



Arb.O.P.(Com.Div.)Nos.646 & 647 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	07.02.2024
Pronounced On	14.08.2024

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)Nos.646 & 647 of 2022
and A.Nos.5370 & 5383 of 2022 &2865& 2867 of 2023

M/s.Axon Constructions Pvt.Ltd.,
Rep.by its Director,
Bhaskar Raj
O.Ps.

... Petitioner in both

vs.

M/s.Amfah Infrastrucure (P) Ltd.,
Represented by its Managing Director
Mustafeez Mehidi
O.Ps.

.. Respondent in both

Prayer in Arb.O.P(comdiv) No.646 of 2022: Original Petition is filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, praying to set aside impugned Arbitral Award dated 22.04.2022 passed by the Arbitral Tribunal in respect of the Work Order dated 21.08.2010, No.AXON/WO/019/2010-11 (Chimney II) and to direct the respondent to pay the costs



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Prayer in Arb.O.P(comdiv) No.647 of 2022: Original Petition is filed under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, praying to set aside impugned Arbitral Award dated 22.04.2022 passed by the Arbitral Tribunal in respect of the Work Order dated 09.08.2010, No.AXON/WO/017/2010-11 (Chimney I) and to direct the respondent to pay the costs.

For Petitioner : Mr.B.Kumar
Mr.K.V.Sundararajan
Senior Counsel

For Respondent : Mr.V.P.Sengottuvel
Senior Counsel
for Mr.U.Bharanidharan

COMMON ORDER

These two Arbitration Original Petitions have been filed under Section 34(2)(b)(ii) and Section 34 (2-A) of the Arbitration and Conciliation Act, 1996 wherein the Impugned Arbitral Awards both dated **22.04.2022** have been challenged.



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2. The Respondent herein was the claimant before the Arbitral Tribunal and had filed two claims in respect of **Chimney No.I** and **Chimney No.II** under **Work Order No.AXON/WO/017/2010-2011 (Chimney No.I)** dated **09.08.2010** and **Work Order No.AXON/WO/019/2010-2011 (Chimney No.II)** dated **21.08.2010** respectively.

3. In **O.P.No.646 of 2022**, the Petitioner has challenged the **Impugned Arbitral Award** dated **22.04.2022** passed in respect of **Work Order No.AXON/WO/017/2010-2011** dated **09.08.2010** for **Chimney No.I**.

4. Similarly in **O.P.No.647 of 2022**, also the Petitioner has challenged the **Impugned Arbitral Award** dated **22.04.2022** in respect of **Work Order No.AXON/WO/019/2010-2011** dated **21.08.2010** for **Chimney No.II**.



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5. By the Impugned Arbitral Award, the Arbitral Tribunal has awarded the following amounts to the Respondent who was the Claimant:-

Table-I-

	Arb.O.P.No.646 of 2022	Arb.O.P.No.647 of 2022	
	Chimney No.I	Chimney No-II	Total
Claim Amount	Rs.14,71,37,932.51/-	Rs.9,87,99,554.86/-	Rs. 24,59,37,487.37/-
Counter Claim Amount	Rs.10,06,19,363.00/-	Rs.15,88,04,578.00/-	Rs.25,94,23,841.00/-
Award on Claim	Rs. 3,89,27,449.51/-	Rs.2,77,85,057.69/-	Rs. 6,67,12,507.20/-
Cost	Nil	Rs.10,00,000.00/-	Rs.10,00,000.00/-
Grand Total	-	-	Rs. 6,77,22,507.20/-
Interest	18%	18%	

6. The Respondent was the Claimant before the Arbitral Tribunal while the Petitioner was the Respondent before the Arbitral Tribunal. The Petitioner had also made a Counter Claimant before the Arbitral Tribunal. Both the Awards have been passed by the same Arbitral Tribunal wherein same Arbitrator was the sole Arbitrator.

7. Since the dispute pertained to two Separate Work Orders, two separate Claim Petitions were filed before the Arbitral Tribunal. As the documents were common in both the Claim Petitions except for the two



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Work Orders and amended Work Orders, the documents were marked commonly before the Arbitral Tribunal. The Arbitral Tribunal has however passed two separate Awards both dated **22.04.2022** impugned herein.

8. Work Orders and Amended Work Orders for **Chimney No.I** and **Chimney No.II** were marked as **Ex.C1** to **Ex.C4** and the rest of the documents of the Respondent's side were marked in a sequential order from **Ex.C5** onwards. Accordingly, document numbers in C Series were mentioned in the Award in the same sequence.

9. However, in the index to the respective separate Awards, the Arbitral Tribunal has shown Work Orders and Amended Work Orders under the respective claims as **Ex.C1** & **Ex.C2** and rest of the exhibits were numbered in sequence..

10. Therefore, to avoid confusion, the Exhibit Numbers shall be referred to, as they were marked before the Arbitral Tribunal and not as referred to in the Index to the respective Impugned Awards.



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Facts of the Case

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11. A Company named RKM Powergen Pvt. Ltd. (hereinafter to referred as the Principal Employer) was setting up a power project to generate power with coal as a main feed at Ucchpinda, Janjar, Champa District in Chhattisgarh State.

12. The Principal Employer had entrusted the civil and structural engineering to the Petitioner as the main Contractor. Among the other things, the project involved construction of two RCC Chimneys (275Mts. Height each). The Petitioner in turn sub-contracted the work and entrusted the construction of two Chimneys to the Respondent under **Ex.C1** and **Ex.C3** Work orders dated **09.08.2010** and **21.08.2010**.

13. The Petitioner issued **Ex.C1 Work Order No.AXON/WO/017/2010-2011** dated **09.08.2010** for **Chimney No.I** to the Respondent. Similarly, the Petitioner issued **Ex.C3 Work Order No.AXON/WO/019/2010-2011** dated **21.08.2010** for **Chimney No.II**. The indicative Contract Value and the quantities of the materials was specified in Annexure-1 as **Rs.4,38,01,975/-** and the Bill of quantity



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(BOQ) for Steel Structural Work was estimated as **Rs.54,21,300/-** in

Ex.C1 Work Order No.AXON/WO/017/2010-2011 dated **09.08.2010**

for **Chimney No.I**. The work was to commence within **15 days** from the date of handing over of the site and was to be completed within a period of **18 months** thereafter.

14. Similarly, the indicative Contract Value and the quantities of the materials was specified in **Annexure-1** to Ex.C3 as **Rs.4,38,01,975/-** and the Bill of quantity (BOQ) for Steel Structural Work was Estimated as **Rs.54,21,300/-** for **Chimney No.II**. Here also the work was to commence within **15 days** from the date of handing over of the site and was to be completed within **18 months** thereafter. The terms and conditions of contract for both the work orders were more or less similar.

15. The time limit for completing the construction of both the Chimneys was however extended on account of various factors. On **28.12.2011**, the Petitioner issued **Ex.C2 Amended Work Order** for **Chimney-I**. The scheduled date for completion as per **Ex.C2 Amended Work Order** was extended to **31.07.2012**.



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16. Likewise, on **02.01.2012**, the Petitioner issued Ex.C4 Amended Work Order for Chimney No.II. The scheduled date for completion for Chimney No.II was extended to **31.08.2012**.

17. The Petitioner however terminated both the Work Orders vide Ex.C10 proceedings dated **12.05.2012** about 2 ½ months prior to the stipulated date of completion as extended vide **EX.C2** dated **28.12.2011** and **EX.C4** dated **02.01.2012** alleging certain irregularities and deficiencies in the work on the part of the Respondent-Claimant.

18. **Vide Ex.C9** dated **13.05.2012**, the Respondent represented that the Termination Order was unjust when the work was in full-swing and requested the Petitioner to reconsider its decision and withdraw the same, to continue to construct the two Chimney work under the respective Work Orders.

19. **Vide Ex.C14** dated **22.06.2012**, the Respondent-Claimant claimed a sum of **Rs.6,44,78,120/-** as outstanding payment due from the



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Petitioner with respect to both the Chimneys and requested the Petitioner to convene a meeting to settle the pending issue.

20. The Petitioner disputed the claim made by the Respondent. While so, the Petitioner convened meetings with the Respondent on **01.03.2015, 14.05.2015** and **10.05.2016** and explored the possibility of resolving the issues which were reduced in writing as **Minutes of Meeting** which were marked as **Ex.C6, Ex.C7** and **Ex.C5** respectively.

21. Since the Petitioner did not come forward to settle the disputes or to make payments to the Respondent, the disputes were referred to Arbitral Tribunal, presided over by the Sole Arbitrator viz., Hon'ble Mr.Justice **S.Rajeswaran**, a retired Judge of this Court by mutual consent of the Petitioner and the Respondent.

22. The Respondent filed a Claim Statement under **10 different Claims** for **Chimney-I** and a separate Claim Statement under 6 different



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Claims for **Chimney No.II**. Later, for **Chimney No.II**, the Respondent added one more claim. Thus, the Respondent made Claim-7 for **Chimney No.II**. The Petitioner filed its Statement of Defence together with a Counter Claim during March, 2018.

