evidence from the respondent/claimant that the petitioner had actually re-exported **1,48,800** testing kits which were returned by ICMR to the respondent/claimant on **29.06.2020** which were later received by the petitioner on **04.07.2020**.

36. That apart, it is submitted that at best the respondent herein was entitled to a sum of **Rs. 4,87,00,000/-** as detailed below, which also the Arbitral Tribunal has failed to consider:-



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Particulars	Value in INR	Remarks
Receipt of Advance	9,60,00,000	Advance received directly from Claimant
Less: Cost of 127200 kits – Rs.420*1272200	5,34,00,000	
Less: Additional IGST Paid	36,00,000	Additional GST as against the claimants advise of 5%
Less: Interest incurred due to delay in receipt of advance	1,03,00,000	Interest @ 18%
Sub-total	2,87,00,000	
The cost of 148800 kits, returned by Claimant and received by R1*	6,24,00,000	
The Cost recovered by the R1* on disposal	-	Scrapped
Profit/(loss)	6,24,00,000	
The cost of 224000 kits, returned by Claimant and received by R1*	9,40,00,000	
The cost recoverable by the R1* on disposal by exporting to HK	9,40,00,000	
The cost of freight incurred for inward of 0.5 Million kits and return of 0.224 million kits	75,00,000	Supporting Documents as evidence enclosed
Net FOREX Loss – the Forex loss incurred in the transaction of 0.5 Million Kits	75,00,000	Supporting Documents as evidence enclosed
Profit/(loss)	-1,50,00,000	
SUMMARY		
Relating to 127200	2,87,00,000	
Relating to 148800	-6,24,00,000	
Relating to 224000	-1,50,00,000	
Total	-4,87,00,000	

(*the petitioner herein)

37. In support of its plea, the petitioner has filed a written submission on the grounds of challenge to the arbitral award as follows:-



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1. ***Breach of Contract*** - 100% advance was not paid which lead to an interest burden for the Petitioner.
2. ***Against the Law*** - The Arbitrator failed to invoke the proviso to Sec 16(1) of the Sale of Goods Act and failed to follow the Superior Court's ratio on identical issues.
3. ***Against the Public Policy of Indian Law*** - non-compliance judicial precedents.
4. ***Against the basic notion of Morality and Justice*** - The Arbitral award was awarded for a higher amount than the amount claimed by the Respondent.
5. ***Not a Speaking Order due to lack of application of mind***
 - a. No reasons for not invoking the proviso to section 16 (1) of the Sale of Goods Act, has been provided in the Award
 - b. Non-application of the ratio laid down in the precedent and application of the decision followed by the ratio in the precedent.
 - c. Non-speaking with regard to the sub-issue determined in para 109(d). The Ld arbitrator failed to examine and compare the relevant document with that of the Purchase Order, rather arbitrarily considered only the submission made by the Respondent that ICMR rejected the kits as it failed to meet the description specified in the procedural order and had made a biased order in Para. 139 (e)(iv) of the Award.
 - d. For invoking clause 7.1 of the agreement, the preconditions are any claims by other person who incurred injury or loss and adverse event occurred to customer supported by complaint with regard to use and effect of the specified products, is mandatory; the Ld Arbitrator failed to refer any documents in this regard in the award.



6. ***Grant of Interest and Rate of Interest*** - *Grant of interest is illegal while the Respondent had breached the contract in the first place and there is no justification for the rate of interest.*

7. Bias of the learned Sole Arbitrator

- a. *Absence of independent evaluation of the contours of the proviso to Sec 16(1)*
- b. *Without adducing any evidence from the Respondent, the Ld Arbitrator passed the order arbitrarily.*
- c. *The product was chosen by ICMR; not offered by the WONDFO or the Petitioner*
- d. *The product approved by the ICMR was based on the name in the catalogue; nowhere any specifications were provided.*
- e. *The Respondent didn't provide any material in support of the rejection; neither the covenants of the agreement which was breached or failed to comply nor with regard to any complaints by the customer.*

38. It is submitted that none of the alternate submissions of the petitioner were also considered by the Arbitral Tribunal.

