



IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

THURSDAY, THE 25th DAY OF NOVEMBER 2021

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

O.P. No.471 of 2020

and

A.No.2589 of 2020

O.P. No.471 of 2020
and A.No.2589 of 2020:-

In the matter of Arbitration and
Conciliation Act, 1996.

&

In the matter of Arbitration Award
dated 03.02.2020 in Arbitration Case
Nos 1 to 3 of 2015

M/s Aanchal Cement Limited
(Previously Kalika Cement Limited)
No.23 A, N.S.Road, Suit - 5, 7th Floor,
Kolkata 700 001

Rep by its Authorised Signatory.

...Applicant/Petitioner

-Versus-

M/s Gimpex Limited
No.282, Linghi Chetty Street,
Chennai 600 001

...Respondent/Respondent

O.P. No.471 of 2020 :-

Original Petition praying that this Hon'ble Court be pleased to set



Arbitrator in the arbitration proceedings in Arbitration Case Nos. 1 to 3 of 2015 between the Petitioner and the Respondent.

A. No.2589 of 2020 :-

Application praying that this Hon'ble Court be pleased to Stay the operation of the Impugned Award dated 03.02.2020 pending adjudication of the Section 34 Petition filed by the Petitioner/Applicant.

This Original Petition and the Application along with O.P.No.216 of 2021 and O.A.No.266 of 2020 and A.Nos.1542, 1543 of 2020 having been heard on 01.11.2021 in the presence of Mr.R.Murari Senior Counsel for M/s.Karun Mehta, Shreyas.E and Adithya Reddy, Advocates for the petitioner in O.P.No.471 of 2020 and for the applicant in A.No.2589 of 2020 and Mr.P.S.Raman, Senior Counsel for M/s. AAV Partners, Advocates for the respondent in O.P.No.471 of 2020 and A.No.2589 of 2020 and upon reading the petition filed in O.P.No.471 of 2020 and the Judges Summons and the affidavit of Vijay Srivastava filed in A.No.2589 of 2020 and having stood over for consideration till this date and coming on this day before this Court for orders in the presence of said advocates for the parties hereto and

this Court does not find any infirmity in the Award passed by the learned



Arbitrator, accordingly, the same cannot be interfered, it is ordered as follows:-

That the O.P.No.471 of 2020, be and is hereby dismissed.

2) That A.No.2589 of 2020 do stand closed.

WITNESS THE HON'BLE MR. JUSTICE MUNISHWAR NATH BHANDARI, ACTING CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 25th DAY OF NOVEMBER 2021.

Sd/-

ASSISTANT REGISTRAR(O.S.-II)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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06/12/2021

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O.P. No.471 of 2020
and
A.No.2589 of 2020

ORDER

DATED : 25.11.2021

THE HON'BLE MR.JUSTICE
N.SATHISH KUMAR

FOR APPROVAL: 14.12.2021

APPROVED ON : 16.12.2021

**THE HIGH COURT OF JUDICATURE AT MADRAS**

Reserved on	Delivered on
01~11~2021	25-11~2021

CORAM:
THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P. Nos.471 of 2020 and 216 of 2021,

O.A.No.266 of 2020 and

A.Nos.1542, 1543 and 2589 of 2020

O.P.No.471 of 2020

M/s.Aanchal Cement Ltd.,
(Formerly known as M/s. Kalika Cement Ltd.,)
No.23-A, N.S.Road, Suit-5, 7th Floor,
Kolkata 700001. ... Petitioner / Respondent

-VS-

M/s. Gimplex Pvt. Ltd.,
No.282 Linghi Chetty Street,
Chennai 600001. ... Respondent / Claimant

O.P.No.216 of 2021

M/s. Gimplex Pvt. Ltd.,
Rep. By its Director
Mr.Binod Choudhury
No.282 Linghi Chetty Street,
Chennai 600001. ... Petitioner / Claimant

-Vs-



M/s.Aanchal Cement Ltd.,
(Formerly known as M/s. Kalika Cement Ltd.,)
Rep.by its Managing Director
Mr.Manoj Goel,
No.23-A, N.S.Road, Suit-5, 7th Floor,
Kolkata 700001.

... Respondent / Respondent

Prayer in O.P.No.471 of 2020: Petition filed under Section 34(2)(a)(ii), (b)(ii) and (2A) of the Arbitration and Conciliation Act, 1996, to set aside the Award dated 03.02.2020 passed by the learned Arbitrator in Arbitration Case No.1 to 3 of 2015.

Prayer in O.P.(Comm.)No.216 of 2021: Petition filed under Section 34 (2)(b)(ii), Explanation 1(ii) and (iii) and 2(A) of the Arbitration and Conciliation Act, 1996, to modify the Arbitration Award dated 03.02.2020 insofar as it disallows the period of the interest on the amount awarded under issue No.4 and 8 of the Arbitration Award.

For Petitioner : Mr.R. Murari, Senior Counsel
in O.P.471/2020 for M/s. Karun Mehta, Shreyas.E
and Respondent and Adithya Reddy
in O.P.216/2021

For Respondent : Mr. P.S. Raman, Senior Counsel
in O.P.471/2020 for M/s.AAV Partners
and Petitioner
in O.P.216/2021

COMMON ORDER

1. Aggrieved over the Order dated 09.11.2020 passed by the sole

Arbitrator the Petitioner/ Respondent before the Arbitral Tribunal, filed

<https://hcservices.ecourts.gov.in/hcservices/>

O.P.No.471 of 2020 to set aside the Award. The Claimant before the



Arbitral Tribunal also filed O.P.(Comm.)No.216 of 2021 insofar as it disallows the portion of interest on the amount awarded under Issue Nos.4 and 8 of the Arbitration Award.

1.(a) The parties are arrayed as per their own rankings before the Arbitral Tribunal. The Petitioner who filed O.P.No.471 of 2020 is referred as Respondent and the Petitioner who filed O.P.(Comm.) No.216 of 2021 is referred as Claimant for the convenience sake.