23. The Claim and Counter-Claim of the Respondent and Petitioner before the Arbitral Tribunal for **Chimney-I** were as under:-

Table-II :-

S.No.	CLAIM-HEADS	CLAIM AMOUNT	COUNTER -CLAIM-HEADS	COUNTER – CLAIM AMOUNT
i)	Cost of Store Material illegally taken away by the Petitioner	Rs.52,30,499.51	Excess payment made to the Claimant	Rs.1,00,23,280/-
ii)	Refund of Providend Fund illegally retained by the Petitioner	Rs.15,00,000.00/-	Liquidated damages @ 5%	Rs. 21,57,189/-
iii)	Cost of materials and equipment used in the work	Rs.2,40,80,580.00	Purchase of Chimney Slip Material	Rs.1,41,38,579/-
iv)	Refund of amount illegally withheld towards Stores	Rs.52,00,000.00	Purchase of additional materials for completing the Work	Rs.16,49,440/-
v)	Refund of the amount illegally deducted towards Liquidated Damages	Rs.26,83,819.00	Additional cost incurred by the 3 rd Party	Rs.1,07,65,073/-



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vi)	Loss of Profit	Rs.45,00,067.00/-	Loss of Reputation	Rs.1,00,00,000/-
vii)	Compensation	Rs.1,00,00,000.00		
viii)	Transportation of material etc.	Rs.70,82,550/-		
	Total Claim	Rs.6,02,77,515.51		Rs.4,87,33,561/-
ix)	Interest @ 24% p.a. on claims i to viii (as adjudged by the Tribunal)	Rs.8,28,36,169.26/-	Interest	Rs.5,18,85,802/-
x)	Cost of Arbitration	Rs.10,00,000/-		
	TOTAL	Rs.14,41,13,684.77	TOTAL	Rs.10,06,19,363/-

24. The Claim and Counter-Claim of the Respondent and the Petitioner before the Arbitral Tribunal for Chimney No.II were as under:-

Table-III

S.No.	CLAIM-HEADS	CLAIM AMOUNT	COUNTER -CLAIM-HEADS	COUNTER -CLAIM AMOUNT
i)	Cost of materials and equipment used in the work	Rs.2,15,62,473.81	Excess payment made to the Claimant	Rs.80,05,943/- -
ii)	Loss of Profit	Rs.57,74,021.70	Liquidated damages @ 5%	Rs.21,79,588/- -
iii)	Compensation for non-allowing the claimant to execute the balance work and the loss of reputation	Rs.1,00,00,000/-	Purchase of Chimney materials of slip	Rs.1,42,24,353/-
iv)	Transportation of material etc.	Rs.21,32,750/-	Purchase of additional materials for completing the Work	Rs.86,04,494/- -
vii)	Pending payment of RA Bill No.7	Rs.40,89,833.88	Additional cost	Rs.2,25,52,810/- -



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			incurred by the 3 rd Party	
	Total	Rs.4,35,59,079.39		Rs.6,55,67,188/-
v)	Interest @24% p.a. on the claims i-iv from the date of letter dated 12.05.2012	Rs.5,42,40,475.47	Interest	Rs.9,32,37,390/-
vi)	Cost of Arbitration	Rs.10,00,000/-	Loss of Reputation	Rs.1,00,00,000/-
	TOTAL	Rs.9,87,99,554.86	TOTAL	Rs.15,88,04,578

25. On **13.04.2018**, the Respondent filed its Rejoinder and Reply to the Statement of Defence/Counter Claims of the petitioner and later the Petitioner filed its Reply to the Rejoinder filed by the Respondent on **14.05.2018**.

26. Thus, the pleadings were completed on **14.05.2018**. By this time Section 29A of the Arbitration and Conciliation Act, 1996 had been inserted vide Act 3 of 2016 with retrospective effect from **23.10.2015**. As per the provision as it during the material time, the Award had to be passed within 12 months from the date of the Arbitrator or the Arbitral Tribunal entering upon reference to the dispute.



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27. In this case, the Arbitral Tribunal entered upon reference on **09.01.2018**. Therefore, the Award should have been passed latest by **08.01.2019** or within such extended period under Sub-Section 3 or 4 to Section 29 -A of the Arbitration and Conciliation Act, 1996.

28. However, during the interregnum, Section 29A of the Arbitration and Conciliation Act, 1996 was amended vide **Act 33 of 2019** with effect from **30.08.2019** as per which Award had to be passed within **12 months** of completion of pleadings which is by **14.05.2019** as per the amended Section 29A of the Arbitration and Conciliation Act, 1996.

29. After completion of pleadings on 14.05.2018, following issues were framed on **23.06.2018** in respect of Claims relating to Chimney No.I and Chimney No.II as detailed below :-



Table-IV

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Chimney No.I and Chimney No.II

- 1) *Who has committed breach of the Contract? Whether the Claimant or the Respondent?*
- 2) *Whether the termination of the work order by the Respondent is valid and sustainable?*
- 3) *What is the value of the stores used by the Respondent? Whether Rs.52,30,499.51/- or Rs.32,98,880.00/-?#*
- 4) *Whether the Claimant is entitled to get any compensation as per the terms and conditions of the work order?*
- 5) *Whether the work executed by the Claimant complied with the prescribed standards?*
- 6) *Whether the Claimant is entitled to claim any of the amounts as specified in paragraph 45/ 46* of the claim petition?*
- 7) *Whether the Claimant is entitled to any interest? If so, at what rate and on what amount?*
- 8) *Whether the claim petition is barred by limitation?*
- 9) *Whether the Respondent is entitled to make any counter claim as specified in paragraph 31/ 32* and 33* of the statement of defence/counter claim?*
- 10) *Whether the counter claim made by the Respondent is barred by Limitation?*



11) Whether the Claimant is entitled to cost of the Arbitration?

12) Whether the Claimant is entitled for loss of reputation?

13) Whether the Respondent is entitled to any interest? If so, at what rate and on what amount?

14) Whether the Claimant and the Respondent are entitled to any other reliefs?

Not for Chimney No.II

**For Chimney No.II*

30. In support of their claims, the Respondent-Claimant filed 113 Document which were marked as **Ex.C1 to Ex.C113**. Similarly, the Petitioner filed 51 documents; they were marked as **Ex.R1 to Ex.R51**. Oral evidence was dispensed by either of the parties before the Arbitral Tribunal.

31. The arguments of both the parties were concluded on **06.02.2020** after extensions under Section 29A of the Arbitration and Conciliation Act, 1996. Thereafter, the Arbitral Tribunal directed both the parties to submit their respective written arguments for both the claims in respect of **Chimney No.I and Chimney No.II**.

32. On **05.03.2020**, the Respondent filed Written Arguments, while



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the Petitioner filed its Common Written Arguments during March, 2020.

With effect from **24.03.2020**, lock was clamped due to outbreak of Covid-19 pandemic.

33. Vide Impugned Arbitral Awards both dated **22.04.2022**, the Arbitral Tribunal has partly allowed the following claims of the respondent-claimant with respect to CHIMNEY NO.I and CHIMNEY NO.II :-

S.No.	CLAIM-HEADS	CLAIM AMOUNT AND AWARDED AMOUNT	
		CHIMNEY NO.I	CHIMNEY NO.II
1.	Cost of Store Material illegally taken away by the Petitioner	Rs.52,30,499.52* Rs.52,30,499.51#	-
2.	Cost of materials and equipment used in the work	Rs.2,40,80,580.00* Rs.2,40,80,580.00#	Rs.2,15,62,473.81* Rs.2,15,62,473.81#
3.	Refund of the amount illegally deducted towards Liquidated Damages.	Rs.26,83,819.00* Rs.26,83,819.00#	-
4.	Transportation of material etc.,	Rs.70,82,550* Rs.69,32,550.00#	Rs.21,32,750* Rs.21,32,750#
5.	Cost	Nil	Rs.10,00,000
6.	Pending payment of RA Bill No.7		Rs.40,89,833.88* Rs.40,89,833.88#
7.	Total of #	Rs.3,89,27,448.51	Rs.2,87,85,057.69
8.	Interest @ 24% p.a. on claims awarded from the date	Rs.8,42,10,417.00* # @ 18% p.a. on claims	Rs.5,42,40,475.47* # @ 18% from



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of letter dated 12.05.2012		i, iii, v and viii, i.e., Rs.3,89,27,448.51 from 12.05.2012 and until the date of actual payment	12.05.2012 on Rs.2,77,85,057.69
	*	CLAIM AMOUNT	
	#	AWARDED AMOUNT	

34. The Arbitral Tribunal rejected the Counter-Claims of the Petitioner towards alleged excess payment to the respondent claimant for **Chimney No.I** and **Chimney No.II** on the ground that the same was not supported by any acceptable materials and evidences. The Respondent has not challenged the Impugned Arbitral Awards in so far as they reject a part of its claim.

35. Aggrieved by the Impugned Arbitral Awards both dated **22.04.2022**, the Petitioner has filed these two Arbitration Petitions in Arb.O.P.(Com.Div.)No.646 of 2022 and Arb.O.P.(Com.Div.)No.647 of 2022 for the Work Orders of Chimney No.I and Chimney No.II mainly on two grounds viz., **Impugned Arbitral Awards** both dated **22.04.2022** being against public policy under Sec.34(2)(b)(ii) and being patently illegal under Section 34 (2-A) of the **Arbitration & Conciliation Act**,



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36. To drive the point on patent illegality, the learned Senior Counsel for the Petitioner has raised a preliminary issue regarding time-limit while passing of the Impugned Arbitral Awards both dated **22.04.2022**. It is submitted that the Impugned Arbitral Awards are both dated **22.04.2022** and were passed after the expiry of mandate of the Arbitral Tribunal expired and also has raised the issue regarding non-consideration of documents and total ignorance of **Counter-Claim** filed on the side of the Petitioner.

Preliminary Submissions:-

37. A preliminary submission was made by the learned Senior Counsel for the Petitioner on **05.10.2023**.

38. The arguments on this aspect is two fold. Firstly, the Arbitral Tribunal had become *functus officio* after **16.07.2021** i.e., after expiry of three months, after communication of the order dated **11.01.2021** in **Appln.No.66 of 2021** extending the mandate of the Arbitral Tribunal. It is therefore submitted that the Impugned Arbitral Awards passed on



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22.04.2022 were a nullity within the meaning of Section 29A(4) of the Arbitration and Conciliation Act, 1996.

39. The second limb of the arguments made by the learned Senior Counsel for the Petitioner is that the Impugned Awards were passed against the public policy and therefore, the sting under Explanation 1(ii) to Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996 was attracted.

