* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 28th May, 2015
Decided on: 14th August, 2015

\+ **O.M.P. 431/2014 and I.A.No.7026/2014 (for stay)**

VANDANA GUPTA AND ANR. ..... Petitioners

Through: Mr.Abhijat and Mr.Aaditya Vijay Kumar, Advocates

versus

KUWAIT AIRWAYS LTD AND ORS ..... Respondents

Through: Ms. Mamta Tiwari, Ms. Swati Sinha, and Mr.Shyam Kumar, Advocates for Respondent no.1.
Mr.Vaibhav Gaggar and Mr.Abhimanyu Chopra, Mr.Tushar Gupta, Mr.Saket Bisani, Mr.Indresh Kumar, Ms.Reena Kumari, Mr.Nitish Sharma and Mr.Anil Jha, Advocates for respondents no.2 and 3.

AND

\+ **O.M.P. 461/2014 & C.M. No. 7934/2014 (for stay)**

TRANSAIR & ORS ..... Petitioners

Through: Mr.Vaibhav Gaggar and Mr.Abhimanyu Chopra, Mr.Tushar Gupta, Mr.Saket Bisani, Mr.Indresh Kumar, Ms.Reena Kumari, Mr.Nitish Sharma and Mr.Anil Jha, Advocates,

versus

M/S KUWAIT AIRWAYS & ORS .... Respondents

Through: Ms. Mamta Tiwari, Ms. Swati Sinha, and Mr.Shyam Kumar, Advocates for Respondent no.1.
Mr.Abhijat and Mr.Aaditya Vijay Kumar, Advocates for R-2 and R-3.

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

%

1. M/s Transair & Ors. (hereinafter referred as TA) and its partners Mr.Chetan Gupta, Ms. Vandana Gupta and Ms. Jagwati (now deceased through LR) have filed the present petitions under Section 14 of Arbitration and Conciliation Act, 1996 (hereinafter called the Arbitration Act) for declaring that the mandate of the Arbitral Tribunal (hereinafter called "the tribunal") - consisting of Hon'ble Mr.Justice B.P. Jeevan Reddy (Retd.) Chairman, Hon'ble Dr. Justice A.S. Anand (Retd.), Hon'ble Mr.Justice V.N. Khare (Retd.) since stood terminated by efflux of time on 17.10.2012, the tribunal had become *de jure* unable to perform its functions, and so its further extension by Director General (hereinafter referred as DG of International Air Transport Association (IATA)) of its mandate vide letter dated 18th December, 2012 and by impugned order dated 14.03.2014 is

illegal and contrary to the IATA Arbitration Rules, and be set aside and quashed.

2. Common question of law and facts are involved in both the petitions hence disposed of vide this common order.

3. The brief facts in nutshell necessary for determination of the matter, are as under.

4. The TA had entered into a General Sales Agency Agreement (hereinafter referred to as GSA) dated 30th July, 1987 with Kuwait Airways Limited (hereinafter referred to as KAL). On 23rd September, 2008, the said GSA was terminated by TA. Under the said GSA, the parties had agreed to conduct the arbitration proceedings under the IATA Arbitration Rules. KAL invoked the arbitration clause as per Article XI of GSA Agreement vide email dated 11th March, 2011. The tribunal was constituted. The first hearing was held on 31st March, 2012, and the tribunal had noted in its Procedural Order No.1 that the tribunal was informed of the payment of administrative cost of US$ 2000 by the claimant. The tribunal fixed the fees of the Arbitrators and directed the parties to pay four months Arbitrator's fee in advance and deposit sum of Rs. 3 lacs with each of the Arbitrators within four weeks from that date. The Procedural Order No.1 also noted that the

parties had agreed to deposit the fee of the Arbitrators in equal share with the respective Arbitrators and not to transmit the said fees to the IATA for being retransmitted to the Arbitrators. AT had also directed each party to deposit the sum of Rs.50 thousand with the Presiding Arbitrator and Rs. 25 thousand with each of the Arbitrators towards secretarial and other expenses likely to incur by Arbitral Tribunal and postponed the matter awaiting intimation from Director General (DG) IATA as contemplated by Rule 29 of the IATA Arbitration Rules. On 19th April, 2012, the tribunal had informed the parties vide its Procedural Order No.2 that the DG IATA had vide its letter dated 13th April, 2012 confirmed the Advance of Costs Scheme arranged by the parties as conveyed by the Arbitral Tribunal and also apprised the parties of the IATA Arbitration Rules which provided a tight deadline for the Arbitration to be completed within six months from receipt of payment of advance of costs, and extendable to three months by the order of DG. The next hearing had taken place before the tribunal on 1st June, 2012 which was recorded as Procedural Order No.3 wherein the tribunal had noted that TA (i.e. the respondents before "the tribunal") had sent the cheque dated 04.06.2012 of the Arbitrators fee by courier. The tribunal also took note of the default on the part of TA in payment of sum of Rs. 50,000/-

to the Presiding Arbitrator and directions were issued to make the necessary payment along with the deposit of sum of Rs.25,000/- with each of the Arbitrator if not already made. The tribunal had further noted that by virtue of Article 29 (4) of IATA Arbitration Rules, the award was to be rendered within 6 months from that day. The Procedural Order No. 4 dated 23rd June, 2012 shows that the claimant KAL had filed its statement of claim along with the relevant documents and the respondent i.e. TA was given time to file their defence statement along with counter claim on or before 14th July, 2012 along with the documents if any and also directed the parties to complete the admission / denial on completion of pleadings.