1.(b) Since both the Petitions are arising out of the same Award, the same are disposed by way of this Common Order.

2. The brief facts leading to file these Original Petitions are as follows:

2.(a) The Claimant is the Government of India recognised 'Trade House' and its activities are mining, minerals processing for value-added products, exports and imports. During the course of business, the Respondent had approached the Claimant to buy 35,000 MTS of Portland Cement Clinker of Vietnam origin and sought for a detailed quotation for

the same, from the Claimant. The Claimant had forwarded their Proforma



Invoice dated 09.03.2012, for a total quantity of 15,000 MTS for the total price of Rs.6,33,75,000/- . The goods were to be shipped only on receipt of advance and upon opening of L/C, in the name of the Claimant for the balance value of the goods. The Respondent remitted a sum of Rs.60,00,000/- on 12.03.2012 by RTGS. Subsequently, the Respondent wanted additional quantity of 15,000 MTS of goods on the same terms and remitted a further sum of Rs.40,00,000/- on 14.03.2012 by RTGS. The Respondent failed to open a L/C for the balance amount, but sought time, which was granted by the Claimant. In spite of that the Respondent had not opened the L/C and so the Claimant did not effect the shipment of 30,000 MTS of goods to the Respondent.

2.(b) As the Respondent failed to open L/C, the Order was cancelled and the Claimant had received notice of claiming damages from the supplier. So, the Claimant contemplating adjustment of advance received from the Respondent towards loss, arising out of the failure on the part of the Respondent, in not fulfilling its obligations. The respondent came with a fresh enquiry for 1 lakh MTS of goods, for its own requirements and requested not to insist upon advance, but promised to pay the entire price of the goods at the time of sale of the goods on High Seas Sales (HSS) basis.



goods, prior to shipping from Vietnam, were inspected. After the goods were loaded in vessels, the Claimant informed the Respondent regarding the date of arrival of the vessel to discharge the goods. But the Respondent, when the goods were on high seas, expressed difficulties in effecting the entire payment for the goods at the time of sale. The Respondent also informed the Claimant that they have buyers for the goods and would make part payments while the goods are on the high seas and they would pay the balance payments within 15 days of the goods arrived in the port. He has also offered to share 50% of the profit realised out of the sale of the goods to the third parties by the Respondent.

2.(c) The Claimant had no choice except to agree such payment terms proposed by the Respondent and agreed to accommodate the request of the Respondent. Thereafter, High Seas Sale Agreements came into existence. Pursuant to which, the Claimant transferred ownership of the goods to the Respondent. As per the Agreements, Customs Duty and other Government levies were to be paid by the Respondent. But the Respondent requested the Claimant to pay the Customs Duty and Wharfage charges, with the promise to reimburse the same with interest. Accordingly, the Claimant had paid a sum of Rs.6,96,74,666/- towards Customs Duty and Rs.8,04,12,495/-

towards Wharfage Charges, which enable the Respondent to clear the



goods. The Respondent took delivery of the goods and started supplying the same to the purchasers. But the Respondent failed to effect the balance payments for the goods purchased.

2.(d) A meeting was held on 09.07.2012. On 10.07.2012, the Respondent handed over 3 cheques for Rs.1 Crore each and promised to effect the balance payment for the goods sold on or before 30.07.2012. Out of the three cheques, two cheques were dishonoured. However, one cheque for Rs.1 Crores was honoured. Subsequently the Respondent gave 18 cheques for a total value of Rs.9 Crores in favour of the Claimant on 06.08.2012. But the said cheques were returned with endorsement “Payment stopped by the Drawer” and “Insufficient Funds.” Accordingly, the Claimant claimed the sums as follows:

(i) In Arbitration Case No.1 Rs.90,472,065/- and
Rs.23,742,827/- with respect to High Seas Sale
Agreement dated 17.04.2012;

(ii) In Arbitration Case No.2 Rs.9,510,992/- and
Rs.9,701,375/- with respect to High Seas Sale
Agreement dated 27.04.2012 and



which was subsequently agreed between the parties. HSSAs also stood novated by reason of Deed of Compromise, having been executed at the instance of the Claimant and the Arbitration Clause perished upon the extinguishment of HSSAs. It is stated that HSSAs entered only for a limited purpose to enable the Respondent to sell the same in the market. There was no sale of the cement to the Respondent, as alleged by the Claimant.

3.(b) The Respondent furnished 18 undated cheques of Rs.50 lakh each, aggregating to Rs.9 Crores to the Claimant, as a security for the sale of imported materials to be undertaken by the Respondent, in the market, in furtherance of its obligation under the Joint Venture. The parties, as contemplated in the Joint Venture have made a payment of Rs.8,26,20,110/- towards duty and wharfage. Between 12th April 2012 and 28th July, 2012, the Respondent paid a sum of Rs.25.187 Crores to the Claimant as a reimbursement of the cost of material. Subsequent to May, 2014, the Joint Venture business seems to have incurred loss and thereafter the Claimant started demanding the refund of money purported to have invested by them, in the Joint Venture. The Claimant avoided reconciliation of the accounts of Joint Venture. In the meeting held on 9th July, 2012, the parties were admitted the existence of the Joint Venture and even in the emails, the



being 50% each. Despite knowing that the cheques were issued for security, the Claimant has presented the cheques and issued notices under Section 138 of the Negotiable Instruments Act. Whereas the Respondent filed a Suit in O.S.No.1615 of 2012 on the file of City Civil Court at Calcutta, challenging the demand for Rs.15 Crores. As the said suit is pending, the proceedings in relation to the same cannot be continued before the Tribunal. Similarly the Claimant has also filed Criminal Complaint. Based on which Mr. Mukesh Goel, Director of the Respondent was arrested. At this stage, a document styled as 'Deed of Compromise' brought forth by the Claimant and Mr. Mukesh Goel was asked to sign the same. The same was signed under coercion and duress by way of the criminal proceedings.