40. The learned Senior Counsel for the Petitioner would submit that the Arbitral Tribunal entered reference on **09.01.2018**. It is further submitted that by mutual consent, the period was extended for completing the arbitration proceedings by another six months which expired on **08.07.2019**. It is submitted that thereafter series of application were filed before this Court to extend the mandate of the Arbitral Tribunal as detailed below and were allowed:-

TABLE -VI



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Sl.No	Application No.	Order date	Extended upto
1	Appln.No.5368 of 2019	20.08.2019	6 Months- 28.03.2020
2	Appln.No.1242 of 2020	23.03.2020	3 Months- 20.06.2020
3	Appln.No.1468 of 2020	09.07.2020	6 Months- 20.12.2020
4	Appln.No.66 of 2021	11.01.2021	3 Months- 11.04.2021

41. It is therefore submitted that by virtue of the last mentioned Order dated **11.01.2021** passed in **Appln.No.66 of 2021**, the mandate of the Arbitral Tribunal stood extended by three months till **11.01.2021**. It is therefore submitted that the Impugned Awards ought to have been passed on or before **11.04.2021**. It is submitted that even if the time taken for securing the certified copy of the Order dated **11.01.2021** in **Appln.No.66 of 2021** is excluded between **11.01.2021** and **16.04.2021**, the period for passing the Award would have expired on **16.07.2021**, as the copy of the Order dated **11.01.2021** in **Appln.No.66 of 2021** was communicated to the Arbitrator on **16.04.2021**.

42. It is therefore submitted that both the Impugned Arbitral Awards dated **22.04.2022** were beyond the statutory period prescribed under Section 29A of the Arbitration and Conciliation Act, 1996 and were nullity and are therefore liable to be set aside under Section 34 of the Arbitration and



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Conciliation Act, 1996

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43. In support of the above submission, the learned Senior Counsel for the Petitioner referred to the following two decisions of the Hon'ble Supreme Court in (i) **Cognizance For Extension of Limitation, IN RE** [(2020) 19 SCC 10] dated 23.03.2020 and **Cognizance For Extension of Limitation, IN RE** [(2022) 3 SCC 117] dated **10.01.2022** wherein period between **15.03.2020** and **28.02.2022** shall stand excluded for the purpose of limitation prescribed by general or special laws in respect of judicial and quasi-judicial proceedings.

44. It is submitted that although by virtue of the second mentioned decision of the Hon'ble Supreme Court rendered in the context of Section 29-A of the Arbitration and Conciliation Act, 1996, the period prescribed for passing the Award cannot be saved in the light of the decision of the Hon'ble Supreme Court in **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others** [(2021) 2 SCC 317].



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45. Drawing a comparison between the time limit prescribed under Section 421(3) of the IBC Court, 2013 and the limitation prescribed under Section 29A of the Arbitration and Conciliation Act, 1996, the second decision of the Hon'ble Supreme Court referred to *supra*, the learned Senior Counsel for the Petitioner would submit that the time for completing and passing the Award could be extended only if the Award was not passed within the period of first 18 months from the date of completion of the arguments on **06.02.2020** or thereafter extension given by the Court.

46. The learned Senior Counsel for the Petitioner has also drawn attention to a recent decision of the Hon'ble Supreme Court, wherein earlier view taken by the Hon'ble Apex Court in **Assam Urban Water Supply and Sewerage Board Vs. Subash Projects and Marketing Limited**, (2012) 2 SCC 624, has been affirmed by the decision of the Three Judges Bench of the Hon'ble Supreme Court in **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others**, (2021) 2 SCC 317, which was reiterated by the Hon'ble Supreme Court in **Bhimashankar Sahakari Sakkare Karkhane Niyamita Vs.**



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Walchandnagar Industries Limited (WIL), (2023) 8 SCC 453.

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47. It is submitted that applying the ratio in *Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others* [(2021) 2 SCC 317], the limitation for passing the Award beyond the period of 12 months under Section 29A(1) and further period of six months under Section 29A(3) alone would be saved.

48. It is further submitted that the Awards were passed beyond the period of **18 months** and thereafter beyond the period prescribed viz., **11.04.2021** by the fourth mentioned order dated **11.01.2021** in **Appln.No.66 of 2021** were clearly barred by law as the Arbitral Tribunal had no mandate after **16.04.2021** even if, the time between **11.01.2021** i.e., date of order and its communication on **16.04.2021**, the limitation would have expired on **15.07.2021**.

49. That apart, in support of the above submissions, the learned Senior Counsel for the petitioner, has placed reliance on the decision of the



Hon'ble Supreme Court in **Anil Rai vs. State of Bihar** [(2001) 7 SCC

318]. A specific reference is made to Para 42 and 43 reads as under:-

*“42.If delay in pronouncing judgments occurred on the part of the judges of the subordinate judiciary the whip of the High Court studded with supervisory and administrative authority could be used and it has been used quite often to chide them and sometimes to take action against the erring judicial officers. But what happens when the High Court Judges do not pronounce judgment after a lapse of several months, and perhaps even years since completion of arguments? The Constitution did not provide anything in that area presumably because the architects of the Constitution believed that no High Court Judge would cause long and distressing delays. Such expectation of the makers of the Constitution remained unsullied during the early period of the post-constitution years. **But unfortunately, the later years have shown slackness on the part of a few Judges of the superior courts in India with the result that once arguments in a list concluded before them the records remain consigned to hibernation. Judges themselves normally forget the details of the facts and niceties of the legal points advanced. Sometimes the interval is so long that the Judges forget even the fact that such a case is pending with them expecting judicial verdict. Though it is an unpleasant fact, it is a stark reality.***

43. *Should the situation continue to remain so helpless for all concerned? The Apex Court made an exhortation in 1976 through a judgment which is reported as **R.C.Sharma Vs.***



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Union of India for expediting delivery of judgments. I too wish to repeat those words as follows: (SCC Headnote)

“Nevertheless an unreasonable delay between hearing of arguments and delivery of judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice. But, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgments”.

50. The learned Senior Counsel for the Petitioner has also referred to the following decisions in support of the above proposition:-

(i) Bharat Oman Refineries Ltd Vs. Mantech Consultants [(2012) 3 Bom CR 754;

(ii) K.Dhanasekar Vs. Union of India, Rep by its General Manager Southern Railway and others [(2019) SCC Online Mad 38989;

(iii) Director General, Central Reserve Police Force Vs. Fibroplast Marine Pvt Ltd [(2022) 290 DLT 619.

51. It is submitted that the Courts have held under similar circumstances the Awards to be nullity and therefore submits that the



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Impugned Awards are liable to be set aside.

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52. The learned Senior Counsel for the Petitioner would submit that once the period prescribed for passing the Awards expired, no further extension could be countenanced in the light of the above mentioned decisions of the Hon'ble Supreme Court.

53. Arguing the case on behalf of the respondent, the learned Senior Counsel for the Respondent would submit that the provision as it stood till **30.08.2019** contemplated Arbitral Tribunal to pass an award within a period of 12 months from the date of entering upon reference by the Arbitral Tribunal. Thus, the 12 month period under Section 29A(1) of the Arbitration and Conciliation Act, 1996 expired on **08.01.2019**. The Arbitral Tribunal itself extended the mandate upto **08.07.2019**.

54. It is submitted that thereafter, above mentioned four applications were filed by the Petitioner itself for extension of the mandate as mentioned above.



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55. It is submitted that the last extension was ordered on **11.01.2021** in **Appln No.66 of 2021**. However, the certified copy of the order was communicated to the learned Arbitrator by the Petitioner/ Respondent only on **16.04.2021**, by which time, the country was again under lock down due to second wave of Covid-19 pandemic.

56. It is submitted that in fact, the country was under lock down immediately after the 2nd Order dated **23.03.2020** was passed in **Appln No.1242 of 2020**. It is submitted that **Appln.No.1242 of 2020** was filed after arguments were completed on **06.02.2020**. It is submitted that in view of the decision of the Hon'ble Supreme Court in **Cognizance For Extension of Limitation, IN RE**, (2020) 9 SCC 468, rendered on **10.07.2020**, the Hon'ble Supreme Court has clarified that the order passed earlier on **23.03.2020** and **06.05.2020** would apply for extension of time for passing Arbitral Award under Section 29A of the Arbitration and Conciliation Act, 1996.



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57. It is submitted that the Delhi High Court has also considered a similar issue in **Harkirat Singh Sodhi Vs. Oram Foods Pvt. Limited and others**, AIR 2023 Del 237, wherein the High Court of Delhi has taken a pragmatic view that the period that commenced on **29.08.2019** in the said case must be deemed to have stopped to run as on **14.03.2020** and thereafter re-commenced on **01.03.2022** in the light of the decision of the Hon'ble Supreme Court rendered in **Cognizance for extension of limitation, IN RE**, (2022) 3 SCC 117, rendered on **10.01.2022**.

58. That apart, the learned Senior Counsel for the Respondent/ Claimant would also submit that all the extensions were sought for by the Petitioner/ Respondent itself by approaching this Court. It is submitted that in view of the decisions of the Hon'ble Supreme Court, the Hon'ble Arbitrator was of the view that time stood extended by a period of **90** days from **01.03.2022**. It is therefore submitted that since the Awards were passed on **22.04.2022** there are no merits in the preliminary objection raised by the Petitioner as the Impugned Awards came to be passed by the learned Arbitrator on **22.04.2022**, before the period was extended by the Hon'ble Supreme Court rendered in **Cognizance for extension of**



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limitation, IN RE, (2022) 3 SCC 117 vide its Order dated 10.01.2022.

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

60. The decision of the Hon'ble Supreme Court in **Assam Urban Water Supply and Sewerage Board Vs. Subash Projects and Marketing Limited**, (2012) 2 SCC 624, which was affirmed by the Hon'ble Supreme Court in **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others**, (2021) 2 SCC 317 and reiterated in **Bhimashankar Sahakari Sakkare Karkhane Niyamita Vs. Walchandnagar Industries Limited (WIL)**, (2023) 8 SCC 453, pertains to the period within which a proceeding under Section 34 of the Arbitration and Conciliation Act, 1996, had to be instituted.

61. In **Assam Urban Water Supply and Sewerage Board Vs. Subash Projects and Marketing Limited**, (2012) 2 SCC 624, the Hon'ble Supreme Court interpreted the proviso to Section 34(3) with Sections 4 and 2(j) of the Limitation Act, 1963. Section 34(3) of the



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Arbitration and Conciliation Act, 1996 reads as under:-

Section 34.Application for setting aside the Arbitral Award

(1)...