5. Thereafter, the tribunal had fixed the schedule specifying the dates by which the admission/denial and inspection of the documents and affidavits of the witnesses in chief examination were to be furnished (if oral evidence was required to be led by parties) and fixed the next date for hearing on 20th October, 2012. TA vide e-mail dated 13th July, 2012 sought for extension by three weeks for filing the reply and counter claim and extension of two weeks was allowed. The tribunal had held their meetings on several dates between 23rd June, 2012 and 20th October, 2012. During the interregnum period, Ms. Vandana Gupta and Ms. Jagwati sent e-mails dated: 1st August,

2012 and 6th August, 2012 entering appearance. On the intervention of Ms. Vandana Gupta and Ms. Jagwati, a defence statement along with the documents was allowed to be filed. However, Ms. Vandana and Ms. Jagwati filed an application dated 18th August, 2012 under section 14 and 16 of the Arbitration and Conciliation Act, 1996 read with Article 10 of IATA Arbitration Rules and in the hearing on 20th October, 2012, the tribunal had fixed the time schedule for the things to be done by the parties and fixed the meeting on 7th November, 2012 and on that date, the hearing was again fixed for 4th December, 2012 and the tribunal had also noted that the respondents had not deposited a sum of Rs. 50,000/- towards cost with the Presiding Arbitrator and also directed the respondents to remit the air fare to the Presiding Officer with immediate effect. The tribunal had also informed the parties about its letter dated 25th November, 2012 to DG and DG's request to seek consent of the parties for extension of the term of the tribunal under Article 19 and 29 of IATA Rules. While the claimant i.e. KAL had agreed to an extension by 6 months, the learned counsels for the petitioners (before this Court) sought time to seek instructions from their clients before consenting to the extension of time. They were directed to communicate their consent by 6th December, 2012. Thereafter, 3 months extension from the date of notification i.e. 18.12.2012 was given by DG. The tribunal fixed the hearing for 14th January, 2013. The petitioners had filed OMP No. 21/13 and OMP No. 24/13before this Court, challenging the extension of terms of tribunal vide letter by DG dated 18.12.2012. The ground taken was that on termination of mandate of the tribunal w.e.f 17.10.2012 as expiry of six months, the same could not be revived by subsequent extension. Both the OMP's were disposed of by this Court vide its order dated 21st October, 2013, directing the parties to approach the DG under Article 12 of IATA Arbitration Rules. Petitioners represented to the DG under Article 12 and vide order dated 14th March, 2014, the representations of the petitioners were dismissed and mandate of the tribunal was extended for three months from the date the order would become effective. The petitioners challenged the said order dated 14.03.2014 by way of SLP before the Supreme Court. Vide order dated 4th April, 2014, the Supreme Court directed the parties to approach this Court under Section 14 of Arbitration and Conciliation Act, 1996. Pursuant to that, the petitioners have filed the present petitions.

6. At the outset of the arguments, learned senior counsels on behalf of all the petitioners have argued that DG IATA is a quasi judicial authority and it must record the reasons in support of its conclusions, that the purpose

of such requirement is to assure that the quasi judicial authority had exercised its discretion on relevant grounds, disregarding the extraneous considerations and that it also help the reviewing authority to judge the propriety of the act of the quasi judicial authority to determine whether the quasi judicial authority had exercised its authority objectively and properly. Reliance has been placed on the findings in the cases of ***Securities and Exchange Commission vs. Chenery Corporation 332 US 194; Kranti Associates Private Ltd & Anr. Vs. Masood Ahmed Khan & Ors (2010) 9 SCC 496 and NBCC Limited Vs. JG Engineering Private Limited (2010) 2 SCC 385.***

7. It is argued that in the present case, the order of the DG dated 14.03.2014 clearly shows that the representation of the petitioners had been dismissed without giving any valid reason and thus is erroneous and liable to be set aside.

8. It is further argued that the period of 6 months under Article 19 of IATA Arbitration Rules was extendable only for three months by DG and the said extension could be given only during six months and after expiry of 6 months, once the tribunal had become *functus officio*, its term could not be extended. The period of 6 months of the tribunal to render the award had

ended on 17.10.2012 and so the order of DG cannot revive its terms, and on this ground also the impugned order is bad in law.

9. For the said purpose, findings in the case of ***NBCC Limited Vs. JG Engineering Private Limited (2010) 2 SCC 385*** has been referred and it is argued by Mr.Abhijat, learned counsel for the petitioner, that in the said case, it has clearly been held that the mandate of the arbitrator automatically expires on expiry of the mutually agreed time period for making of the award, if parties do not consent to the extension of time any further. It is further argued that the arbitrator has no authority to continue with the proceedings after expiry of the time within which it is needed to render its award. Reliance has also been placed on ***Bhagirathi Co-op Joint Farming Society Ltd. Vs Howrah Zilla Parishad*** AIR 1984 Cal 125; ***Kifayatullah Haji Gulam Rasool & Ors Vs. Smt. Bilkish Ismail Mehsania & Ors*** AIR 2000 Bom 424; ***Teltech Instrumentation Pvt. Ltd. Mumbai Vs. Bharat Petroleum Corporation Ltd.,*** Mumbai 2012 Vol. 114 (2) Bom. L.R 125; ***Ghanshyam Sarda Vs. Govind Kumar Sarda*** MANU/WB/1390/2009; ***Krishan Chowdhury and Others vs. State of West Bengal and Ors reported in AIR 1997 Calcutta 38; Babubhai Tansukhlal vs. Madhavji Govindji***

<u>and Co. reported in AIR 1931 Bom. 343 and Chetandas Daga Vs. Radhakisson Ramchandra, AIR 1927 Bom. 553.</u>

10. It is further urged that the petitioners had never consented to extension of mandate of the tribunal either expressly or impliedly by its conduct and the conclusion of the DG is based on erroneous grounds that the participation of parties in the arbitration proceedings without objection amounts to waiver of its rights to object, since at no stage the participation was substantial participation.