39. It is submitted that not only the Arbitral Tribunal Impugned Award has arrived improbable conclusion in the Impugned Award based on the available facts but has also ignored the fundamental law.



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40. The learned Senior Counsel for the petitioner has placed reliance

on the following case laws:-

- i. ***Aircon Beibars FZE vs. Heligo Charters Private Limited***, MANU/MH/0495/2022;
- ii. ***Associate Builders vs. Delhi Development Authority***, MANU/SC/1076/2014;
- iii. ***Eastern Mining Contractors (Private) Limited vs. The Premier Automobiles Limited***, MANU/MH/0205/1962;
- iv. ***Mideast Pipeline Products vs. Fernas Construction Co.Ltd***, MANU/DE/1352/2018;
- v. ***MMTC Ltd vs. Vedanta Limited***, MANU/SC/0221/2019;
- vi. ***Ssangyong Engineering & Construction Co. Ltd vs. National Highways Authority of India (NHAI)***, MANU/SC/0705/2019

41. Mr.N.L.Rajah, the learned Senior Counsel for the petitioner has also placed reliance on the decision of this Court in the case of **M.Manohara Chetty and Others vs. C.Coomaraswamy Naidu and Sons**, MANU/TN/0688/1979 in so far as admission is concerned. A specific reference is made to Paragraph 10 of the aforesaid order, which reads as under:-



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"10. The law by no means regards admission as conclusive proof of the matters admitted. This is because to a Court of law admissions are but statements which do no more than suggest an interference as to some fact or facts in issue. (See Section 31 and 17 of the Indian Evidence Act, 1872). It is, therefore, important that the Court should examine any given admission inside out to see if it suggests any clear interference on the fact in issue against the party making it. For a Court to draw an adverse inference against a party on the basis of what he is stated to have admitted, the admission must be unequivocal. It must also be comprehensive. It must go the whole-hog, as it were, on the point at issue. If a party's admission falls short of the totality of the requisite evidence needed for legal proof of a fact in issue, such an admission would be only a truncated admission. It follows that in such a case it cannot support a valid judicial determination, unless it be that the Court is in a position to find other evidence before it to make up for the deficiencies in the admission."

42. The learned Senior Counsel for the petitioner has also placed reliance on the decision of this Court in the case o **Chemplast Sanmar Limited vs. Appellate Authority, Tamil Nadu Pollution Control Board and Others**, [2008) 8 MLJ 1100. A specific reference was made to Paragraph Nos.23, 24 & 25, which reads as under :-

"23. In the decision Pullangoda Rubber Produce Co. vs. State of Kerala (supra), the Hon'ble Supreme Court dealt



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with a rebuttable presumption of admission. The Hon'ble Supreme Court has held in paragraph-5 as follows:-

"5... An admission is an extremely important piece of evidence but it cannot be said that it is conclusive. It is open to the person who made the admission to show that it is incorrect."

24. In the decision Ranjit Singh vs. Union of India and Others (supra), the Hon'ble Supreme Court has held as under in Paragraphs 22 and 23:

"22. He filed a show-cause but, albeit after some time the said cause was available with the disciplinary authority before he issued the order of dismissal. Even if he had prepared the order of dismissal, he could have considered the show-cause as he did not leave his office by then. The expression "communication" in respect of an order of dismissal or removal from service would mean that the same is served upon the delinquent officer. (See State of Punjab vs. Amar Singh Harika)

23. Even otherwise also the jurisdiction of a disciplinary authority to consider the matter would remain with it till it goes out of its hands which would mean that the order is dispatched, as in the case of the order of suspension. (See Sultan Sadik v. Sanjay Raj Subba).

25. A learned Single Judge of this Court (Justice BALASUBRAMANIAN) in the discussion Manohara Chetty and Others vs. Coomaraswamy Naidu and Sons (supra) has held as under in Paragraph 10:



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"10. The law by no means regards admission as conclusive proof of the matters admitted. This is because to a Court of law admissions are but statements which do not more than suggest an inference as to some facts or facts in issue. (See Sections 31 and 17 of the Indian Evidence Act, 1872). It is therefore, important that the Court should examine any given admission inside out to see if it suggests any clear inference on the fact in issue against the party making it. For a Court to draw an adverse inference against a party on the basis of what he is stated to have admitted, the admission must be unequivocal. It must also be comprehensive. It must go the whole-hog, as it were, on the point at issue. If a party's admission falls short of the totality of the requisite evidence needed for legal proof of a fact in issue, such an admission would be only a truncated admission. It follows that in such a case it cannot support a valid judicial determination, unless it be that the Court is in a position to find other evidence before it to make up for the deficiencies in the admission."