(2)...

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

62. Sections 2(j) and 4 of the Limitation Act, 1963, reads as under:-

2.Definition:-	4. Expiry of prescribed period when court is closed.-
j) “period of limitation” means the period of limitation prescribed for any suit, appeal or application by the Schedule, and “prescribed period” means the period of limitation computed in accordance with the provisions of this Act;	Where the prescribed period for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day when the court re-opens. Explanation.—A court shall be deemed to be closed on any day within the meaning of this section if during any part of its normal working hours it remains closed on that day.



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63. It was in this context, the Hon'ble Supreme Court in **Assam Urban Water Supply and Sewerage Board Vs. Subash Projects and Marketing Limited**, (2012) 2 SCC 624 also referred to the definition of expression “ period of limitation” as defined in Section 2(j) of the Limitation Act, 1963. In paragraph Nos.13 to 16, the Hon'ble Supreme Court has held as under:

*“13.The crucial words in Section 4 of the 1963 Act are '**prescribed period**'. What is the meaning of these words?*

14.Section 2(j) of the 1963 Act defines:

*“2.(j).'**period of limitation**' which means the period of limitation prescribed for any suit, appeal or application by the Schedule, and '**prescribed period**' means the period of limitation computed in accordance with the provisions of this Act.”*

*Section 2(j) of the 1963 Act when read in the context of Section 34(3) of the 1996 Act, it becomes amply clear that the prescribed period for making an application for setting aside arbitral award is three months. The period of 30 days mentioned in proviso that follows sub-section (3) of Section 34 of the 1996 Act is not the '**period of limitation**' and, therefore, **not 'prescribed period' for the purposes of making the application for setting aside the arbitral award. The period of 30 days beyond three***



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months which the court may extend on sufficient cause being shown under the proviso appended to sub-section (3) of Section 34 of the 1996 Act being not the 'period of limitation' or, in other words, 'prescribed period', in our opinion, Section 4 of the 1963 Act is not, at all, attracted to the facts of the present case.

15. Seen thus, the applications made by the appellants on January 2, 2004, for setting aside the arbitral award dated August 26, 2003 were liable to be dismissed and have rightly been dismissed by the District Judge, Kamrup, Guwahati, as time barred.

16. The dismissal of the Arbitration Appeals (6 of 2004 and 7 of 2004) by the High Court, thus, cannot be legally flawed for the reasons we have indicated above."

64. This view was affirmed by a Three Judges Bench decision of the Hon'ble Supreme Court in **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others**, (2021) 2 SCC 317, wherein the Hon'ble Supreme Court while dealing with the appellate remedy under Section 421 of the Companies Act, 2013, observed as under:

"11. Section 421(1) provides for a remedy of appeal to the Appellate Tribunal as against an order of NCLT. Sub-section (3) of Section 421 prescribes the period of limitation for filing an appeal and the proviso thereunder confers a limited discretion upon the Appellate Tribunal to condone the delay. Sub-section (3) of Section 421 together with the



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proviso thereunder reads as follows:

“421. Appeal from orders of Tribunal.—

(1)-(2)

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order of the Tribunal is made available to the person aggrieved and shall be in such form, and accompanied by such fees, as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days from the date aforesaid, but within a further period not exceeding forty-five days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within that period.”

12. Therefore, it is true, as contended by the appellants, that the period of limitation of 45 days prescribed in Section 421(3) would start running only from the date on which a copy of the order of the Tribunal is made available to the person aggrieved. It is also true that under Section 420(3) of the Act read with Rule 50, the appellants were entitled to be furnished with a certified copy of the order free of cost.

13. Therefore if the appellants had chosen not to file a copy application, but to await the receipt of a free copy of the order in terms of Section 420(3) read with Rule 50, they would be perfectly justified in falling back on Section 421(3), for fixing the date from which limitation would start running.



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But the appellants in this case, chose to apply for a certified copy after 27 days of the pronouncement of the order in their presence and they now fall back upon Section 421(3).

*14. Despite the above factual position, we do not want to hold against the appellants, the fact that they waited from 25-10-2019 (the date of the order [Sagufa Ahmed v. Upper Assam Plywood Products (P) Ltd., 2019 SCC OnLine NCLT 749] of NCLT) up to **21-11-2019**, to make a copy application. But at least from **19-12-2019**, the date on which a certified copy was admittedly received by the counsel for the appellants, the period of limitation cannot be stopped from running. From 19-12-2019, the date on which the counsel for the appellants received the copy of the order, the appellants had a period of 45 days to file an appeal. This period expired on 2-2-2020.*

15. By virtue of the proviso to Section 421(3), the Appellate Tribunal was empowered to condone the delay up to a period of 45 days. This 45 days started running from 2-2-2020 and it expired even according to the appellants on 18-3-2020. The appellants did not file the appeal on or before 18-3-2020, but filed it on 20-7-2020. It is relevant to note that the lockdown was imposed only on 24-3-2020 and there was no impediment for the appellants to file the appeal on or before 18-3-2020. To overcome this difficulty, the appellants rely upon the order of this Court dated 23-



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3-2020 [Cognizance for Extension of Limitation, In re, (2020) 19 SCC 10 : 2020 SCC OnLine SC 343] . This takes us to the second contention of the appellants.”

65. Sections 29-A(4) and 34(3) of the Arbitration and Conciliation Act, 1996 and its Proviso reads as under:-

29A.Time limit for arbitral award	34.Application for setting aside arbitral award
(1) ... (2) ... (3) ... (4) If the award is not made within the period specified in sub-section (1) or the extended period specified under sub-section (3), the mandate of the arbitrator(s) shall terminate unless the Court has, either prior to or after the expiry of the period so specified, extended the period: Provided that while extending the period under this sub-section, if the Court finds that the proceedings have been delayed for the reasons attributable to the arbitral tribunal, then, it may order reduction of fees of arbitrator(s) by not exceeding five per cent. for each month of such delay.	(1) (2) (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.



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Provided further that where an application under sub-section (5) is pending, the mandate of the arbitrator shall continue till the disposal of the said application: Provided also that the arbitrator shall be given an opportunity of being heard before the fees is reduced.”

66. The Hon'ble Supreme Court in **Sagufa Ahmed and others Vs.**

Upper Assam Polywood Products Private Limited and others, (2021)

2 SCC 317, ultimately held as under:-

*“21. Therefore, the expression “prescribed period” appearing in Section 4 cannot be construed to mean anything other than the period of limitation. Any period beyond the **prescribed period**, during which the court or tribunal has the discretion to allow a person to institute the proceedings, cannot be taken to be “prescribed period”.*

67. This Court also had an occasion to deal with an issue in the context of Section 29-A (3) of the Arbitration and Conciliation Act, 1996, in **E.Sugumaran Vs. M.Malarmaran** and another in O.P.No.627 of 2018 rendered on 26.02.2020, wherein it has been observed as under:-

“5.17. A reading of the provisions of 29 A (3) and (4) would therefore indicate that on the expiry of the one year period or the extended period of six months, the mandate of the



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Arbitral Tribunal would automatically come to a close. The same can be revived only by the Court as contemplated under Sections 29 A (4) and 29 A (5). As already stated Section 29 A is framed on the lines of Section 28 of the 1940 Act albeit with an emphasis on a defined time frame even to the Court. Under the 1940 Act, the power was given to the Court to extend/enlarge from time to time the time for making the Award which indicates that the Court can be moved several times to extend the time for making the Arbitral Award. However under the new regime the Courts are permitted to enlarge the time only:

- a) When the one year period had expired and parties had not extended time.*
- b) When the extended period of six months has already expired and the Award was still to be delivered.”*

68. The Hon'ble Supreme Court in **Cognizance for Extension of Limitation IN RE**, (2020) 19 SCC 10, in Paragraph No.3 and 4 observed as under:-

“3.We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all courts/tribunals and authorities.

4.This order may be brought to the notice of all the High Courts for being communicated to all subordinate courts/tribunals within their respective



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jurisdiction.”

69. The Hon'ble Supreme Court rendered in **Cognizance for extension of limitation, IN RE**, (2022) 3 SCC 117, rendered on 10.01.2022, held as under:-

“5. Taking into consideration the arguments advanced by the learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of MA No.21 of 2022 with the following directions:-

5.1. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings.

5.2. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

5.3. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.



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5.4. It is further clarified that the period from 15.03.2020 till 28.02.2022 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29-A of the Arbitration and Conciliation Act, 1996, Section 12-A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings.

6. As prayed for by the learned Senior Counsel, MA No.29 of 2022 is dismissed as withdrawn.”

70. The decisions of the Hon’ble Supreme Court in **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others**, (2021) 2 SCC 317, has no relevance to the facts of the present case.

71. In **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others**, the National Company Law Tribunal had passed an order on **25.10.2019**.

72. The appellant therein had filed a copy application only on



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21.11.2019 for Order dated **25.10.2019** passed by the National Company Law Tribunal. The copy of order dated **25.10.2019** was received by the counsel for the appellant on **19.12.2019**. The limitation of **45 days** to file an appeal before the **National Company Law Appellate Tribunal [NCLAT]** expired on **02.02.2020**. The condonable period of **45 days** thereafter also expired on **18.03.2020**.

73. This was before the lockdown was imposed on **24.3.2020**, on account of the outbreak of COVID-19 pandemic. The appeal was however filed finally on **20.7.2020**. Thus, the benefit of the decision of the Hon'ble Supreme Court dated **23.03.2020**, extending the period up to **28.02.2022**, for computation of period of limitation was held not available to **Sagufa Ahmed and others**.

74. However, in the present case, the pleading were completed on **14.05.2018**. Ordinarily, the Award should have been passed within a period of twelve months thereafter on **03.05.2019** as per the amended Section 29A of the Arbitration and Conciliation Act, 1996 as it stood then.



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As per the provision as it during the material time, the Award had to be passed within twelve months from the date of the arbitrator entering upon reference.