11. That they had clearly refused to give consent to the extension of time of the tribunal which had ended on 17.10.2012.

12. It is further argued that in view of the proceedings of the tribunal dated 1st June 2012 wherein the tribunal had noted that *the award has to be rendered within six months from today*, the petitioners were under the bonafide impression that six months would end on 30th November, 2012 and therefore anything done by the petitioners was done under bonafide belief that the tribunal had the mandate till 30.11.2012. The petitioners were not aware that the mandate was to expire on 17th October, 2012 as the letter of DG dated 13.04.2012 (received by tribunal on 17.04.2012) was never forwarded to the petitioners. It was only on 3rd January, 2013 and 5th

January, 2013 when the copies of the correspondences exchanged between the DG, IATA and the tribunal were supplied to them that they came to know the DG had informed the tribunal of payment of advance on cost via its letter dated 13.04.2012 and the tribunal has reckoned the period of 6 months from 17.04.2012, which stood expired on 17.10.2012. Thus, the participation, if any, was due to mis-information and does not constitute waiver as there was no voluntary and intentional relinquishment of right. It is argued that petitioners in OMP No. 431/2014 had at no stage submitted to the jurisdiction of the tribunal nor acquiesced to the continuation of the proceedings after 17.10.2012 either expressly or by conduct and therefore there was no question of waiver within the meaning of Section 4 of Arbitration and Conciliation Act. Reliance has been placed on the findings of the Supreme Court in the cases of ***Municipal Corporation of Greater Bombay vs. Dr. Hakimwali Tenants Association & Ors. 1988 (Supp) SCC 55 Bharat Oman Refineries Ltd. vs M/s Mantech Consultants 2012 , Vol. 114 (3) Bom L.R. 1709.***

13. It is further argued that an application under Section 16 of the Arbitration and Conciliation Act, 1996 challenging the jurisdiction of the tribunal had been filed which shows that petitioners had never submitted to

the jurisdiction of the tribunal and at no stage, waived their right to challenge the mandate of the tribunal. Reliance has been placed on the cases ***Booz Allen and Hamilton Inc. Vs. SBI Home Finance Limited & Ors (2011) 5 SCC 532*** and on ***Rashtriya Ispat Nigam and Another Vs. Verma Transport Co., reported in (2006) 7 SCC 275.***

14. Common argument in both the petition is that the tribunal is the creation of the agreement between the parties and it is bound by the agreement and cannot go beyond the terms of the agreement and was required to function under the IATA Arbitration Rules and in terms of Article 19 of the IATA Rules, "must" render its award within six months from the date DG notifies the tribunal of the payment of advance on cost unless the term is extended by DG for further period of three months (before that too during existence of mandate of the tribunal). It is argued that the expression used in Article 19 of IATA Rules is "must render the award within six months" and the expression is mandatory. It is argued that the words "shall" and "must" are mandatory and the word 'may" is directory. It is submitted that the mandatory nature of Article 19 of IATA Arbitration Rules was understood by the tribunal and that is why repeatedly in the Procedural Order nos. 2,3 & 9 dated 19th April, 2012, 1st June, 2012 and 20th

October, 2012 have shown its anxiety to complete the proceedings within the time limit of 6 months and urged the parties to complete the trial within the time schedule. It is further contended that even the DG, IATA in its impugned order dated 14.03.2014 had acknowledged its error of extension of time of tribunal by three months but had tried to cover it up on the ground that no prejudice or actual harm had been caused to the parties and the error with respect to three months extension stood waived by the parties conduct.

15. It is urged that on expiry of mandatory period of 6 months, the mandate of the tribunal stood terminated automatically. Reliance has been placed on the findings in the cases of ***UOI & Ors. Vs A.K. Pandey (2009) 10 SCC 552; Balasinor Nagrik Co-op Bank Ltd Vs. Babubhai Shanker Lal Pandya and Ors,(1987) 1 SCC 606; M/s Krishan Chander Ramesh Chander and Bros. Vs. Sohan Lal reported in AIR 1982 Delhi 122.***

16. It is further argued that once the tribunal had become *functus officio,* proceedings held on 20th October, 2012 and 7th November, 2012 were ultra vires and *non est* in the eye of law. It is further argued that from the very inception, petitioners have challenged the jurisdiction of the tribunal first by way of their application under Article 10 of IATA Rules and then by way of application under Section 16 of Arbitration and Conciliation Act, 1996.

Even the reply filed by the petitioners to the Statement of Claim of KAL was without prejudice to their objection that the tribunal was acting without jurisdiction. It is submitted that once the mandate of the tribunal had expired on 17th October, 2012, by virtue of Article 19 of IATA Arbitration Rules, the DG could not have extended the mandate of the tribunal for another three months by its order dated 18.12.2012 thereafter.