43. On the other hand, it is the case of the respondent that out of **2,76,000** testing kits imported by the petitioner on **17.04.2020** that were delivered to ICMR on behalf of the respondent. **1,48,800** testing kits were returned to the petitioner on **29.06.2020** and that **1,27,200 testing kits** were not returned to the petitioner. There was no claim for **1,27,200 testing kits**.



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44. It is further submitted that **2,24,000** testing kits that were delivered pursuant to order dated **24.04.2020** of the Delhi High Court in O.M.P.(I)(COMM) 93 of 2020 were returned to the petitioner immediately on 26.04.2020 and since the amount was paid in advance before **2,76,000** testing kits were supplied, the petitioner was required to refund the amounts for **1,48,000** testing kits returned on **29.06.2020**.

45. It is the submission of the respondent that the respondent paid a sum of **Rs.9,60,00,000/-** to the petitioner as advance and a further sum of **Rs.3,15,00,000/-** was paid by the promoter viz., Rare Metabolics Life Sciences Private Limited to the petitioner on 21.04.2020 as advance.

46. Thus, in all a sum of **Rs.12,75,00,000/-** (Rs.9,60,00,000 + Rs.3,15,00,000) was paid to the petitioner by the respondent/distributor and by the promoter viz., Rare Metabolics Life Sciences Private Limited for supply of 5,00,000 testing kits.



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47. It is the case of the respondent/distributor that a sum of **Rs.1,15,80,000** [12,75,00,000 -11,59,20,000] was paid in excess for **2,76,000** /- kits supplied, which were delivered to the ICMR. The petitioner/importer thus refunded a sum of **Rs.20,00,000/-** to the promoter viz., Rare Metabolics Life Sciences Private Limited on 30.07.2020 and a further sum of **Rs.95,80,000/-** to the respondent/distributor on 03.02.2021 being the excess amounts paid against supply of **2,76,000** /- kits. It is therefore submitted that the petitioner was required to refund the amount paid in advance for **1,48,800** testing kits that were returned on 29.06.2020.

48. It is submitted that to realize its payment, the respondent initiated the arbitration proceedings which was presided by the Sole Arbitrator and based on the pleadings filed by the parties the Sole Arbitrator framed issues and based on the submissions of the both the parties, facts on record and applicable law, the Sole Arbitrator passed a reasoned award upon full consideration of facts, evidences presented by the parties, and has allowed the Respondent's claim.



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49. The learned counsel for the respondents submitted that the petitioner failed to satisfy any of the grounds for setting aside an award under Section 34 of the Arbitration and Conciliation Act, 1996. It is further submitted that the Petitioner also urges re-appreciation of evidence and merits that were already considered in the arbitration proceeding by the Arbitral Tribunal and by doing so the Petitioner attempts to seek a retrial of the dispute which it is therefore submitted that the present Petition does not meet the requisites of a challenge under Section 34 of the Act and ought to be dismissed "*in limine*".

50. It is further submitted that the petitioners contention that the terms of the Agreement were breached due to non-payment of advance amounts and that the Petitioner's most important defence has not been considered by the Sole Arbitrator is untenable and submitted that non-payment of advance has no bearing on this Respondent's claims in the arbitration, which were *inter alia* for repayment of advances paid for the rejected kits, which were returned to the Petitioner.



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51. It is further submitted that the Sole Arbitrator has considered the same at length under Issue No.1, at para 109 (b) and para 138 of the Award dated 31.10.2022. It is further submitted that the Petitioner did not raise any counter claim or seek any declaratory relief in this respect in the Arbitral Proceedings.