75. In this case, the arbitrator entered upon reference on **09.01.2018**. Therefore, the Award should have been passed latest by **08.01.2019**. During the interregnum applications were filed as mentioned above and time was extended by this Court. During the interregnum **Section 29-A** was also amended vide **Act 33 of 2019** with effect from **30.08.2019**. Thus, the timelines for passing awards changed due to statutory interventions.

76. As far as the facts of the present case are concerned, the **18 months** limitation [12+6 months] under Section 29 (A) (1) & (3) of the Arbitration and Conciliation Act, 1996 expired on **08.07.2019** s per the pre-amended Section 29A of the Arbitration and Conciliation Act, 1996.

77. Thereafter series of applications have been filed and last of the



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extension was granted on **11.01.2021**. The order of this Court dated **11.01.2021** in Appln.No.66 of 2021 was communicated to the learned Arbitrator on **16.04.2021**.

78. The decision of the Hon'ble Supreme Court in **Sagufa Ahmed and others Vs. Upper Assam Polywood Products Private Limited and others** rendered in the context of Section 421(3) of the Company Act, 2013 is therefore no more relevance to the facts of the case. Therefore, the preliminary objection to the Award is answered against the Petitioner.

Submissions on Merits:

79. The learned Senior Counsel for the Petitioner submits that there are two parts to the Award. The first part of award pertains to the finding that the Petitioner had committed breach of the contract and that termination of the **Work Order** by Petitioner on **12.05.2012** vide **Ex.C10** was ostensibly not sustainable. The Second part of the award pertains to the claims, which Respondent was held entitled to and rejection of the counter claim of the Petitioner without any discussion.

80. It is submitted that as far as the first part of the award is concerned, the findings of the Arbitral Tribunal is that **Clause 6** of the



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Ex.C1 & C3 Terms and Conditions is against public policy and that no complaint whatsoever was made with regard to petitioner's performance, progress and inferior quality of work before the termination. It is submitted that this observation/finding in the impugned Award is erroneous, perverse, and patently illegal.

81. It is submitted that the crucial terms and conditions of contract for both the Work Orders are more or less similar. It is submitted that it was the duty of the Respondent to have completed the Work Order as spelled out in the terms and conditions stipulated in **Ex.C1 and Ex.C3**. It is submitted that as per the terms and conditions, the Ready Mix Concrete (RMC) were to be provided by Petitioner. However, subsequently under a mutual Agreement, Work Orders were given to the Respondent for creating necessary infrastructure for Concrete batching Plant for the purpose of producing Ready Mix Concrete (RMC).

82. Therefore, it is submitted that though in the Work Order it was mentioned that the Ready Mix Concrete (RMC) was to be provided by



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Petitioner, for the purpose of easier and smoother coordination and facilitation with some additional work, Petitioner had given separate Work Orders were issued to the Respondent. It is therefore submitted that there was no delay on the part of the Petitioner in not providing the Ready-Mix Concrete (RMC) to the respondent. It is submitted that as onus was shifted on the Respondent to provide Ready-Mix Concrete (RMC).

83. It is submitted that Petitioner has supported Respondent in all possible manner, namely: _

- (1) by making regular on time payments of all running bills raised by the respondent,
- (2) Mobilization advance of Rs.25 lakh;
- (3) Although not a part of the contract, purchases of major equipment at the request of the Respondent-Claimant for which payments were made;
- (4) In addition to running bill payments, cash and advance payments were released from site ;and
- (5) payment to sub-contractor/labour of the Respondent at the request of the respondent

84. It is submitted that the Respondent however had used poor quality materials and deployed insufficient number of manpower, equipment and materials and delayed the project and thereby rendered the



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petitioner liable for delay under the contract with its principal.

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85. It is submitted the **Chimneys** being the critical structure towards overall project sequence, time was the essence under the respective Contracts. However, the Respondent has taken time to complete the project as a result of which Petitioner was taken to task by its Principal Employer **namely RKM Powergen Pvt. Ltd.**

86. It is submitted that on a review of the contract Work done by Respondent in 2012, it was found that the Respondent-claimant had completed only **28%** for the **first Work Order for Chimney I** and **12%** in the **Second Work Order for Chimney No.II** and that even the work executed was of poor standard and therefore after several emails and reminders, the Petitioner was forced to terminate the respective Work Orders vide **Ex.C10** dated **12/5/2012**.

87. It is submitted that Clause 6, clause 7 and Clause 17 clearly show that the contract could be terminated without assigning any reason and without giving notice if the quality, progress and performance is not up to the mark.



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88. It is further submitted that **Ex.R8** to **R19** would show that several issues were red-flagged by the Principal employer namely **RKM Powergen Pvt. Ltd** against the progress, quality and performance of work by the Respondent. It is submitted that some of the documents are subsequent to extension of Work Order granted and therefore, the findings that there was no complaint against the Respondent is patently illegal in the fact of it.

89. It is further submitted that clause 6 and other terms and conditions of the contract are not in violation of Section 23 of the Contract Act; nor against the public policy since the contract is between two private business entities, who had signed the contract with open eyes agreeing on the Terms and Conditions understood by them and agreeing on the extension of contract and hence to say that the said Terms and Conditions are against public policy is perverse and patently illegal.

90. It is further submitted that even assuming without admitting that



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the termination was invalid, the 2nd part of the award allowing certain claims of Respondent ignoring vital evidences and allowing some claims without evidences cannot be sustained.

91. It is submitted that as regarding the Award of **Rs.52,30,499.51** under the head of store Materials to Respondent in **O.P. No. 646 of 2022**, the Arbitral Tribunal has referred to certain email correspondences where except the fact that there were **212 materials**, which were jointly signed by both Petitioner and Respondent vide **Ex.R-21**, there was no acceptance by the Petitioner that the price is **Rs.52,30,499.51** and when Petitioner has stated that the price is **Rs.32,92,880/-** only in the Counter. It is submitted that the Arbitral Tribunal cannot award the claim when there is no other proof by Respondent to prove that the value of stock is **Rs.52,30,499.51**. Hence, it is submitted that the Arbitral Tribunal has miserably erred and committed patent illegality in allowing the claim of the Respondent for **Rs.52,30,499.51**.

92. It is further submitted that the Tribunal failed to see that holding



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212 items of Respondent, under the caption 'store materials', is left behind cannot confer jurisdiction on the Arbitral Tribunal to award an arbitrary value thereof as claimed by the claimant without any proof as to value of each item of the store material left behind when the Petitioner has stated that the value of the left-over items could be only **Rs.32,92,880/-**. Thus, it is submitted that this also amounts to patent illegality.

93. It is submitted that apart from the **Ex.C1** and **Ex.C3 Work Orders** for, **Chimney I** and **II**, other related Work Orders were given to the Respondent by the Petitioner. It is submitted that the total claim pertaining to Running Account Bills (RA Bills) for all Work Orders listed and mentioned at additional Counter of Petitioner was **Rs.3,14,58,345/-** (TDS not included) and this is for the amount of work done by the Respondent for which it is entitled to claim the amounts from Petitioner.

94. It is further submitted that as regarding the claim pertaining to cost of materials and chimney equipments, the Arbitral Tribunal has come to the conclusion that only the quantity and the items have been accepted



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by the parties but the rates were not accepted and has erroneously without any evidence produced by the Respondent by oral or otherwise, has accepted and fixed the rate as claimed by the Respondent, namely **Rs.82/-** per kg., when the Petitioner had accepted for **Rs.65/-** per kg alone and have arrived at **Rs.2,40,80,580/-** for **Chimney I** and **Rs.2,15,62,473/-** for **Chimney II**. It is submitted that the Arbitral Tribunal has also not even referred to the amount paid by Petitioner on behalf of Respondent for material suppliers and labor Contractors.

95. It is further submitted that the Arbitral Tribunal has even ignored the vital evidence of the admission made by the Respondent in its Written Arguments, where it had admitted that payment of **Rs.1,81,81,983/-** was made by Petitioner on behalf of Respondent for the materials that ought to have been purchased by Respondent. Similarly it is submitted that the Respondent has also admitted to the payment of **Rs.13,36,935/-** made by Petitioner to the Labour Contractors on behalf of it and that even this admitted amount has not been deducted from the Chimney equipment costs.



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96. It is further submitted that the vital evidences, namely **Exhibits R-40, R-41, R-43 and R-51** would prove that a sum of **Rs.3,28,16,224/-** was paid by Petitioner on behalf of Respondent for its material and labor contractors apart from the direct payment of **Rs.3,64,40,581/-** (including TDS) to the Respondent. It is submitted that this ignoring of vital evidences has let to irreparable hardship and the Award is liable to be set aside for patent illegality.

97. It is submitted that the Respondent claims that RA Bills includes the amounts paid to Labour Contractors and Material Suppliers on behalf of Respondent by Petitioner. It is submitted that if the Running Account Bills includes these amounts, then the direct payment of **Rs.3,64,40,581/-** couldn't have been made to Respondent.

98. Regarding Excess payment made by the petitioner to the respondent and the amount admitted by the petitioner as payable to the materials of the respondent the petitioner has given the following tabulation:-

i) Running Account Bills (RA Bills):



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Claimed by AMFAH* : Rs.3,64,40,318	
AXON# Paid the entire Amount:(TDS Paid for the rest of the amount) That the Amount paid by AXON is reflected from Bank Statement of AMFAH (R-41) First Minutes of Meeting (MOM)- AMFAH has Accepted the same("C"Series;C-4,Volume -II)	Rs.3,19,72,927
Thus AXON has paid to the AMFAH	Rs.3,64,40,318/-

*Respondent claimant

Petitioner

II) The amount paid to Suppliers of AMFAH at his instance and also to his Laborers:- **Rs.1,37,04,975/-**

According to AXON Supplier payments : Rs.2,97,87,666 Labour : Rs. 30,28,558 TOTAL : Rs. 3,28,16,724	
However AMFAH accepts only towards suppliers	Rs.1,81,81,938
AMFAH accepts only towards labour	Rs. 13,36,936
Total Amount accepted by AMFAH	Rs.1,95,18,919
Total amount paid by Axon towards RA Bills and accepted payments by AMFAH towards Suppliers and Labours	Rs5,59,59,237/- [Rs.3,64,40,318/- +Rs.1,95,18,919/-]

*Respondent claimant

Petitioner

III) As against this, the amount admitted by Axon as payable to



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materials of Respondent-claimant

Value of store material used	Rs 32,98,880
The cost of chimney materials accepted (R 48-636) by Axon for Chimney-1	Rs1,82,15,567
The cost of Chimney Materials accepted (R48-636) by Axon For Chimney-2	Rs.1,73,90,846
Cost of materials @ Chimney site	Rs. 21,68,653
Thus total amount payable	Rs. 4,10,73,946

99. Thus it is stated that the petitioner has paid **Rs,1,48,85,291/-** [Rs. 5,59,59,237 (-) 4,10,73,946] in excess in respect of Running Account bills, payment to suppliers and labours, Value of Store materials and Chimney materials to Respondent-claimant.