3.(c) It is also the contention that there was no obligation imposed upon the Respondent to effect the entire payment of goods at the time of sale. It is only a sharing of the profits which clearly outside the scope of the agreement. The Originals of the said HSSAs have not been disclosed. There are different set of originals in different proceedings taken by the Claimant. There was no agreement to pay the balance amount by the Respondent. The entire accounts between the parties are not related to or restricted to HSSAs, but it is covered under Joint Venture arrangement and so no adjudication



liable to pay a sum of Rs.29,54,86,859/-. Hence prayed to set aside the Order passed by the learned Arbitrator.

4. Based on the above pleadings, the following issues were framed:

1. *Whether High Seas Sale Agreements dated 17.04.2012, 27.04.2012 and 27.04.2012 entered between the Claimant and the Respondent are sham and nominal and not intended to be acted upon between the parties?*
2. *Whether the 3 High Seas Sale Agreements, dated 17.04.2012, 27.04.2012 and 27.04.2012 are entered in Accord and Satisfaction, by virtue of the Deed of Compromise dated, 12.03.2013?*
3. *Whether the transaction entered between the Claimant and the Respondent would amount to a Joint Venture Agreement or would amount to an outright sale of goods, covered under the 3 High Seas Sale Agreements, dated 17.04.2012, 27.04.2012 and 27.04.2012 ?*
4. *Whether the claim for return of money said to have been paid towards Wharfage, Customs Duty and demurrage, forms part of the arbitrable claimed arising in term of the 3 High Seas Sale Agreements, Dated 17.04.2012, 27.04.2012 and 27.04.2012 ?*



5. *Can the Claimant invoke Arbitration Clause, mentioned in High Seas Sale Agreements dated 17.04.2012, 27.04.2012 and 27.04.2012, even after the new contract between the parties as set out in para 18 of the Claim Petition?*
6. *Whether the Claimant is entitled to 50% of the profit realized by the Respondent, by selling the goods to third parties, over and above the price of the goods mentioned in the High Seas Sale Agreements, dated 17.04.2012, 27.04.2012 and 27.04.2012 and whether the same is arbitrable dispute before this Tribunal as 3 High Seas Sale Agreements dated 17.04.2012, 27.04.2012 and 27.04.2012, do not contain such terms?*
7. *What amount would be due and payable to the Claimant by the Respondent under the High Seas Sale Agreements dated 17.04.2012, 27.04.2012 and 27.04.2012 ?*
8. *Whether the Claimant is entitled for the interest? If so, on what amount, at what rate and on what amount?*
9. *Any other reliefs, including the costs, the parties are entitled to.”*



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5. On the side of the Claimant, Claimant was examined as C.W.1 and marked Exs.C-1 to C-82. The Respondent was examined as R.W.1 and produced documents which were marked as Exs.R-1 to R-33. Learned Tribunal after considering the oral and documentary evidence has passed the following Award:

“A. The Tribunal directs that the Respondent, a sum of Rs.9,94,75,000/- (Rs.2,95,00,343/- and Rs.6,96,74,666/- and Rs.3,00,000/-) (Rupees Nine Crores Ninety Four Lakhs Seventy Five Thousand only) with interest at 15% from the date of this Award, to pay to the Claimant till the realisation of the said amount or unpaid portion thereof, till the date of actual payment.

B. No order as to costs and so the parties should bear their own costs.”

6.(a) The above Award has been challenged by the Respondent in O.P.No.471 of 2020 mainly on the ground that the Claimant has filed a suit in O.S.No.1615 of 2012 on the file of the City Civil Court, Calcutta. In the above Suit an Application under Section 8 of the Arbitration Conciliation

Act has been filed. The same was dismissed by the Court on the ground of



non-production of original contract. Therefore, it is the contention of the learned Senior Counsel Mr.R. Murari appearing for the Respondent/Petitioner in O.P.No.471 of 2020 that once the Section 8 Application is dismissed in the Civil Court matter could not have referred for Arbitration. Learned Arbitrator has no jurisdiction to resolve the dispute between the parties. Hence, it is the contention of the learned Senior Counsel that the Arbitrator's Award cannot be sustained in the eye of law.

6.(b) It is further submitted by the learned Senior Counsel that subject matter of the suit and the arbitration are one and the same. In such circumstance it is not open for the Respondent to rely on the Order passed under Section 11 of the Act while appointing the Arbitrator. Hence, it is his submission that the statute be interpreted to make its provision effective and operative and not meaningless or otiose as held in the judgment of the Apex Court in *Managing Director, Chattisgarh State Co-operative Bank v. Zila Sahkari [(2020 6 SCC 411)]*. Hence it is his contention that mere dismissal of the application on technical ground will not make any difference as the Act does not contemplate to different outcome for rejection of Section 8 application.

6.(c) It is also submitted by the learned Senior Counsel that as the Act



is modeled on the basis of UNCITRAL model law on International Commercial Arbitration, 1985. It is his further submission that the Model law has been adopted in 85 countries including India. The consequence of dismissal of Application under Section 8 of the Arbitration Conciliation Act, when omitted in the Act and especiallly in the absence of any precedent produced by the Respondent would find place in the UNCITRAL Model Law, foreign enactments and commentaries. The learned Senior Counsel also submitted a comparative statement of the prevailing laws in other countries especially in Newzealand, Germany, Canada and England & Wales and submitted that Court across jurisdictions have interpreted the rejection of an application akin to Article 8 of Model Law, which is similar to Section 8 of the Indian Act, to mean that the suit shall continue to the exclusion of the arbitration and any arbitral proceedings that have continued post rejection of such application, including any award made, shall be without jurisdiction. Learned Senior further submitted that the Respondent has not been able to demonstrate any reason as to why the above sound and judicious principle of law developed by Courts / Tribunals across jurisdictions following the Model Law ought not to be followed while interpreting the facts of this case and Section 8 of the Act, which is also based on Article 8 of the Model Law.