52. It is further submitted that the Sole Arbitrator also took note of the fact that regarding admission by the Petitioner's witness that it accepted the ICMRS decision on the Rejected Test Kits as it did not challenge the ICMR's decision for rejecting 1,48,80,000 testing kits. It is further submitted that the Arbitrator, having considered the positions of the parties and evidence tendered had held that there is no basis for the Petitioner to deny the Respondent refund for the sums paid towards the Rejected Test Kits.

53. It is further submitted that the Petitioner admitted in paragraph No.2.11 of its Closing Submissions, that Section 16(1) of the Sale of



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Goods Act,1930 does not apply in cases where an express representation as to the fitness of an article for any particular purpose exists.

54. It is further submitted that the Sole Arbitrator has considered the Petitioner's argument in detail and provided its reasons and analysis at Para Nos.145-156 of the Award that Clause 6.2 of the Agreement dated 23.03.2020 contains an express warranty from the Petitioner that the Test Kits would confirm to specifications of Contract. Furthermore, through Clause 7 of the aforesaid Agreement the Petitioner contracted and undertook to indemnify and hold this Respondent harmless and submitted that Section 16 of the Sale of Goods Act, 1930 concerns implied warranty and therefore has no bearing on the matter at hand.

55. It is submitted that the Petitioner has thus far not paid any of the sums due to the Respondent under the impugned Award dated 31.10.2022 and submitted that the present Petition is an attempt to delay payment and to obstruct enforcement of the Award and hence submitted that the present Petition is devoid of merits and deserves to be dismissed.



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56. The learned counsel for the respondent submitted that the scope of challenge under Section 34 of the Act is very narrow. It is submitted that the Petitioner herein has not discharged the burden to show how they fall within the limited bracket for setting aside an arbitral award as per the amended Section 34 of the Act and has placed reliance on the following decisions:-

- i. ***MMTC Ltd v. Vedanta Ltd., (2019) 4 SCC 163;***
- ii. ***Ssangyong Engineering & Construction Co. Ltd vs. National Highways Authority of India (NHAI), (2019) 15 SCC 131***
- iii. ***PatelEngineering Ltd. v. NEEPCO, (2020) 7 SCC 167;***
- iv. ***The Project Director. NHAI V. M Hakim (2021) 9 SCC 1***

57. The learned counsel for the respondent has also placed reliance on the following decisions:-

- i. ***McDermott International Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181;***
- ii. ***Sutlej Construction Ltd. v. UT of Chandigarh, (2018) 1 SCC 718***
- iii. ***Sheladia Associates Inc. V. TN Road Sector***



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Project II, Represented by its Project Director
2019 SCC OnLine Mad 17883

58. I have considered the arguments advanced by the learned Senior Counsel for the petitioner and the learned Counsel for the respondent.

59. Scope of interference under Section 34 of the Arbitration and Conciliation Act, 1996 is very limited.

60. This Court can neither sit as a Court of appeal or re-appreciate the evidence placed before the Arbitral Tribunal or substitute the finding of the Arbitral Tribunal with its own conclusion on facts or evidence. In this connection, the decision of the Honourable Supreme Court in **The Project Director, NHAI V. M. Hakim**, (2021) 9 SCC 1 is invited wherein, it was held that the power to set aside an Arbitral Award under Section 34 of the Arbitration And Conciliation Act, 1996 does not include the authority to modify the award. It further held that an award can be 'set aside' only on limited grounds as specified in Section 34 of the Act and it is not an



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appellate provision. It further held that an application under Section 34 for setting aside an award does not entail any challenge on merits to an award.

61. The Honourable Supreme Court in **Ssangyong Engineering and Construction Co Ltd versus National Highway Authority of India**, (2019) 15 SCC 131 has held that an award can be set aside on the ground of patent illegality under Section 34 (2-A) of the Arbitration And Conciliation Act, 1996 only where the illegality in the award goes to the root of the matter. It further held that **erroneous application of law by an Arbitral Tribunal** or the re-appreciation of evidence by the Court under Section 34 (2-A) of the Arbitration and Conciliation Act, 1996 is not available.