100. Regarding Liquidated Damages, it is submitted that the Liquidated Damages were never deducted from the Respondent, but the Arbitral Tribunal has granted this claim to Respondent holding that Liquidated Damages has been deducted. It is further submitted that the Respondent itself admitted that it would not have made this claim if the threat of deducting of Liquidated Damages was not made by the Petitioner.

101. Regarding Interest, it is submitted that the Arbitral Tribunal



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has erred in awarding interest at 18% p.a. effective from **12/5/2012**. It is submitted that the Parties were negotiating by mutually trying to settle the issues, and Meetings were held on various dates as evidenced in **Ex-C3, C4 and C5** and that the Arbitration was initiated only thereafter. Hence, it is submitted that the interest cannot be imposed from **12/5/2012** and further submitted that that the Arbitral Tribunal itself had delayed about two years from the date of completion of arguments in passing the impugned award and therefore to impose interest at 18% p.a. for this period is also patently illegal.

102. It is further submitted that the high rate of interest @ 18% p.a. if at all, can be fixed only from the date of award. Therefore, it is submitted that granting interest from 12/5/2012 at 18% p.a. is against the terms and conditions of the contract and well-settled principles of law. Thus, it is submitted that the Arbitral Tribunal has exceeded its jurisdiction in awarding the interest.

103. It is further submitted that after the 2015 amendment of the



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Arbitration Act, the award of interest for the post-award period has to be in compliance with Section 31(7)(b), which is 2% higher than the current rate of interest prevalent.

104. In 2022, the interest payable for deposits is only less than 6%. Hence, it is submitted that granting interest at 18% p.a. even for the post-award period is highly exorbitant, and it is submitted that due to the peculiar facts of the case, no interest should have been awarded for the pre-award period.

105. The petitioner has Submitted interest calculations as awarded by the Arbitral Tribunal as follows:-

Arb.OPNo,646 of 2022(CHIMNEY NO.I)

AWARD Amount	Rs. 3,89,27,448.51/-
Interest as on date of Award i.e.,from 12/05/2012 to 22/04/2022 (9 years, 11 Months and 10 days)	Rs.6,96,80,152.85/-
Grand Total	Rs. 10,86,07,601.36/-

Arb.OPNo,647 of 2022(CHIMNEY- II)



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AWARD Amount	Rs. 2,77,85,057.69/-
Interest as on date of Award i.e., from 12/05/2012 to 22/04/2022 (9 years, 11 Months and 10 days)	Rs. 4,97,35,253.20/-
Grand Total	Rs, 7,75,20,310.89/-

106. Regarding transport Charges, it is submitted that as per the terms and conditions of the Work Orders the Transport of Chimney Equipment by the Respondent cannot be burdened on the Petitioner. It is submitted that as per **Ex.C82** the bills produced by Respondent is **Rs.12,15, 100/-** (for both the Chimneys), whereas, the Learned Arbitral Tribunal has awarded Rs.69,32,550/- as charges towards transportation, erection, cost of office building, GI Shed. It is submitted that no proof whatsoever has been given for the above claim and another claim of **Rs.21,32,750/-** in respect of Chimney II. It is submitted that proof was provided by the Respondent only for **Rs.12,15,100/-**.

107. It is further submitted that the amended claim relating to **Chimney No.II** for **Rs.44,58,426/-** is based on a false **RA Bill No. 7**, which was allegedly fabricated. It was further contended that RA Bill No. 7 was already listed in the original documents and that respondent-



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claimant claim of its recent discovery is false. It was further submitted that the **RA Bill No.7** is essentially a duplicate of **RA Bill No.1**, making it a fraudulent claim.

108. It is submitted the Arbitral Tribunal did not address the petitioners counterclaims or the compliance issues related to third-party work, which warrants setting aside the award.

109. It is submitted that the Arbitral Tribunal has ignored vital evidences and that many findings are not backed by any evidence. It is further submitted that the Arbitral Tribunal due to wrong application of legal principles has erroneously partly allowed the Claim Petition and had completely rejected the Counter Claim of the Petitioner vide the Impugned Awards dated **22/4/2022**. Hence, pays for allowing these Original Petitions under Section 34 of the Arbitration and Conciliation Act, 1996.

110. On the other hand, the learned counsel for the respondent on the issue regarding patent illegality and public policy submits that the



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Arbitral Tribunal framed 14 Issues and had elaborately taken into consideration the pleadings and documents of either side before answering to the issues. It is submitted that none of the grounds raised by the Petitioner would come under Sec.34 (2) (b) (ii) and patent illegality under Sec.34 (2A) of the A & C Act, 1996.

111. It is submitted that as per **Ex.C1** and **C3** Work Orders the time to start the work was within 15 days from the date of handing over of the site, and the work was to be completed by the respondents within 18 months. It is submitted that the scope of work and the Materials to be provided by the Petitioner were stipulated clearly.

112. It is submitted that even though the **Work Order for Chimney No.I** was issued on **09.08.2010** and the Work Order for Chimney No.II was issued on **21.08.2010**, the Petitioner could not hand over the site to the Respondent to commence construction due to local issues as was originally planned.

113. It is further submitted that only during the end of October,



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2010, the Respondent was able to raise **RA Bill No.1** for **Rs.2,29,113/-** for preparatory works and the same was paid vide **Ex.R-5** on **29.11.2010**.

114. It is further submitted that the Petitioner could issue **Work Order No./WO/26/2011** for erecting, operation and maintenance of concrete Batching Plant and transit mixtures and supply of concrete mix, to the Respondent only vide **Ex.R-6** on **18.10.2011** as against the scheduled date of completion of 18 months, which is 14 Months from the date of Work Orders dated **09.08.2010 & 21.08.2010**. It is submitted that the Respondent could raise an RA Bill for **Rs.18,02,914/-** only on **05.11.2011** after erecting and operating of batching plant and transit mixture.

115. It is submitted that the Respondent commenced the work under the respective Work Orders and was making substantial progress even though, on several occasions, the Petitioner failed to fulfill its scope of work under the Work Orders. It is further submitted that the Respondent faced many local issues while the work was in progress, which was well



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within the knowledge of the Petitioner as is evident from **Ex.C-66** and submitted that in fact due to delay on the part of the Petitioner in fulfilling its scope of work, the Respondent had incurred idling charges. It is submitted that since the delay is not attributable to the Respondent, the Petitioner has also certified **RA Bill No.3A** for idling charges vide **Ex.C-69 & Ex.C-70** on **06.12.2011**.

116. It is submitted that taking into consideration of the difficulty in handing over the site as originally planned and other local issues at site, the Petitioner thus issued Ex.C-2Amended Work Order for Chimney No.1 on 28.12.2011 wherein the scheduled date for completion of the Amended Work Order was extended till 31.07.2012.

117. It is further submitted that due to the same issue, the Petitioner, on 02.01.2012, issued Ex. C-4 Amended Work Order for Chimney No. 2, wherein the scheduled completion date of the Amended Work Order was extended till 31.08.2012.



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118. It is further submitted that the Respondent fast-tracked the execution of the work for both Chimney-1 & Chimney-2 in spite of delay in supplying the materials under the scope of the Petitioner. It is submitted that in this regard, there are number of communication and correspondence between the Employer, the Petitioner and the Respondent.

119. It is further submitted that when that being so, without any prior intimation or opportunity of hearing, the Petitioner in its proceedings dated 12.05.2012 issued Ex.C-10 termination of Work Orders alleging certain issues and in turn the Respondent vide Ex.C-9 dated 13.05.2012 represented to the Petitioner that the termination order was issued when the work was in full-swing and requested for withdrawal of the same to continue to construct the works under the Contract.

120. It is submitted that the Arbitral Tribunal primarily rejected the arguments of the Petitioner that the delay in execution of work was attributable to the Respondent after carefully considering the entire pleadings and documentary evidence and by giving proper reasons. It is



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further submitted that the Tribunal rejected the Petitioner's contention on the delay upto the Amended Work Orders on the ground that the Amended Work Order did not refer to any such delay attributable to the Respondent and moreover taking into consideration of the fact that the Petitioner themselves have paid idling charges to the Respondent until December, 2011 vide Ex.C-69 & Ex.C-70.

121. It is further submitted that the Petitioner who has to provide materials to the Respondent as mentioned at Page No.3 of the Work Orders has inordinately delayed in providing the materials mentioned at the Work Order and submitted that to substantiate the same the Respondent has produced **Ex.C-61, Ex.C-62, Ex.C-63, Ex.C-66, Ex.C-67, Ex.C-68, Ex.C-75 to Ex.C-78.**

122. It is further submitted that the ground raised by the Petitioner that documents in **Ex.R-9, Ex.R-11 to Ex.R-19** were not considered by the Tribunal is also factually incorrect, as the same has been elaborately discussed by the Arbitral Tribunal @Page No.52, Para 3 & Page No.59,



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Para 2 of the impugned Award.