6.(d) It is also submitted by the learned Senior Counsel that the Award is suffers from patent illegality, contrary to fundamental policy and basic notions of justice since the Arbitrator has failed to decide the issue of admissibility, reliability and proof of HSSA Agreements. It is his further contention that the learned Arbitrator has also failed to adjudicate the issue whether HSSA were vitiated by fraud and forgery. Similarly, learned Arbitrator also not decided whether the transaction is outright sale or the joint venture. The learned Arbitrator also passed an Award relate to the Customs Duty which is contrary to the contract. It is his main contention that once the Application under Section 8 was rejected by the competent Court, only suit has to proceed, arbitration cannot be continued. In support of his contention he relied upon following the judgments:

1. South City vs. Jugal Kishore [2010 SCC Online Calcutta 2137]

2. Marwadi Shares v. Kishorkumar [2008 SCC Online Guj. 182],

3. Onyx Musicabsolute vs. Yash Raj Films [2008 SCC Online Bom 636]

4. Sukanya Holdings (P) Ltd., vs. Jayesh H. Pandya and Anr. [(2005) 5 scc 531]



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5. *Anil v. Rajendra* [(2015) 2 SCC 583]
6. *Duro Felguera vs. Gangavaram Port Limited* [(2017) 9 SCC 729]
7. *Dharamvir Khosla vs. Asian Hotels (North) Limited, [CS(Comm) No.184 of 2020, Delhi High Court]*
8. *Atul Singh vs. Sunil Kumar* [(2008) 2 SCC 602]
9. *Associate Builders vs. DDA* [(2015) 3 SCC 49]
10. *Booz Allen & Hamilton Inc. Vs. SBI Home Finance Limited* [(2011) 5 SCC 532]
11. *Ssangyong Engineering and Construction Company Limited vs. NHAI* [(2019) 15 SCC 131]
12. *State of Orissa vs. Mamata Mohanthy* [(2011) 3 SCC 436]
13. *Ayyasamy vs. A. Paramasivam* [(2016) 10 SCC 386]



and submitted that whether the dismissal of application under Section 8 of the Act was in different ground, merit has no relevance to the outcome of such dismissal. His contention is that once the Application under Section 8 is dismissed only the suit alone to continue. Hence it is his contention that even assuming that the dismissal of the application on technical ground the effect of such dismissal would mean that no Section 8 application was filed in the suit. In such a situation also it would amount to the defendant subjecting himself to the suit. Therefore, the arbitration cannot be continued and it is also submitted that HSS Agreement is novated by subsequent deed of compromise which was ignored by the learned Arbitrator.

7.(a) Whereas the learned Senior Counsel Mr. P.S. Raman appearing for the Claimnant/Petitioner in O.P.No.216 of 2021 submitted that the application filed under Section 8 was not disposed on merits. It is dismissed on technical grounds, i.e., for non-production of the original contract. Therefore, it cannot be said that there cannot be no arbitration at all. Whereas the Arbitrator appointed in pursuant to the orders passed by this Court under Section 11 of the Arbitration and Conciliation Act, it has reached the finality. Same being the judicial order, it reached finality, same

cannot be questioned. Further, it is his contention that the Suit and



Arbitration cannot go simultaneously. There is no progress whatsoever in the suit. In the meanwhile entire Arbitration proceedings concluded and Award has been passed. Such being the position, preference to be given to the Award. Now the Claimant cannot take advantage of the dismissal of Section 8 Application on the technical grounds. The Court has not dismissed Section 8 Application on merits to hold that the Civil Court alone has got jurisdiction in this matter.

7.(b) It is his further contention that the suit is filed for declaration, whereas the proceedings before the Arbitrator is for recovery of money. At any event once the proceedings culminated the Award in the alternate dispute resolution, mere pendency of the suit, the Award cannot be challenged. Even Section 8 of the Act does not prohibit passing of Award by Arbitral Tribunal during the pendency of the suit. Hence it is his contention that there is no bar even during the pendency of the application filed under Section 8 of the Act to refer the matter for Arbitration. The Arbitration may be commenced and Award may be passed. Such being the position merely because Section 8 application was dismissed on technical ground, it cannot be said that Arbitration Award passed by the sole Arbitrator is not according to law.



7.(c) With regard to the merits, it is the contention of the learned Senior Counsel that the learned Arbitrator has considered every documents, analysed the facts and appreciated all the evidence. The so called oral arrangements about the Joint Venture Agreement pleaded by the Respondent has not been established. The party to the contract has not appeared before the Arbitrator to prove the so called oral arrangement which is contrary to the written contract. The pleas of forgery raised by the petitioner raised by Petitioner was not established. Learned Arbitrator has taken note of all the documents and passed an Award. Hence, prayed for dismissal of O.P.No.471 of 2020. It is also submitted that learned Arbitrator in fact failed to grant *pentente lite* interest which is contrary to the contract. Hence, submitted that the same has to be interfered and O.P.No.261 of 2021 is to be allowed.

7.(d) In support of his contention the learned Senior Counsel relied upon the following judgments:

1. *Punjab State Co-operative Supply and Marketing Federation Ltd., vs. M/s. Shiv Rice and General Mills and another* [**AIR 2000 PH 333**]



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2. *P. Dhandapani and another vs. The Motor and General Finance Ltd., [2006 (2) R.A.J. 199 (Del)]*
3. *Kuchipudi Bapineedu vs. Kommareddi Anitha and others [AIR 1994 129, 1993 (2) LAT 271]*
4. *Vaisyaraju Subramaniam Raju vs. Vaisyaraju Chandramauli Raju and others [1986 SCC Online Ori 42]*
5. *Kerala State Electricity Board vs. Kurien E.Kalathil [Civil Appeal Nos.3164-3165 of 2017 Supreme Court dated 09.03.2018]*
6. *LMJ International Limited vs. Sleepwell Industries Company Limited [(2019) 5 SCC 302]*
7. *Gayatri Balaswamy vs. ISG Novasoft Technologies Ltd.,[2014 (6) CTC 602]*
8. *ISG Novasoft Technologies Limited vs. Gayatri Balasamy and another [2019 SCC Online Mad 15819 : (2019) 6 CTC 601]*
9. *J.K.Fenner (India) Ltd., vs. Neyveli Lignite Corporation and Others [2020 SCC Online Mad 1017 : (2020) 5 CTC 579]*