17. It is further argued that dispute referred by respondent no.1 for arbitration is beyond the scope of arbitration proceedings. Serious allegations of fraud and allegations relating to malpractices in account books and misappropriation of funds were made in the application under Article 10 of IATA Arbitration Rules, filed on 31st October, 2011 before the DG, IATA challenging the arbitrability of the claim filed by KAL and vide mails dated 19th September, 2012 and 28th September, 2012, request was made to the tribunal to pass appropriate orders, however, the same was not disposed of by the tribunal. It is argued that the dispute is not arbitrable and the tribunal thus has no jurisdiction. Reliance has been placed on the cases titled as ***Abdul kadir Shamsuddin Bubere vs. Madhav Prabhakar Oakand and Another, AIR 1962 SC 406; N. Radhakrishnan Vs. Maestro Engineers & Ors, (2010) 1 SCC 72; A. Somasundara Reddiar Vs. K.M.S. Roadways (P)***

Ltd. vs. Jayankondan & Ors AIR 1965 Mad.58; D.L. Miller & Co. Ltd. Vs. Daluram Goganmull AIR 1956 Cal. 361.

18. On these contentions, it is submitted that the impugned orders of the DG be set aside and it be declared that the mandate of the tribunal had ended on 17th October, 2012 and thereafter it had become *functus officio* and all acts done by the tribunal beyond that date are *non est.*

Reliance is placed on ***Rambaksh Lachhandas Vs. The Bombay Cotton Company in AIR 1931 Bom 81.***

19. Both the petitions are contested by the KAL. It is argued that Article 19 contemplates that the tribunal must render its award within 6 months from the date Director General notifies the tribunal that the advance on cost had been paid in full. It is submitted that vide letter dated 13.04.2012, DG IATA had only confirmed to the tribunal that ***"an advance on cost scheme"*** was approved by the parties forwarded to it by tribunal and had not conveyed the tribunal of fact of payment of cost on advance. It is also argued that the tribunal in its hearing dated 19th April, 2012 directed the parties to strictly adhere to the timeline for the deposit of fees of the Arbitrators and the cost. The tribunal could start its proceedings on receiving the fees and cost and this fact is noted in PO No. 2 which shows

that tribunal noted that it would proceed with adjudication of claim only on payment of advance on cost as per Article 29 (4) of IATA Arbitration Rules and noted down in its Procedural Order No.3 dated 1.06.12 the factum of deposit of the fees of the Arbitrators as per Article 29(4) of IATA Arbitration Rules and proposed to proceed under Article 29(4) of IATA Arbitration Rules, taking note of the fact that award was required to be rendered within six months from that date as Article 29(4) of IATA Arbitration Rules. It is contended that both the tribunal and DG had erred in stating that the six months time had lapsed on 17th October, 2012, while the tribunal itself on 01.06.2012 had noted in PO No.3 that the period of six months was to begin from 01.06.2012.

20. It is further contended by Ms.Mamta Tiwari, learned counsel for the KAL that the full payment of advance on cost was not made by the petitioners as late as 7th November, 2012 and therefore the period of six months as per Articles 19 and 29 of IATA Rules to render Award had never started and both the tribunal and DG had over-looked this fact which this court in exercise of its power under judicial review should set right. It is further argued that the petitioners, who were the respondents in the arbitration proceedings, made every effort to delay and derail the

proceedings which can be deduced from the various procedural orders of the tribunal. It is further contended that it was only vide their letter dated 5th December, 2012 and 6th December, 2012 that the petitioners had declined to give their consent for extension and sought closure of arbitral proceedings and had not raised any such objection anytime before. It is submitted that the objections had been raised only when the tribunal sought the consent of their parties for extension.

21. It is further contended that the various PO's show that the petitioners are responsible for the delay as they had not been complying with the directions of the tribunal and seeking adjournments and moving frivolous applications and they cannot be allowed to take advantage of their own wrong. Reliance has been made on the proposition of law laid down in the case of ***Kusheshwar Prasad Singh Vs. State of Bihar & Ors (2007) 11 SCC 447.***

22. It is further argued that IATA Arbitration Rules are procedural rules and cannot be allowed to be used to stall the arbitration proceeding. It is submitted that constituting the new tribunal would only cause further delays. It is submitted that procedures are not handmaiden of justice and reliance has been placed on ***Kailash Vs. Nankhu & Ors reported in (2005) 4 SCC***

480; Sushil Kumar Sen vs. State of Bihar reported in (1975) 1 SCC 774; The State of Punjab & Anr Vs. Shamlal Murarai & Anr. reported in (1976) 1 SCC 719; Ghanshyam Dass & Ors. Vs. Dominion of India & Ors reported in (1984) 3 SCC 46; Mahadev Govind Gharge Vs. LAO (2011) 6 SCC 321; Union of India & Ors. Vs. Shanti Gurung & Ors. reported in MANU/DE/0641/2014 and Vinay Bhushan Chandhok Vs. Vivek Bhushan Chandhok & Anr. 133 (2006) DLT 510 & Union of India & Ors. Vs. Shanti Gurung & ors, MANU/DE/3385/2006.

23. I have given due consideration to the contentions of the learned counsel for petitioners, namely, Mr. Abhijat and Mr.Aaditya Vijay Kumar and learned counsel, Ms. Mamta Tiwari, for the contesting respondent and the case laws supplied by them alongwith their written synopsis and have also perused the record.

24. The history of the case shows that the extension of term of the tribunal vide letter dated 18.12.2012 by DG was challenged before this Court in OMP No. 21/2013 and 24/2013 and both the OMP's were dismissed with directions to petitioners to approach DG under IATA Arbitration Rules. Accordingly, DG was approached. The parties made a representation which was dismissed by DG vide order dated 14.03.2014.