62. The Court held that the above ground is available only where the view taken by the Arbitral Tribunal is an impossible view while construing the contract between the parties or where the award of the Tribunal lacks any reasons. The Court further held that an award can be set aside only if an arbitrator/arbitral Tribunal decide(s) the question beyond the contract or beyond the terms of reference or if the finding arrived by the Arbitral



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Tribunal is based on no evidence or ignoring vital evidence or is based on documents taken as evidence without notice to the parties.

63. The Honourable Supreme Court in **Patel Engineering Ltd V. NEEPCO**, (2020) 7 SCC 167 held that patent illegality as a ground for setting aside an award is available only if the decision of the arbitrator is found to be perverse or so irrational that no reasonable person would have arrived at the same or the construction of the contract is such that no fair or reasonable person would take or that the view of the arbitrator is not even a possible view.

64. The Honourable Supreme Court in **McDermott International Inc. v. Burn Standard Co. Ltd**, (2006) 11 SCC 181 held that while interpreting the terms of a contract, the conduct of parties and correspondences exchanged would also be relevant factors and it is well within the arbitrator's jurisdiction to consider the same.



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65. The Honourable Supreme Court in **Sutlej Construction Ltd. v. UT of Chandigarh** (2018) 1 SCC 718, held that when the award is a reasoned one and the view taken is plausible, re-appreciation of evidence is not allowed while dealing with the challenge to an award under Section 34 of the Arbitration And Conciliation Act, 1996 for setting aside an award. It further held that the proceedings challenging the award cannot be treated as a first appellate court against a decree passed by a trial court.

66. The Honourable Supreme Court in **Sheladia Associates Inc. V. TN Road Sector Project II, Represented by its Project Director**, 2019 SCC OnLine Mad 17883 reminded itself of the Hodgkinson principle which has been explained by the Honourable Supreme Court in the oft-quoted and celebrated Associate Builders Case being **Associate Builders V. Delhi Development Authority**, (2015) 3 SCC 49. It held that Hodgkinson principle in simple terms means that the Arbitral Tribunal is the best judge with regard to quality and quantity of evidence before it. It further held that if there is no infraction of Section 28(3) of the Arbitration And Conciliation



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Act, 1996 the question of challenge on the grounds of public policy does not arise.

67. The facts of the case indicate that the Tribunal has examined the facts at length and had framed issues and answered it in favour of the respondent.

68. The petitioner as an importer of the testing kits had imported **10,00,000** of testing kits and had supplied **5,00,000** testing kits to ICMR for and on behalf of the respondent who was appointed as the distributor for promoter M/s.Rare Metabolics Life Sciences Private Limited, (the 2nd respondent in the Arbitral Proceeding) under Ex.C2 Tripartite Master Distribution Agreement dated 23.3.2020 signed between them (i.e. the petitioner, the respondent and promoter M/s.Rare Metabolics Life Sciences Private Limited).

69. Initially, the petitioner had imported **3,00,000** test kits and had



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supplied **2,76,000** test kits to ICMR on 17.4.2020 for the respondent.

About **24,000** test kits out of **3,00,000** were supplied to the government of Tamil Nadu. The petitioner had thereafter imported **7,00,000** test kits during the last week of April 2020.

70. Initially, the transaction was for **Rs.30,00,00,000/-** at Rs.600 per test kit. The respondent and the promoter M/s.Rare Metabolics Life Sciences Private Limited, together had paid an advance of **Rs.12,75,00,000/-** to the petitioner.

71. Since balance payments were not received in advance for the balance supply of **2,24,000 test kit**, the petitioner threatened not to supply the aforesaid quality to ICMR. Therefore, the promoter M/s.Rare Metabolics Life Sciences Private Limited, along with the respondent AARK Pharmaceuticals - (the claimant) filed in O.M.P.(I)(COMM) 93 of 2020 before the Delhi High Court and secured an order dated **24.04.2020**, Content of which has been extracted above.



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72. As a result of order dated **24.04.2020** of the Delhi High Court, there was a downward revision in the price agreed between the parties under the Tripartite Master Distribution Agreement dated 23.3.2020. Both the petitioner and the respondents are also not in dispute on this issue. Thus, the contract for **Rs.30,00,00,000/-** was reduced to **Rs.21,00,00,000/-**.