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*10.M/s.Kris Heavy Engineering and Construction
SDN BHD vs. M/s PNHB-LANCO-KHEC-JV
[O.P.D. No.18227 of 2020 Madras High Court
dated 15.10.2021]*

8. Heard both sides. The first and foremost submission is that since the Section 8 application dismissed by the Civil Court, Arbitrator ought not to have passed an Award, when seen, it is to be noted that the Claimant has filed Suit No.1615 of 2012 before the City Civil Court, Calcutta, for Declaration that demand of Rs.15 Crores by the Respondent is illegal as the transaction was made only by joint venture. It is not disputed that the Claimant has filed Application under Section 8 of the Arbitration and Conciliation Act. No copies of agreement were filed along with that Application. Section 8 Application was pending from 2016, though the Application was filed on 27.11.2012. In the meanwhile, the Claimant has filed an Application under Section 11 of the Arbitration and Conciliation Act, before this Court in O.P.No.131 of 2013. The said application was allowed and the sole Arbitrator was appointed. After appointment of Arbitrator, the Application filed under Section 8 was dismissed by the City Civil Court, Calcutta on 02.11.2016 on the ground that original contract has



Memo before the Sole Arbitrator asking to defer the Arbitral Proceedings in view of Section 8 order. As against the dismissal of Section 8 Application also challenge, was made before the Calcutta High Court and it was withdrawn later by the Claimant on 18.03.2019. In the meanwhile the Award came to be passed.

9.The main contention of Mr.Murari, the learned Senior Counsel is that once Section 8 Application is rejected by the competent court by any reason, only the suit has to continue and if the Arbitration is allowed to continue it will lead to multiplicity of proceedings and conflict of decision and it amounts to questioning the jurisdiction of the Civil Court. In this regard, in ***South City Projects vs. Jugal Kishore [(2010) SCC Online Cal 2137]*** it is held as follows:

9. In the above situation there are three possibilities. The first is that the subject matter of the suit and disputes arising out the arbitration agreement are the same. In view of my analysis above, once a suit has been filed, the court assumes jurisdiction over the matter. Then comes the question of exercise of option by one of the parties who wants arbitration. He has the right to obtain reference of the disputes to arbitration on the ground that the subject matter is covered by the arbitration clause. But there



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is a time limit within which he has to exercise the option. He has to exercise it at or before filing the first statement i.e. the written statement. If the written statement is filed and no such objection is taken, that right is deemed to have been waived.[see [Rashtriya Ispat Nigam Ltd. & Anr. vs. M/s. Verma Transport Company](#), reported in **AIR 2006 SC 2800**] If such objection is made within such time the court has the duty to examine the issue and if it finds that the issues are the same, it will refer the parties to arbitration. This simply means it will abstain from exercising its jurisdiction any further. Now suppose the court keeps the [Section 8](#) application pending or think of a situation where a party repeatedly takes adjournment in that application, which the court grants .In these cases the arbitration may proceed but can only proceed subject to the court deciding the question of its jurisdiction.[see [Kalpana Kothari \(smt\) vs. Sudha Yadav \(Smt.\) and others](#), reported in (2002) 1 SCC 203 and [Vijay Kumar Sharma Alias Manju vs. Raghunandan Sharma Alias Baburam and others](#), reported in (2010)2 SCC 486 (para 11 and 12) and [Modi Korea Telecommunication Ltd. vs. Appcon Consultants Pvt. Ltd.](#) reported in 1999 (II) CHN 107 (para 31)].”



indicated that the object and the purpose of the Act is to avoid multiplicity of proceedings, and not to allow two forums simultaneously to proceed with the matter.

11. In *Anil Vs. Rajendra* [(2015) 2 SCC 583] the Honourable Supreme Court has held as follows:

“11. Under Section 8(1) of the Act, either party is free to apply to the judicial authority within the prescribed time to refer the parties to arbitration, in case the matter pending before it is the subject matter of an arbitration agreement. Section 8(3) of the Act however makes it clear that notwithstanding the application under Section 8(1) of the Act and the issue pending before the judicial authority, arbitration may be commenced or continued and an arbitral award can also be made. In other words, despite the pendency of an application under Section 8(1) of the Act before the judicial authority, Section 8(3) of the Act permits the parties to commence and continue the arbitration and the arbitral tribunal is free to pass an award. That alone is what is contemplated under Section 8(3) of the Act.

12. In the suit instituted by the firm and some of the respondents, the order passed by the civil court that it was well within its jurisdiction to try the suit,



despite the objection regarding the existence of a clause for arbitration, has become final. Thereafter, Section 11(6) jurisdiction of the Chief Justice cannot be invoked by either party. The principle of res judicata will also be attracted in such a case. The other judgments referred above indicate that Award is subject to the order passed by the Civil Court. Hence, only one found to decide the matter.”

12. It is to be noted that here in this case Section 8 Application was not dismissed on merits. It was dismissed only on the ground of non production of the original contract. What is prohibited in entirety is that two parallel proceedings in two different forums. Therefore, mere pendency of the application before the Civil Court, under Section 8 of the Arbitration and Conciliation Act will not totally take away the right of the parties to go for Arbitration. It is to be noted that Section 8(iii) of the Arbitration and Conciliation Act reads as follows:

“8. Power to refer parties to arbitration where there is an arbitration agreement.—

(i),

(ii)

(iii) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an



arbitral award made.”