This order was challenged before the Supreme Court vide ***SLP (C) No. 9294-9295 of 2014*** *in the case of* ***Vandana Gupta & Anr Vs. Kuwait Airways Ltd & Ors.*** and the Supreme Court in view of the consensus of the parties allowed the petitioners to challenge the impugned orders before this Court under Section 14 of the Arbitration and Conciliation Act, 1996 vide its order dated 04.04.2014 in crux.

25. Following is the excerpt of the said order:-

> *"3. During the course of hearing, the consensus emerged among the learned senior counsel and counsel for the parties that the order dated 14.03.2014 passed by the Director General, IATA could be challenged in Section 14 of the Arbitration & Conciliation Act, 1996 (for short "1996 Act"). It is also agreed that if the remedy under Section 14 of the 1996 Act is now availed by the appellants, the earlier order passed by the High Court on 21.10.2013 in OMP Nos. 21 and 24 of 2013 shall have no bearing for consideration of the fresh application under Section 14 of the 1996 Act.*
>
> *4. Having regard to the above, we dispose of these appeals by the following order:*
>
> *i) The appellants shall be at liberty to pursue their remedy under Section 14 of the 1996 Act against the order dated 14.03.2014 passed by the Director General, IATA.*
>
> *ii) In the event of such remedy being pursued by the appellants, the order passed by the High Court on 21.10.2013 in OMP Nos. 21 and 24 of 2013 shall have no bearing and the application under Section 14 of the 1996 Act shall be considered by the High Court appropriately in accordance with law uninfluenced by the order dated 21.10.2013.*
>
> *5. We accept the undertaking given by the advocate-on-record for the appellants that the appellants shall make an application under section 14 of 1996 Act within ten days from today.*

6. We request the High Court to hear and decide such application as expeditiously as may be possible and preferable within three months from the date of making such application."

26. Although, contesting respondent had taken the plea that present petition under Section 14 of the Arbitration and Conciliation Act was not maintainable, but at the stage of arguments, learned counsel for the respondent did not forward the argument. Even otherwise, in view of the above order of the Supreme Court, the contention does not have any merit.

27. The present contest is under Section 14 of the Arbitration & Conciliation Act, 1996.

Section 14 of the Arbitration and Conciliation Act reads as under:-

14. Failure or impossibility to act.—
(1) The mandate of an arbitrator shall terminate if—
(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and
(b) he withdraws from his office or the parties agree to the termination of his mandate.
(2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate.
(3) If, under this section or sub-section (3) of section 13, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub-section (3) of section 12.

28. The expression *"de jure"* used in Section 14 of Arbitration Act has been discussed and elaborated by this Court in the case of *Shyam Telecom (supra)* wherein it has been held as under:-

> *12. What is the object, intent and scope of the above provision of law would decide the question of maintainability of the present petition. This section postulates the circumstances under which the mandate of the Arbitrator can be terminated. The Arbitrator's mandate can be terminated under the following situations:*
>
> *(i) Automatic termination,*
>
> *(ii) By the Arbitrator himself,*
>
> *(iii) By the parties,*
>
> *(iv) By tribunal order,*
>
> *(v) By Court's order.*
>
> *The mandate of an Arbitrator automatically terminates at the death of the Arbitrator or his physical incapacity to proceed with the mandate. This provision sets following three grounds that constitutes an Arbitrator's inability ; (i) his de jure, or (ii) his de facto inability to perform his functions, or (iii) his failure to act without undue delay for other reasons. The first situation refers to an Arbitrator's legal incapacity to perform his functions under the law and relates to circumstances under which the Arbitrator by law is barred from continuing in office, for instance, incapacity, bankruptcy conviction for a criminal offence, etc. The second incapacity relates to factual inability, which includes factual situation, in which the Arbitrator is physically unable to perform his functions for instance, such as continuous ill-health, etc. The*

last situation "failure to act without undue delay" is an expiry provision according to which the mandate of the Arbitrator shall terminate if for other reasons he fails to act without undue delay.

13. The de jure impossibility referred to in Clause (a) of Sub-section (1) of Section 14 is the impossibility which occurs due to factor personal to Arbitrator and de facto occurs due to factors beyond the control of the Arbitrator. The judicial intervention of the Court is provided in Sub-section (2) only if a controversy remains concerning any of the grounds referred to in Clause (a) of Sub-section (1) of Section 14 of the Act. Sub-section (2) of Section 14 empowers the Court to decide the question of termination of the mandate if a controversy arises concerning the termination of the Arbitrator's mandate on one or the other grounds.

14. The moot question which falls for consideration, therefore, is whether an Arbitrator becomes unable to perform his functions on his failure to render the Award within the time limit prescribed by the Arbitration agreement. Mr. Sanghi, learned counsel representing the petitioner has not disputed that not making the Award within the prescribed period will not visit the Arbitrator with any de facto inability (incapacity) to continue with the mandate but his submission is that this would make the Arbitrator de jure unable to act legally whenever he is visited with any such legal disability. The expression "de jure" means the 'legal right' or 'authority' or 'according to law'. The Blacks Legal Dictionary defines "de jure" to be "existing by right or according to law". P. Ramanatha Aiyar's Law Lexicon, Second Edition, 1997 defines "de jure" as "of right ; legitimate ; lawful ; by right and just title".