73. Pursuant to the order dated **24.04.2020** of the Delhi High Court in O.M.P.(I)(COMM) 93 of 2020, petitioner also supplied **2,24,000** test kits to ICMR. However, the entire consignment of **2,24,000** test kit was returned immediately by ICMR. According to the petitioner, in view of the return of **2,24,000** test kits by ICMR, the balance **4,76,000** (7,00,000-2,24,000) test kits were also later exported to a buyer from Hong Kong.

74. Later, ICMR, returned **1,48,000** test kits to the respondent which were in turn were returned to the petitioner on **4.7.2020**. According to the petitioner, the petitioner was unable to the export **1,48,000** test kits as the package were opened.



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75. The cost price of the **2,76,000/-** Test kits @ Rs. 420 per kit, amounts to **Rs.11,59,20,000/-** (Eleven Crore Fifty-Nine Lakhs Twenty Thousand Rupces). The amount paid by the Respondent and Rare Metabolic to the Petitioner was **Rs.12,75,00,000/-**. Therefore, the petitioner has repaid a sum of Rs.95,80,000/- on 03.02.2021 to the respondent herein namely AARK Pharmaceuticals and a sum of Rs.20,00,000/- on 30.07.2020 to M/s.Rare Metabolics Life Sciences Private Limited, (the promoter), amounting to **Rs.1,15,80,000/-** being the excess paid for the cost price for **2,76,000** Test kits. Thus, the refund of the aforesaid amount of **Rs.1,15,80,000/-** is on account of return of the downward revision of price of the Test Kits pursuant to order dated of Delhi High Court.

76. From the records that are available before this Court, there are indications that the petitioner has exported three shipments of Test Kits to the buyer in Hongkong as per Ex.R1-R7, as detailed below:-



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Shipping Bill No.	Date	Invoice Value in Rupees	Invoice Value in USD	FOB Value in Rupees
2681162	15.05.2020	2,29,34,475	305793	2,28,80,000.00
2693406	29.05.2020	14,81,04,264	1977360	14,78,50,128.30
2893468	29.05.2020	-	-	*14,78,50,128.00

* Amount in US Dollar -1973966.9960 USD [Calculated at Rs.74.900 per US Dollar]

77. The above exports can be co-related only to **7,00,000/-** test kits imported by the petitioner during the 4th week of April 2020 out of which **2,24,000/-** test kits were earlier supplied to ICMR and balance to other buyers in India. Though the details of the Bill of Entries/Entry for import of **7,00,000** Test Kits are not available, admitted case of the petitioner is that the petitioner exported them during the month of May as detailed above vide shipping bills mentioned above.

78. The records Ex.R1- 8 which were filed by the petitioner also establish that the petitioner had disputed with the customs department



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regarding customs duty on imports. The Principal Commissioner indicates that the petitioner had earlier imported “SARS-COV-2 Antibody Test (Covid-19 Test Kit) from China vide Bill of Entry No.**7460225** dated 16.04.2020. Proceedings came to be initiated by the Customs Department, Principal Commissioner of Customs ACC (Imports) which culminated in order dated 27.01.2021 of the Principal Commissioner of Customs ACC (Imports). The said order indicates that the petitioner had imported **15,0000** Nos. of Covid-19 Test Kits vide Bill of Entry and that out of 15,000 Nos. of Covid-19 Test Kits imported vide aforesaid Bill of Entry No.7460225 dated 16.04.2020, the petitioner has exported 8098 kits vide Shipping Bill No.5380454.

79. In the said proceeding, it was also the stand of the petitioner that 6360 Nos.of Kits were sold to ICMR through the promoters which was exempted for payment of duty @ 5% in terms of Notification No.45/2017 (CGST) dated 14.11.2017 and that 525 Kits were sold to a Chennai Company (Clinical Automation) and that only a small quantity of 17 Nos of test kits were held in their stock and thus differential duty payable by the



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petitioner was only on the balance 542 Nos of Test Kits . Para 21 of Ex.R.1 to Ex.R8 of the Principal Commissioner of Customs ACC(Imports) of order reads as under:-

21. The importer. on the other hand, has contended that they have imported 15,000 Nos of COVID.19 Kit vide Bill of Entry no. 7460225, dated 16.04.2020, out of which 8098 kits were exported vide Shipping Bill No 5380454 and that there existed revenue neutral situation as they were eligible for refund of duty paid to the government at the time of import. Further out of the balance quantity, 6360 Nos were sold to ICMR through M/s Rare Metabolics on which duty 59% was payable under Notification No 45/2017 (CGST) dated 14/11/2017; that 525 nos were sold to Chennai Company (Clinical Automation) and only small quantity of 17 nos was held in their stock and thus differential duty was payable only on the balance 542 nos.