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13. The Act is very clear that the pendency of the Application under Section 8 will not prevent the Arbitration being commenced or continued and an Arbitral Award being made. The same makes it clear that nothing prevents the arbitrator from proceeding with Arbitration. Sub-Clause (iii) of Section 8 makes it clear that mere pendency of the application will not take away the right of the parties to go for an Arbitration. It is to be noted that Section 8 Application was filed on 27.11.2012, which was pending till 2016 when it was dismissed for default. In the meanwhile, in 2013 an Application under Section 11 filed and Arbitrator was appointed as per the Order of this Court dated 27.04.2015.

13. Since the Award has already passed by the Tribunal and it can be challenged only under Section 34 of the Act, since the subject matter in arbitration and the suit is also in respect of the same matter. Once the Award is passed, even there can be a situation that the Civil Court will restrain itself from proceeding further in the civil suit. The only purpose for which two parallel proceedings in the similar matter prohibited is to avoid multiplicity of proceedings and conflict of judgements. As the dispute has



of former suit shall denote a suit which has been decided prior to the suit to be questioned, whether or not it was instituted prior to that suit as per the explanation 1 to Section 11 of the CPC. Therefore, once the dispute is already decided and it reached the finality. Therefore, the principles applicable to the plea of res judicate though may not be applicable, the plea of estoppel is certainly apply to parties. Keeping in mind of the above principle merely because section 8 Application has been dismissed on technicalities and the Civil Court has not rejected the contention of the parties to retain its jurisdiction or otherwise to continue the proceedings the Award passed by the Arbitrator cannot be faulted with.

14. In *Anil vs. Rajendra* [(2015) 2 SCC 583] it is held that when the order passed by the Civil Court it was well within its jurisdiction to try the suit, despite the objection regarding the existence of a clause for arbitration, which has become final. Thereafter, Section 11(6) jurisdiction of the Chief Justice cannot be invoked by either party. The principle of res judicata will also be attracted in that case. Wherein the case on hand even before the decision taken under Section 8 application, Arbitrator was appointed. To apply the above ratio, the principle of res judicata will be attracted only on the orders passed by the Civil Court on merits. Therefore, the principle of res judicate cannot be made applicable in this case. Admittedly in this case,



order of appointment of Arbitrator was passed in Section 11 application.

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15. In ***SBP & Co. vs. Patel Polyfab Pvt.Ltd., [(2005) 8 SCC 618]*** the Apex Court has held that an application under [Section 11\(6\)](#) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under [Article 136](#) of the Constitution of India. In paragraph 44 of the above judgment is held as follows:

“44. Once we arrive at the conclusion that the proceeding before the Chief Justice while entertaining an application under [Section 11\(6\)](#) of the Act is adjudicatory, then obviously, the outcome of that adjudication is a judicial order. Once it is a judicial order, the same, as far as the High Court is concerned would be final and the only avenue open to a party feeling aggrieved by the order of the Chief Justice would be to approach to the Supreme Court under [Article 136](#) of the Constitution of India. If it were an order by the Chief Justice of India, the party will not have any further remedy in respect of the matters covered by the order of the Chief Justice of India or the Judge of the Supreme Court designated by him and he will have to participate in the



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arbitration before the Tribunal only on the merits of the claim. Obviously, the dispensation in our country, does not contemplate any further appeal from the decision of the Supreme Court and there appears to be nothing objectionable in taking the view that the order of the Chief Justice of India would be final on the matters which are within his purview, while called upon to exercise his jurisdiction under [Section 11](#) of the Act. It is also necessary to notice in this context that this conclusion of ours would really be in aid of quick disposal of arbitration claims and would avoid considerable delay in the process, an object that is sought to be achieved by the Act.”

16. Further it is also to be noted that once the order of appointment made by the Court under Section 11 of the Act the issue of Arbitrality cannot be raised by invoking his power under Section 16. ***State of West Bengal vs. Sarkar and Sarkar [(2018) 12 SCC 736]***, which was held by the three judges bench of the Apex Court that the challenge procedure under Section 16 cannot be invoked where the appointment procedure under Section 11 has been invoked. It can be done only when the parties have gone to arbitration without intervention of the court under section 11. This

is because decision under Section 11 is made final by virtue of Section

11(7) of the Act. Therefore, the Arbitrator cannot go beyond the order of



the Chief Justice, High Court under this section. Section 11(7) of the Act puts the seal of finality of the issue and the Arbitrator cannot invoke section 16 to revise the finding given by the High Court. The Arbitrator is the creator of the Order. Therefore, the Arbitrator cannot destroy the very Order. The Award cannot be questioned on the ground since it would be indirectly annulling the order of the High Court which cannot be done by way of Section 11(7) of the Act. What can not be done directly before the Arbitrator is, cannot be indirectly achieved in the petition, questioning the award under Section 34.

17.(a) The Newzealand and other cases, the comparative analysis brought to the notice of this Court by the learned counsel for the Petitioner in O.P.No.471 of 2020. The High Court of New Zealand has held that the Award may be made by the Arbitral Tribunal while the issue is pending before the Court. But by implication, not after a decision has been made by the Court on the same issue.

<i>Relevant Statutory Provision in New Zealand</i>	<i>Interpretation of the provision by Court/commentary</i>
Article 8 of the Schedul 1 of the New Zealand Arbitration Act, 1996. “8. Arbitration agreement and substantive claim before the Court. (1) A court before which the proceedings are	<i>High Court of New Zealand in Carter Hold Harvey Limited v. Ganesis Power Limited CIV-2001-404-1974, 26 Februrary 2006</i> held as follows: “4. Art. 8 of the First Schedule to the Arbitration Act 1996.