15. In the opinion of this Court, the expression "de jure" is amply wide so as to cover a situation like the case in hand. This view is based on the settled legal position that Arbitration agreement is the fountain head of the Arbitrator's power and authority and the parties as well as the Arbitrator are governed and controlled by

> *the terms of the said Arbitration agreement. Unless parties agree to the contrary, the terms of Arbitration agreement must operate in full. The consequence of the Arbitrator not concluding the proceedings and rendering the Award within the period prescribed under the Arbitration agreement as in the present case would uncloth the Arbitrator of his legal authority to continue with the proceedings unless the parties agree to extend the period of making the Award or a party waives his right to such an objection. It must, therefore, be held that expiry of the prescribed period for making the Award, would render the Arbitrator 'de jure' unable to continue with the proceedings and has the effect of termination of the mandate of the Arbitrator within the meaning of Section 14 of the Act.*

29. It is the settled proposition of law that Tribunal is the creation of an arbitration agreement. Article XI of GSA requires the resolution of disputes between parties to agreement by way of arbitration which will be governed by IATA Rules. Since the tribunal is a creation of an arbitration agreement, it is its lifeline and tribunal has to act within the four corners of that agreement. In the present case as the IATA Rules govern the arbitral proceedings, the tribunal was bound to follow these rules. Of course, it goes without saying that parties to an agreement can, at any stage, change the rules of the game but till it is done, the tribunal is bound to follow the agreed rules and it cannot unilaterally change the rules. The moot question therefore, for consideration, is whether the tribunal had acted under IATA rules.

30. The main contention of the petitioners is that, in terms of Article 19, the mandate of the tribunal automatically came to an end on 17th October, 2012 on expiry of 6 months and thereafter it had become *functus officio* and vide impugned orders, DG could not have extended the term of the tribunal which was a dead entity by that time.

31. Article 19 of IATA Arbitration Rules is reproduced as under in order to understand its import clearly.

> ***Article 19 - Time-limit for the award***
> *The tribunal must render an award within six (6) months* ***from the date the*** *Director General* ***notifies the tribunal*** *that the* ***advance on costs*** *has been* ***paid in full****. The Director General may, if necessary, extend this time-limit for up to three (3) months.*
> *(emphasis is mine)*

32. The bare reading of Article 19 shows that the tribunal was bound to render an award within six months which was to begin from the date the DG notifies the tribunal that the ***"advance on cost stood paid in full."***

33. By necessary implications, the Article does not provide any time limit for tribunal to complete its proceedings. The time limit has only been provided for rendering the award within six months from the date when the tribunal was informed by DG of the payment of ***"advance on cost in full by the parties."***

34. While Article 19 of IATA Arbitration Rules requires that the award be rendered within 6 months from the date of payment of cost ***"in full"*** by parties, Article 17 of IATA Arbitration Rules deals with the hearing before the tribunal. It reads as under:-

Article 17 - Hearings
1. The tribunal shall proceed within as short a time as possible to establish the relevant facts of the case. The tribunal may fix time-limits.
2. After study of the written submissions and of all documents relied upon, the tribunal shall hear the parties if one of the parties so requests, or failing such request, on the tribunal's own initiative. In addition, the tribunal may decide to hear any other person in the presence or absence of the parties.
3. At the request of one of the parties, or if necessary, on the tribunal's own initiative, the tribunal, giving reasonable notice, shall summon the parties to appear at a hearing.
4. If one of the parties, although duly summoned, fails to appear, the tribunal, if satisfied that the summons was duly received and the party is absent without valid excuse, shall proceed with the arbitration. Such proceedings shall then be deemed to have been conducted in the presence of all parties.
5. Persons not involved in the proceedings shall not be admitted without the approval of the tribunal and of the parties.
6. The parties may appear in person or through duly appointed representatives and may be assisted by advisers.
7. The tribunal may appoint one or more experts, define their terms of reference, receive their reports and/or hear them in person in the presence or absence of the parties.

35. Hence, the proceedings before the tribunal starts as soon as it is convened and IATA rules cast a duty on the tribunal to proceed with the hearing of the case.

36. Article 29 further confirms that there is no bar under IATA Rules for the tribunal to start the proceedings. The only requirement is that the advance on cost is paid. So it speaks:-

Article 29 - Advance on costs
1. xxx xxx xxx
2. xxx xxx xxx
3. xxx xxx xxx
4. The tribunal shall only proceed in respect of those claims for which the Director General has confirmed that the advance on costs has been paid.
5. xxx xxx xxx
6. xxx xxx xxx

37. The important fact to notice is that this clause does not mandate that the tribunal could begin with the proceedings only when advance on cost is paid ***'in full'*** as the expression ***"payment of advance on cost in full"*** has not been used in this Article (while used in Article 19). The tribunal thus could proceed with the case even on part payment of advance on cost. It is thus apparent that to begin the proceedings before the tribunal, ***"payment of advance on cost in full"*** was not a pre-condition, while under Article 19 of IATA Rules for the award to be rendered within 6 months by the tribunal, ***"the payment of advance on cost "in full"*** is a pre-condition**.**

38. Now what is "advance on cost". Article 27 defines cost of Arbitration as under:-

"Article 27- Costs of Arbitration

The costs of arbitration shall comprise the IATA Administrative fee and the tribunal's fees and expenses (including the expenses of any expert appointed by the tribunal). These are described in the Schedule of costs at Appendix 2. Once the tribunal has calculated these fees and expenses, it shall submit a breakdown to IATA for transmission to the parties and for processing the arbitration."