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123. It is further submitted that the Arbitral Tribunal considered **Issue No.1 & 2** with respect to the validity of the termination order dated **12.05.2012** by relying on various documents filed on either side, scope of works etc. from Page No.62 to 78 of the Award and held that the Termination Order of the Respondent was not valid.

124. It is further submitted that the grounds of this Petition in (viii) & (ix) to drive a point that the impugned Award is perverse and patently illegal, is without any basis and submitted that the impugned Award passed by the Arbitral Tribunal is in no way against the terms of the contract as defined under Sec.28 (3) of the A & C Act, 1996.

125. It is further submitted that the Petitioner has not substantiated the 4 reasons assigned by it to terminate the contract on 12.05.2012. It is submitted that the documents in **Ex.R-8, Ex.R-9, Ex.R-11, Ex.R-12 & Ex.R-13** are before the issuance of Amended Work Order and therefore, those cannot be relied on to substantiate the termination order. It is further



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submitted that Ex.R-14 dated 01.01.2012, Ex.R-15 dated 03.01.2012, **Ex.R-16** dated 04.01.2012 & Ex.R-17 dated 16.01.2012 also cannot be relied on to substantiate the termination order as the same is immediately after the amended Work Order dated 28.12.2011. With respect to Ex.R-18 dated 28.04.2012 & Ex.R-19 dated 05.05.2012, it is submitted that they are emails sent by the Principal-Employer to all the Contractors / Agencies pointing out various issues and that does not solely pertain to the Respondent and therefore these documents also cannot be considered as supporting document to the termination order. Hence, it is submitted that the Tribunal has rightly held that the reasons mentioned in the termination Order were not supported by any document.

126. It is further submitted that **Ex.C-74, Ex.C-75, Ex.C-77, Ex.C-79, Ex.C-95, Ex.C-80 and Ex.C-100** would also show that the delay in execution of the work is not attributable to the Respondent.

127. It is further submitted that the Arbitral Tribunal while deciding the issues has not ignored any of vital evidence. It is submitted that the



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Arbital Tribunal while arriving at a decision on **Issue No.6, 7 & 11**

considered **Ex.C26** email containing the calculation for the cost of materials signed by both parties and therefore submitted that the Petitioner cannot claim that there is no evidence for payment to be made.

128. It is submitted that the Petitioner's reliance on Ex.R-48 is without authentication or signatures of any of the parties but the very same document filed by the Respondent in Ex.C-26 along with working calculation is counter-signed by both the parties and therefore it is submitted that Ex.R-48 cannot be looked into.

129. It is further submitted that the elaborate discussion on the pleadings and documents on the side of both the parties and the decision on issue-by-issue commencing from Page No.49 of the Award onwards, cannot be assailed by anyone of the grounds raised by the Petitioner as none of the Grounds raised by the Petitioner would fall under Sec.34 of the A & C Act, 1996, to attract interference by this Hon'ble Court. Hence, prayed for dismissing the Original Petitions filed by the Petitioner.



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130. The Respondent has relied on the following judgments on the issues raised by the Petitioner:-

S.No.	Description
Scope of interference under Sec.34 of the A& C is minimal:	
<i>Challenge under Sec.34 cannot be treated like a Civil Appeal</i>	
01.	Dyna Technologies (P) Ltd., Vs. Crompton Greaves Ltd., 2019 (20) SCC 1 Para 24
02.	Punjab State Civil Supplies Corp., Vs. Ramesh Kumar & Co., &Ors., 2021 SCC Online SC 1056 Para 11 & 12
03.	Haryana Tourism Ltd., Vs. Kandhari Beverages Ltd., 2022 (3) SCC 237 Para 9
<i>Award cannot be set aside merely because another view is possible:</i>	
04.	UHL Power Company Ltd., Vs. State of Himachal Pradesh 2022 (4) SCC 116 Para 16 & 17
05.	Delhi Airport Metro Express (P) Ltd., Vs. Delhi Metro Rail Corp. Ltd., 2022 (1) SCC 131 Para 26, 28, 29, 42 & 49
06.	G.M Northern Railways Vs. Poineer Publicity Pvt. Ltd &Anr., 2023 SCC Online Del 39 Para 30, 31 & 32
<i>Public Policy</i>	
07	Associate Builders Vs. Delhi Development Authority 2015 (3) SCC 49
<i>Patent Illegality</i>	
08	NHAI Vs. GVK Jaipur Express Way Pvt. Ltd., 2023 ONLINE DEL 3790 – Para 17, 24, 26 & 27

131. Having perused both the Impugned Arbitral Awards dated **22.04.2022** and having considered the submissions made by the learned counsel for the Petitioner and the Respondent-Claimant and having over



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ruled the preliminary objection of the petitioner to the respective Impugned

Arbital Awards dated 22.04.2022, I shall now proceed with the rest of the submissions on merits regarding the challenge to the respective Impugned Arbitral Awards passed by the Arbitral Tribunal on **22.04.2022** for **Chimney No.I** and **Chimney No.II** in these respective petitions.

132. The total claim and counter claim for **Chimney No.I** and **Chimney No.II** of the Petitioner and the Respondent-Claimant and the amount awarded are detailed as under :-

Claim

Particulars	Arb.O.P.No.646 of 2022	Arb.O.P.No.647 of 2022	Total
	Chimney No.I	Chimney No.II	
Claim	Rs.6,02,77,515.51	Rs.4,35,59,079.39	Rs.10,38,36,594.90
Interest	Rs.8,28,36,169.26 (as adjudged by the Tribunal)	Rs.5,42,40,475.47	Rs.13,70,76,644.26
Cost of Arbitration	Rs.10,00,000.00	Rs.10,00,000.00	Rs.20,00,000.00
Total Claim	Rs.14,41,13,684.77	Rs.9,87,99,554.86	Rs.24,59,37,487.37

Counter Claim

Particulars	Arb.O.P.No.646 of	Arb.O.P.No.647 of	Total
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	2022	2022	
Counter Claim	Rs.4,87,33,561.00	Rs.6,55,67,188.00	Rs.11,43,00,749
Interest	Rs.5,18,85,802.00	Rs.9,32,37,390.00	Rs.14,51,23,192
Total Counter Claim	Rs.10,06,19,363.00	Rs.15,88,04,578.00	Rs.25,94,23,841.00

Awarded Amounts

Particulars	Arb.O.P.No.646 of 2022	Arb.O.P.No.647 of 2022	Total
Awarded	Rs. 3,89,27,449.51	Rs.2,77,85,057.69	Rs.6,67,12,507.20
Interest	18%	18%	18%
Cost	Nil	Rs.10,00,000.00	Rs.10,00,000.00
Grand Total of Award on claims excluding interest			Rs.6,77,12,507.20

133. Thus, **63.97%** of the total claim of the respondent-claimant of **Rs.10,58,36,594.90/-** (**Rs.10,38,36,594.90** + **Rs.20,00,000.00**) for Chimney No.I and Chimney No.II has been allowed. It is equal to **59.24%** of the counter claim of the petitioner of **Rs.11,43,00,749/-**. Over and above Interest **at 18%** has been awarded.

134. The Hon'ble Supreme Court in **Anil Rai vs. State of Bihar** [(2001) 7 SCC 318], has recognized that a delay in passing judgment long



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after the arguments are over can be fatal. Since the arbitral proceedings have to be completed in the time bound manner and since more than four extensions had already been obtained, the learned Arbitrator would have been constrained to pass the Award in a hurry.

135.Arguments were completed on 06.02.2020 before the Arbitral Tribunal. Thereafter, the parties were called upon to give their written submissions. The written submissions of the respondent-claimant is dated 05.03.2020 and the written submissions of the petitioner is also of March, 2020. However, the country immediately went into lockdown from **24.03.2020**.

136. Thus, the learned arbitrator would have been handicapped to formulated his thought process and dictate the Awards in absence of proper secretarial assistance as movements were restricted due to COVID-19 lockdown.



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137. The Learned Arbitrator was under a bind to pass the award as already several extensions were granted by this Court. Consequently, the Impugned Awards dated **22.04.2022** was authored by the learned Arbitrator during the period when the learned Arbitrator was at a disadvantage due to COVID-19 lockdown. The Impugned Awards passed are susceptible to a valid challenge under Section 34 of the Arbitration and Conciliation Act, 1996 for reasons I shall state hereafter.

138. At the outset, it has to be emphasized that this Court can neither sit as a court of appeal nor re-appreciate the evidence placed before the Arbitral Tribunal, nor can it substitute the findings of the Arbitral Tribunal with its own conclusions on facts or evidence placed before the Arbitral Tribunal.

139. The Hon'ble Supreme Court in *The Project Director, NHAI v. M. Hakim*, (2021) 9 SCC 1, has 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



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that an award can be set aside only on limited grounds as specified in Section 34 of the Act, and it is not an appellate provision.

140. The Hon'ble Supreme Court further held that an application under Section 34 for setting aside an award does not entail any challenge on the merits of the award.

141. 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. The Hon'ble Supreme Court further held that the 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.



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142. The Hon'ble Supreme Court also 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 Hon'ble Supreme Court further held that an award can be set aside only if an arbitrator/arbitral tribunal decides a question beyond the contract or beyond the terms of reference, or if the finding arrived at by the Arbitral Tribunal is based on no evidence, ignores vital evidence, or is based on documents taken as evidence without notice to the parties.

143. Although the Court examining the correctness of the Award under Section 34 of the Arbitration and Conciliation Act, 1996, is not expected to act as an Appellate Court or substitute the finding of facts arrived by the Arbitral Tribunal to give a different conclusion, nevertheless, the Court has to necessarily examine the evidence and pass an order either sustaining the Award or set it aside on any of the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996 and in the light of the above mentioned well settled principles of law.



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144. The claim of the Respondent-Claimant before the Arbitral Tribunal under various Heads as in **Table No.II** and **Table No.III** to this Order for **Chimney No.I** and **Chimney No.II** are primarily on account of the cost of materials and equipments stored at the site which remained with the petitioner and used in work by the petitioner and certain other Heads which was partly allowed by the Arbitral Tribunal as in **Table No. IV** to this order.