<i>Relevant Statutory Provision in New Zealand</i>	<i>Interpretation of the provision by Court/commentary</i>
brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to a arbitration unless it finds that the agreement is null and void, imoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred. (2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued and on award may be made, while the issue is pending before the Court.”	[32] “Art.8 effects major changes to the pre existing law. Under Sec.5 Arbitration Act 1908, the Court had a discretion to grant a stay of the Court proceedings except in the limited circumstances defined in Art.8(1). Importantly Art.8(2) recognizes that where court proceedings have been brought arbitral proceedings may be commenced or continued notwithstanding. This is an explicitly statutory recognition of the position established by previous case law, that there is no objection in principle to matters proceeding in parallel before both a court and an arbitral tribunal subject to any controls the court or arbitral tribunal is obliged or permitted to exercise. An award may even be made by the arbitral tribunal while the issue is pending before the court (but by implication, not after a decision has been made by the Court on the same issue)”

17.(b) Similar is the case in Germany also:

<i>Relevant Statutory Provision in Germany</i>	<i>Interpretation of the provision by Court/commentary</i>
Section 1032 of the German Code of Civil Procedure (Zivilprozeßordnung) (“ZPO”) reads as follows: (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if the respondent raises an objection prior to the beginning of the oral hearing on the substance of the dispute, reject the action as inadmissible unless the court finds that the arbitration agreement is null and void, inoperative or incapable being performed. (2) Prior to the composition of the arbitral tribunal, an application may be made to the court to declare whether or not arbitration is admissible (3) Where an action referred to in sub-section 1 or 2 is pending, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the Court.	I. Commentary: “When a court's judgment on an arbitration agreement's invalidity becomes final, the arbitral tribunal will be bound by the court's decision under German arbitration law and any arbitral award rendered thereafter would be set aside by the German courts” II Commentary: “Arbitration in Germany. The model law practice edited by Karl Heilinz Bockstiegel, Stefan Michael Kroll and Patricia Nacimlento wherein it is stated as follows: “66. According to Section 1032(3) ZPO where an action or application under section 1032 (1) or (2) ZPO has been brought, arbitral proceedings may nevertheless be commenced or continued ... and an arbitral award may even be made while the issue is pending before the Court... If the state court procedure has not been commenced for the sole purpose of delaying arbitration, it may well be advisable for the tribunal to stay the proceedings- despite not being forced to do



<i>Relevant Statutory Provision in Germany</i>	<i>Interpretation of the provision by Court/commentary</i>
	so.”

17.(c) In Canada, jurisdictions have provisions in their Arbitration Act which are similar to Section 8 of the Indian Arbitration and Conciliation Act, but also envisage the outcome of rejection of such an application:

<i>Relevant Statutory Provision in Canada</i>	<i>Interpretation of the provision by Court/commentary</i>
Arbitration Act, 1991 is a specific provincial Legislation enacted for the province of Ontario, Canada. Section 7 of the said Act reads as follows: Stay: 7(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, C.17, S.7(1). Exceptions: (2) However, the court may refuse to stay the proceeding in any of the following cases: 1. A party entered into the arbitration agreement while under a legal incapacity. 2. The arbitration agreed is invalid. 3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law. 4. The motion was brought with undue delay. 5. The matter is a proper one for default or summary judgment. 1991, c.17, s.7(2) Arbitration may continue: (3) An arbitration of the dispute may be commenced and continued while the motion is before the court. 1991, c.17, s.7(3). Effect of refused to stay	Sub-Clause (4) of Section 7 of the Arbitration and Conciliation Act, 1991 is self-explanatory on the consequences of rejection of an application filed under the said Section.



<i>Relevant Statutory Provision in Canada</i>	<i>Interpretation of the provision by Court/commentary</i>
(4) If the court refuses to stay the proceeding (a) no arbitration of the dispute shall be commenced; and (b) an arbitration that has been commenced shall not be continued and anything done in connection with the arbitration before the court made its decision is without effect 1991, c.17, s.7(4) Agreement covering part of dispute: (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that, (a) the agreement deals with only some of the matters in respect of which the proceedings was commenced; and (b) it is reasonable to separate the matters dealt with in the agreement from the other matters 1991, c.17, S.7(5). No appeal (6) There is no appeal from the court's decision 1991.c.17.s.7(6)	

17.(d) The brief frame work of the law on arbitration in England and

Wales is as follows:

<i>Relevant Statutory Provision in England and Wales</i>	<i>Interpretation of the provision by Court/commentary</i>
Section 9 of the English Arbitration Act 1996 9. Stay of legal proceedings: (1) A party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration may apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.	1. Commentary : Russels on Arbitration “Refusal to stay. Where the Court refuses to stay legal proceedings the dispute will be determined in those proceedings and not by arbitration” [Note: Russels on Arbitration is quoted with approval by the Honourable Supreme Court in case of A. Ayyasamy v. A. Paramasivam [(2016) 10 SCC 386]



<i>Relevant Statutory Provision in England and Wales</i>	<i>Interpretation of the provision by Court/commentary</i>
(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures. (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim (4) On the application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed. (5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.	Case Law: Republic of Kazakhstan v. Istil Group Inc. [2007] EWHC 2729 (Comm) <i>wherein the High Court of Justice Queen's Bench Division Commercial Court</i> held in the context of Arbitration as follows: “...In my judgment it would be invidious to leave it to the arbitrators to decide whether they should give preference to their own earlier decision over that of the supervisory court on precisely the same subject matter. The supervisory court has held in proceedings between the parties that there is no basis upon which the arbitrators have been invested with jurisdiction to determine the dispute between those parties. That should be an end of the matter.” II. Commentary: Gary Born, International Commercial Arbitration (Wolters Kluwer Publication) “In the view taken in <i>Republic of Kazakhstan v. Istil Group Inc.</i>, the jurisdictional decision of a national court in the arbitral seat is entitled to preclusive effect in any subsequent arbitral proceedings. [Note: Gary Born, International Commercial Arbitration has been quoted with approval by the Hon'ble Supreme Court in the case of <i>Ssangyong Engg. & Construction Co. Ltd., v. NHAI</i> [(2019) 15 SCC 131]

18. From the above, it is clear that after the decision was made in the court, on the same issue Arbitral proceedings cannot decide the same issue.