80. In para 18.1 of Ex.R1-8 Order dated 27.01.2021 of Principal Commissioner of Customs ACC(Imports), detail of the exports of 8098 Nos. of Test Kits vide Shipping Bill No.5380454 dated 23.09.2020 is given. Para 18.1 of Ex.R1-8 order dated 27.01.2021 of Principal Commissioner of Customs ACC(Imports) reads as under :-

M/s Matrix Labs vide their written submission received in this office on 22.12.2020, submitted that in the said BoE No.7460225 dated 16/04/2020, they



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have imported 15,000 quantity of COVID-19 Test Kit out of which **8098 quantity of test kit has been exported vide Shipping Bill No. 5380454 dated 23/09/2020.** Therefore, there existed a revenue neutral situation and that they were eligible for refund of tax amount paid to the government. In a catena of cases, the courts have from time and again held that the duty cannot be demanded when it is a revenue neutral situation. The Hon'ble Supreme Court in the case of Nirlon Ltd v Commissioner, 2015 (320) ELT 22 (SC) held that when the situation is revenue neutral the assessee could not have achieved any purpose to evade the duty.

81. The above export is after the Kits returned by ICMR to the respondent on 29.06.2020 and thereafter to the petitioner by the respondent on 04.07.2020. Thus, there are two sets of exports made by the petitioner during the month of May as in the table above from and out of 7,00,000 Test Kits imported during the 4th Week of April 2020 and second export vide Shipping Bill No.**5380454** dated 23.09.2020 of **8098** Nos. of Test Kits out of **15,000** of Testing kits. The petitioner had no other imports or exports.

82. The records also indicate that the petitioner had been promised to return the balance as and when payment were received from the buyer on



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the export made by the petitioner. Therefore, even on this count, theory put forward before this Court that the Impugned Award suffers from patent illegality is not acceptable. Therefore, the impugned Award does not call for any interference.

83. There is nothing on record to show that there is a patent illegality in the impugned award or to infer a conclusion that the impugned award is in conflict with the public policy of India. The impugned award indicates that the evidence was examined and there was an admission by the petitioner to refund the amount on the returned 1,48,800 test kits.

84. The interpretation placed by the arbitral tribunal in so far as proviso to Section 16 (1) of the Sale of Goods Act, 1930, also does not call for any interference.

85. The argument that the Arbitral Tribunal has ignored vital evidence also cannot be countenanced as the WhatsApp chats and admission in Ex. C27 e-mail dated 14.07.2020 wherein the petitioner has



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stated that he had communicated to the supplier for the process and are waiting for the same and that the petitioner has not denied any payment return but have to complete the process. In the said email, the petitioner has categorically stated that the petitioner had transferred to the supplier for the purchase of kits and was waiting for company formality to return the kits and there is no point in discussion about the interest charges.

86. The impugned order also records that the respondent was chasing for payment between July 2020 and January 2020 one for the payment through WhatsApp chat content of which has been extracted in the Impugned Award. In response to various WhatsApp chats, the petitioner has stated that the petitioner had not received any payment from the supplier namely Wondfo, and that only once that is completed payments will be made. The petitioner has promised to return the payments. However failed to make payments. Therefore I do not find any reasons to come to a conclusion that the impugned award either suffers from patent illegality or is in conflict with public policy of India.



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87. In the result, this original petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 has to fail. Therefore, this original petition is liable to be dismissed and is accordingly dismissed. Consequently, A.No.1375 of 2023 is dismissed. No costs.

18.04.2024

Index : Yes/No
Neutral Citation : Yes/No
kkd

C.SARAVANAN, J.

rgm/kkd

Pre-delivery Order in
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