145. The incongruity in the claim of the Respondent-Claimant and the counter claim of the Petitioner are writ at large. The total value of the contract for **Chimney No.I** and **Chimney No.II** vide **Ex.C1** and **Ex.C3** as amended by **Ex.C2** and **Ex.C4** are as under:-

Particulars	Chimney No.I	Chimney No.II	Total
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As per Ex.C1 and Ex.C3	Indicative Contract Value and the quantities of the materials	Rs.4,38,01,975/-	Rs.4,38,01,975/-	Rs.8,76,03,950/-
	Bill of quantity (BOQ) for Steel Structural Work	Rs.54,21,300/-	Rs.54,21,300/-	Rs.1,08,42,600/-
Grand Total				Rs.9,84,46,550/-
As per Ex.C2 and Ex.C4	Indicative Contract Value and the quantities of the materials	Rs.4,32,43,775/-	Rs.4,35,91,775/-	Rs.8,68,35,550/-

146. Out of the aforesaid sum of **Rs.8,68,35,550/-** for the work to be carried out by the Respondent-Claimant to the Petitioner, the Petitioner has admittedly paid a sum of **Rs.5,59,59,310/-** to the Respondent-Claimant under the following heads:-

Payments against various running bills for both Chimney No.I and Chimney No.II	Rs.3,64,40,318/-
Payments to suppliers vendors of the respondents and labours	Rs.1,95,18,992/- (Rs.1,81,81,987 + 13,36,935)
Total	Rs.5,59,59,310/-



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147. Thus, as against a total estimated value of the contract for **Chimney No.I** and **Chimney No.II** for a sum of **Rs.8,68,35,550/-**, the Respondent - Claimant has received a sum of **Rs.5,59,59,310/-** leaving a balance of **Rs.3,08,76,240/- (Rs.8,68,35,550/-— 5,59,59,310)**. Thus, 64% of the contract amount has been already paid to the respondent-claimant by the petitioner.

148. Since the termination of the contract vide **Ex.C10** dated **12.05.2012** has been held to be improper, over and above **Rs.5,59,59,310/-** paid by the petitioner to the respondent-claimant for the work completed for **Chimney No.I** and **Chimney No.II**, the Arbitral Tribunal has held that the respondent-claimant was also entitled to recover a sum of **Rs.26,83,819/-** being the amount allegedly retained as of **12.05.2012** by the petitioner from the Running Bills raised for **Chimney No. I** on the respondent-claimant towards liquidated damages.



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149. Thus, for the work to be carried out by the Respondent-claimant, the total amount paid and payable to the petitioner would increase to **Rs.5,86,43,129/- (Rs.5,59,59,310 + Rs.26,83,819)** from and out of contract value of **Rs.8,68,35,550/-** and stands confirmed if the Impugned Awards are upheld. This is allegedly for 28/- and 12% of the work completed by the respondent-claimant for **Chimney No.I** and **Chimney No.II**.

150. Before the Arbitral Tribunal, the Respondent-Claimant has not made any claim for the work done except for the **RA Bill No.7** for **Chimney No.II** for a sum of **Rs.40,89,833/-** which has been allowed by the Impugned Award dated **22.04.2022**.

151. According to the petitioner, on the date of termination of contract vide Ex.C10 dated **12.05.2012**, the work completed by the Respondent suffered from the following deficiencies:-

- i. Performance & Quality of the works are very poor;*
- ii. Mobilization of resources, tools & tackles not done at the required time;*
- iii. Skilled manpower mobilization is not as per the requirement till date;*
- iv. You never achieved the targeted progress as per your commitment till date.*



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152. According to the Petitioner, on the date of termination of the contract on **12.05.2000** vide **Ex.C10 Termination Letter** dated **12.05.2012**, the quantum work that was reportedly completed by the respondent-claimant for **Chimney No.I** and **Chimney No.II** was only **28%** and **12%** respectively. This claim of the petitioner has also not been seriously contested by the Respondent-Claimant before the Arbitral Tribunal.

153. Arbitral Tribunal has found the termination of contract by the petitioner vide **Ex.C10 Termination Letter** dated **12.05.2012** was not valid and therefore unsustainable. This is contrary to express clause (vi) of general terms and conditions in Ex.C1 dated **09.08.2010** & Ex.C3 dated **21.08.2010** which reads as under:-

vi) We reserve the right to cancel, amend or modify the work in part or full upon being dissatisfied regarding the quality, progress and the performance of the work executed by the Contractor and the behaviour of Contractor's supervisor staff/workmen



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without assigning any reason and without giving any notice whatsoever. Our decision on such matters will be final and binding on Contractor.

154. The Arbitral Tribunal has thus ignored the above clause (vi) of the General Terms and Conditions in Ex.C1 dated **09.08.2010** & Ex.C3 dated **21.08.2010** and thus the Impugned Awards both dated 22.04.2002 violated Section 28(3) of the Arbitration and Conciliation Act,1996. Therefore, in terms of the decision of the Hon'ble Supreme Court in *Ssangyong Engineering and Construction Co. Ltd. versus National Highway Authority of India*, (2019) 15 SCC 131, the Impugned Awards have to be held to be suffered from the vices of patent illegality.

155. Vide **Ex.28** dated **20.08.2012**, the petitioner confirmed the quantity of materials and equipment stored at site as of **Ex.C10 Termination Letter** dated **12.05.2010**. Vide **Ex.C29** dated **22.08.2012**, the respondent-claimant valued the materials at **Rs.82- per kg**. Vide **Ex. C111** dated **28.8.2012**, the petitioner estimated the value at **Rs.65 per kg**.

156. The Arbitral Tribunal has awarded as sum of



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Rs.4,56,43,053.81 (Rs.2,40,80,580+ Rs.2,15,62,473.81) towards

materials and equipment stored at site as of **Ex.C10** Termination Letter dated **12.05.2010**. There ought to have been a proper valuation of the material with the help of an independent report of an expert Commissioner or a Chartered Engineer soon after the contract was terminated by the Petitioner vide **Ex.C10** Termination Letter dated **12.05.2010**.

157. Neither the Petitioner nor the Respondent-Claimant have produced any evidence to substantiate the value of **Rs.4,56,43,053.81** being the cost of material and equipment used in work either at **Rs.82/-** or **Rs.65/-**. The Arbitral Award has however awarded the same to the respondent-claimant without any proper discussions and proper evidence on record.

158. The Arbitral Tribunal ought to have examined the evidence



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properly and ought to have given a finding as to why the Respondent-

Claimant would have stored materials and equipments for a total sum of

Rs.4,56,43,053/- [Rs.2,40,80,580/- and Rs.2,15,62,473.81] for **Chimney**

No.I and **Chimney No.II** respectively which was valued at **Rs.82/-** per kg

by the Respondent-Claimant and at **Rs.65/-** per kg by the Petitioner.

159. A reading of the Impugned Award also indicates that there is no clear discussion in the Impugned Award regarding the payments allegedly made in excess against various Running Bills on the petitioner.

160. There is also no clear discussion regarding amounts alleged to have been illegally deducted from the Running Bills raised by the Respondent-Claimant and appropriated towards liquidated damages after the termination of the contract.

161. Similarly, an amount of **Rs.70,82,550/-** and **Rs.21,32,750/-**



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allegedly incurred by the Respondent-claimant towards transportation of material stored also remains unexplained in the respective Impugned Awards for **Chimney No.I** and **Chimney No.II**. There is no clear discussion in the respective Impugned Awards on other amounts awarded. Thus, the Impugned Awards have resulted in a patent illegality.

162. The Arbitral Tribunal ought to have discussed the issue before awarding huge amounts to the respondent-claimant which were over and above the value of the contract in **Ex.C1** dated **09.08.2010** and **Ex.C3** dated **21.08.2010** and amended vide **Ex.C2** dated **28.12.2011** and **Ex.C4** dated **02.01.2012** for **Chimney No.I** and **Chimney No.II**.

163. It is also not clear how a sum of **Rs. 21,79,588/-** each for **Chimney No.I** and **Chimney No.II** which was claimed towards liquidated damages by the petitioner in the counter claim was rejected and **Rs.26,83,819/-** was awarded to the respondent-claimant as **Rs.26,83,819/-** for **Chimney No.I**.



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164. That apart, the Arbitral Tribunal ought to have given a clear finding as to whether the delay in awarding of work order vide **Ex.R6** on **18.10.2011** for setting up a Ready Mix Concrete Plant vide **Ex.R6** on **18.10.2011** which was **82 days** and **94 days** before the expiry of the first dead line fixed for completion of work for **Chimney No.I** and **Chimney No.II** on **08.02.2012** and **20.02.2012** had indeed resulted in the delay by the Respondent – claimant or not. There ought to have been discussion as to whether premature termination of the contract vide **Ex.C10** Termination Letter dated **12.05.2012** few days before the extended period for completion of the work for the respective Chimneys on **31.07.2012** and **31.08.2012** was justified or unjustified.

165. That apart, the counter claim of the Petitioner has been rejected by holding that there were no documents to substantiate the same even though the petitioner has marked **53** documents in support of the aforesaid claim. There is no discussion regarding these exhibits in the Impugned Award. Thus, there is patent illegality in the Impugned Award.



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166. Under these circumstances, the Court is left with no other options except to set aside the Impugned Award. While, the Impugned Awards are set-aside, it has to be observed that the learned Arbitrator is not to be blamed on account of extra ordinary situations that prevailed in the Country due to outbreak of Covid-19 and lock down imposed.

167. Since, the Impugned Award have been passed without proper reasoning, they are therefore liable to be set aside. Liberty is however given to the parties to work out their *inter-se* rights the manner known to law. The time spent before this Court by either of the parties from the date of filing of the respective Original Petitions till the date of receipt of certified copy of this order shall stand excluded for the purpose of computation of limitation for the parties to work out their *inter se* rights in the manner known to law.

168. In the result, both the Impugned Awards dated **22.04.2022** are set aside with the above observations. Consequently these Original Petitions are allowed. Consequently, these Applications are closed.



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C.SARAVANAN, J.

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