Therefore, above judgments and commentaries in the foreign courts will not

be helpful to the Petitioner in O.P.No.471 of 2020. Section 8 of the Indian

<https://hcservices.ecourts.gov.in/hcservices/>

Law does not bar for commencement of arbitration proceeding during the



pendency of Application. The very object is to prevent the multiplicity of the proceedings on the same issue. When the issue has already been decided either in Court or Arbitral Tribunal, the grievance of the parties would be as per the respective laws only and not to contend that the decision making itself is vitiated.

19. Further, It is to be noted that very incorporation of Clause (iii) to Section 8 non-obstate clause to commence the Arbitration and continuation of the Arbitral Award makes it very clear that the proceedings initiated before the Arbitrator cannot be found fault with merely on the basis of the pendency of the suit. If the Civil Court rejected the jurisdiction to refer the matter to the arbitration then there will be a different matter. That scenario there is no other option except to wait for the decision by the Civil Court. The Civil Court has not assumed jurisdiction; simply dismissed the Section 8 Application only on the ground of non-production of original contract. Therefore, when the Section 8 itself does not prohibit the commencement of the of Arbitral Proceedings even pending the application filed under Section 11. When the proceedings culminated Award after proper opportunities given to the parties, it cannot be said that mere pendency before the Civil Court and rejection of the Section 8 Application on the technical grounds, the contention that the Arbitrator ought not to have entertained the claim



has no legs to stand. Therefore, the contention of the learned senior counsel in this regard, cannot be countenanced.

20. Therefore, as long as the Section 8 application not decided on merits, or the Civil Court has not rejected the contention of the parties on appreciation of objections, it cannot be said that the proceedings cannot be arbitrated. With regard to the merits, it is the contention of the learned Senior Counsel that entire transaction between the parties is only a joint venture for sharing the profits. The learned Arbitrator has not relied upon the emails sent in this regard available in page No.44 to 46 of the typed set. Though there is some correspondence dated 18 July 2012 indicating that the parties to certain extent agreed JV deal as 50 : 50 ratio. Whereas High Seas Sale Agreement dated 17.04.2012, 27.04.2012 and 27.04.2012 executed subsequent to the email correspondence and the entire claim has been made on the basis of the High Seas Sale Agreements. Execution of the agreement and the signatures in the agreements are not disputed. What was contended before the Arbitrator is fabrication and forgery.

21. Further, it is contended that in view of the compromise during the criminal proceedings HSS Agreement was also got novated. It is relevant to note that though the compromise entered between the parties which was not



honoured and materialised, such deal cannot be taken a new contract for novating the existing contract. When the party to the compromise committed a breach to the compromise terms cannot plead novation which has been held in a judgement of the Apex Court in ***United Bank of India vs. Ramdoss Mahadev Prasad and Others [(2004) 1 SCC 252]*** which is as follows:

“9. Mr. Ranjit Kumar, learned senior advocate contended that in view of the MOU signed by the parties the original contract stood substituted by the MOU and it is a fit case where Section 62 of the Indian Contract Act can be invoked. We have already said that there was no concluded settlement or novation. Even otherwise, there has been non-compliance of the terms and conditions of the MOU by the respondents and a party in breach can hardly seek to enforce a contract. Therefore, the MOU does not amount to novation of contract as envisaged under Section 62 of the Indian Contract Act. The contention of Mr. Ranjit Kumar is, therefore, legally untenable.”

22. It is stated before the Arbitrator that the signatures in the different HSS Agreements are fabricated and not original. To establish the alleged forgery the entire burden lies on the party who set such a plea. Whereas the party to contract who signed the document never entered into the witness



box and R.W.1 is not connected with the contract, examined on the side of the Respondent. Even in R.W.1's proof affidavit it is stated that he had overheard the telephonic conversation between Mukesh Goel and Samir Goenka on 26.03.2012 as to the nature of the agreement. According to him it was a joint venture agreement. Having said that it is the joint venture agreement in the chief examination, in the cross examination he admitted that he did not hear the exact words of Samir Goenka. Therefore, when the very party to the contract who made a different contract other than the HSS Contract ought to have subjected himself for examination before the Arbitral Tribunal which has not been done so.

23. Learned Arbitrator in fact considered the entire gamut of evidence and appreciated and factually recorded that the claim arising out of the HSS Agreement dated 17.04.2012, 27.04.2012 and 27.04.2012 marked as Exs.C.10, 11 and 12. The learned Arbitrator has specifically recorded that there is no dispute raised on the side of the Respondent about the Exs.C.10, 11 and 12. The learned Senior Counsel for the Respondent/Petitioner in O.P.471 of 2020 made much emphasis that there are some difference in seal and signatures in the agreements. It is to be noted that agreements, as per the contention of the learned Senior Counsel has to be executed in triplicate, to



another one by the Respondent. Therefore, merely because some discrepancy in seal and other, it cannot be said that the entire agreement is fabricated. The signatures have not been disputed and the party pleaded fabrication has not deposed before the arbitral tribunal. Therefore, merely some other view is also possible by reappreciation of evidence, it cannot be a reason to hold that the entire Award falls within the ambit of perversity.

24. With regard to the Customs Duty payable what was sought to be recorded is the payment actually made by the claimant to the Customs. As per the contract, it was agreed to be paid by the Respondent. There was sufficient pleadings made in this regard by the Claimant explaining the circumstances on which the Customs Duties were paid. Therefore, when the concerned person of the Respondent has not even come to the Court and the learned Arbitrator given reasons for awarding such amount, it cannot be said that the Award falls within the ambit of perversity.

25. Further, payment towards Customs Duty was also admitted by the witnesses which also taken note by the arbitrator. With regard to the interest aspect, the learned Arbitrator has exercised his jurisdiction as there is no contract governing the interest in the High Seas Sale Agreements.



Accordingly, this Court do not find any infirmity in the Award passed by the learned Arbitrator. Accordingly, the same cannot be interfered.

26. In view of the same, both the Original Petitions are dismissed. Consequently connected Original Application and Applications are closed.

Sd./-N.S.K.J.

25.11.2021

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

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