39. Cost of Arbitration consists of (a) Administrative fee (b) Tribunal's fee (c) Tribunal expenses.

40. Appendix II defines the constituents of cost. The tribunal is required to fix its own fee and cost as per Clause 4 of Appendix II. Thereafter, tribunal is required to submit the breakdown to IATA pursuant to Article 27 for transmission. This cost fixed under Clause 4 of Appendix II by Arbitrator becomes an ***advance on cost*** when DG pursuant to Article 29 of IATA Arbitration Rules fixes the amount of advance on cost in sum likely to cover the cost of arbitrators which shall include the fees and expenses calculated by Arbitrators under Clause 4 of Appendix II of IATA Arbitration Rules. This Article also cast a duty on DG to draw a scheme and prescribe time limit of payment of Advance on Cost and then inform the parties in order to facilitate them to make the payment. This can be discerned from Article 29(5) of IATA Arbitration Rules.

"Article 29- Advance on cost

1. *xxxx xxxxx xxxx*
2. *xxxx xxxx xxxx*
3. *xxxx xxxx xxxx*
4. *xxxx xxxx xxxx*
5. *If the advance on costs is not paid within a reasonable time-limit to be specified by the Director General, he shall so inform the parties, in order that any party may make the required payment. If such payment is not made, the Director General may consider the case as withdrawn. This will not prevent the party or parties concerned from filing a new Request at a later date."*
6. *xxxx xxxx xxxx.*

41. The conjoint reading of all these three Articles i.e. Article 17, 19, 27 and 29 clarifies that the tribunal shall after fixing the fee and expenses shall submit the breakdown to DG and DG then fix the advance on cost likely to cover the cost of Arbitration and draws a scheme of payment and transmit it to the parties to facilitate its payment and when cost is not paid as per schedule, the DG then after giving the notice to defaulting party, may consider the case as withdrawn.

42. If DG, on account of non-payment of advance on cost, withdraws the case, the hearing before the tribunal came to an end or remained suspended, which can be revived by filing a new request at a later date.

43. Undisputably, the petitioners have not paid ***"in full"*** the advance on cost as per schedule and a sum of Rs.50,000/- and odd is still due towards them. The DG however did not pass any order of withdrawal of case pursuant to Article 29(5) of IATA Arbitration Rules. The tribunal, thus

continued with the hearing. The scheme of IATA Rules shows if the ***'advance on cost'*** remain unpaid or not paid ***"in full",*** the DG can withdraw the case, but if DG does not do so, nothing prevents the tribunal to continue with the hearing of the case. The mandate of tribunal stood terminated automatically only under Article 19 of IATA Arbitration Rules.

44. The question, thus is, which is the date an which advance on cost ***in 'full'*** stood paid i.e. the date from which period of 6 months is to be reckoned under Article 19 of IATA Arbitration Rules. This can be determined on the basis of various orders of tribunal and other documents on record.

45. The tribunal vide its order dated 31.03.2012 fixed its fee and expenses and also set out the mode of payment. It is numbered by the tribunal as PO No.1 and is reproduced as under.

> *"5. With the agreement of learned Advocates for the parties, following directions are made: -*
>
> > *(a) Rs. 1,50,000/-(Rupees One Lakh Fifty Thousand Only) for each of the Arbitrators, for each hearing/session not exceeding 2 (two) hours. The fees of the Arbitrators shall be shared equally by both the parties. The parties shall deposit, in advance, the Arbitrator's fees for 4 (four) hearings which mean that each party shall deposit Rs.*

3,00,000/-(Rupees Three Lakhs only with each of the Arbitratos within 4 (four) weeks from today.

(b) So far as the fee of the Arbitrators is concerned, the parties agree that the fees of the Arbitrators shall be deposited by the parties, in equal share, with the respective Arbitrators. The parties are agreed that it will not be necessary that the fees of the Arbitrators be transmitted to the IATA for being re-transmitted by IATA to the Arbitrators. Similarly, the expenses incurred for travel of the Presiding Arbitrator, and the accommodation at Delhi, shall also be the responsibility of the parties to be arranged as between them i.e. they should undertake these expenses/costs alternately. For the present hearing, the Claimants have made arrangements. It is, therefore, directed that for the next hearing, the Respondents shall make arrangement.

(c) The expenses incurred for arranging the venue of hearing shall also be borne alternately.

(d) In addition to the aforesaid expenses, each party shall deposit a sum of Rs. 50,000/- (Rupees Fifty Thousand only) with the Presiding Arbitrator and Rs. 25,000/- (Rupees Twenty Five Thousand only) with each of the Arbitrators towards secretarial and other expenses of the Arbitral Tribunal. So far as the expenses to be deposited are concerned, these shall be free of deduction by way of TDS."

46. This order was passed in the presence of Advocates of the parties and parties through their lawyers agreed to deposit fee and expenses, directly with the Arbitrators instead of depositing the same with IATA for

retransmission to the Arbitrators. Both the parties had agreed to this arrangement.

47. The fee and expenses so fixed by tribunal (Appendix II (4) of IATA Arbitration Rules) shall be called "advance on cost" when in terms of Article 29 (1) of IATA Arbitration Rules, DG fixes the amount of the advance on cost in a sum which is likely to cover the tribunal's fee and expenses. It is only after the DG approves it, that the Arbitrator's fee and expenses can be termed as "advance on cost."

47. Although, as per IATA rules, the advance on cost was to be transmitted to the DG, parties by their agreement, agreed to pay the said advance on cost directly to the arbitrators. This part of the IATA Rules therefore had been changed by the parties vide their agreement which is recorded in **PO No.1**.

48. Both, Mr.Abhijat and Mr.Aaditya Vijay Kumar, counsel for the petitioners have argued that vide its letter dated 13th April, 2012, DG had confirmed the payment of the advance on cost to the tribunal and the tribunal had duly received the said communication and had also made note of this fact in its PO No.2, and so the period of six months to render the award, had begun from that day and ended on 17th October, 2012, and

thereafter the mandate of the tribunal stood terminated *de jure* and it had no jurisdiction to proceed further into the matter.

49. There is no dispute that Article 19 of IATA Arbitration Rules stipulates that the period of 6 months to render an award starts from the date when the tribunal gains knowledge on the basis of communication from DG that ***"advance on cost stood paid in full."***

50. Now, what was communicated by DG through its letter dated 13th April, 2012. The communication is reproduced as under:-

> *"We are please to acknowledge safe receipt of the copy of the summary of the Procedural OrderNo.1 dated 31st March, 2012.*
>
> *According to Article 29 of IATA Arbitration Rules, IATA Director General hereby **confirms the advanced of costs scheme arranged by the parties** and described by the arbitral tribunal under Section 5 of the Procedural Order aforementioned.*
>
> *Please note that IATA is not liable for any of the costs and fees of the arbitration.*

51. The bare reading of this letter clearly shows that DG had only confirmed ***"the advance on cost scheme arranged by the parties".*** There is no whisper of communication of payment of advance on cost, what to say of payment of advance on cost ***"in full"***. Also, there could not be any

communication from DG of ***"payment of advance on cost in full",*** since parties had agreed to deposit it with the Arbitrators (which included Arbitrator's fees and expenses). Since parties had agreed to deposit the fee etc directly with the Arbitrators, the fact of deposit of advance on cost ***"in full",*** necessarily therefore was not required to be communicated by the DG to tribunal as the fact of deposit of advance on cost "in full" would be in the notice of the tribunal itself if such a payment would have been made by the parties (noted in PO No.1 dated 31.03.2012).

52. But, everybody including tribunal and DG had acted on the premise that the communication dated 13th April, 2012 confirms the payment of advance on cost ***"in full".***

53. Under Article 19 of IATA Arbitration Rules, to kick start the period of six months to render an award, the pre-condition is that the ***"advance on cost stood paid in 'full'"*** and it is brought to the notice of the tribunal.

54. PO's of various dates show that the advance on cost was not paid ***<u>"in full"</u>*** till this time.

55. PO No. 3 of tribunal dated 01.06.2012 clearly shows that the payment of advance on cost was due even on 01.06.2012. Even otherwise the

petitioners had deposited the fee of Arbitrators by cheque which they had dated as 04.06.2012 so even part payment of advance on cost was not made by petitioners before 04.06.2012.

56. Even as late as on 7th November, 2012 in PO No.11, tribunal had observed that ***"the respondents have to deposit a sum of Rs.50,000/- towards costs with the Presiding Arbitrator which they are yet to do."***

57. So, the question remains when was the ***"advance on cost in full"*** stood paid? Because the period of 6 months requiring the tribunal to render award would start, only from the date tribunal gains 'knowledge' that ***"advance on cost stood paid in full"***. As discussed above, the letter dated 13.04.2012 of DG was not the communication of payment of advance on cost in full". It had only confirms the scheme of payment of advance on cost as already noted. The petitioners have neither contended nor shown on which date they had paid the advance on cost stood paid ***"in full."***

58. Article 19 of IATA Rules is very clear. It requires that the tribunal must render the award within 6 months and these rules are binding upon the tribunal but the period of 6 months to render award starts only on payment of advance on cost in full. The catch word in Article is "the payment of

advance on cost in full". Unless the advance on cost is paid in full, the period of six months to render an award by the tribunal does not kick start.

59. The advance on cost was agreed to be deposited directly with Arbitrators but none of the procedural orders show the date on which the advance on cost stood paid ***"in full"***.

60. The attention of this Court has been drawn to the letter dated 14th March, 2014 of the DG by the learned counsel for the petitioners and it is argued that the DG has reiterated the ***payment of advance on cost in full on 17.14.2012***. Reliance has been placed on the portion of the said letter which is reproduced as under:-

> *"The IATA DG notified the tribunal that the advance on costs had been paid in full on 17th April, 2012, thereby giving it until 17th October, 2012 to render an award under Article 19 of the Rules. The tribunal's mandate therefore expired on 17th October, 2012. It is important to note that although the tribunal's 6-month mandate expired on 17th October, 2012, the arbitration proceedings themselves have not been terminated and neither has the case been withdrawn as provided for under the Rules."*

61. As discussed above, it is apparent that this noting of the DG in this letter is contrary to the record and the facts of this case. The DG has recorded in this letter that **"*the advance on costs had been paid in full on 17th April, 2012*"**

This noting of DG in this letter is certainly contrary to facts on record because the DG himself in its letter dated 13th April, 2012 had only confirmed the ***scheme of payment of the advance on cost*** and there is no mention of the payment of ***advance on cost in full***. Even the PO No. 2 dated 19.04.2012 had noted as under:-

> *"The parties are informed that the Director General, IATA has, by their letter dated April 13, 2012, confirmed the Advance of Costs scheme arranged by the parties and described the Arbitral Tribunal under Section 5 of the Procedure Order No. 1"*
>
> *xxxx xxxxx xxxx*
>
> *"By Procedural Order No.1, both the parties were directed to deposit a sum of Rs. 3,00,000/- each with each of the Arbitrators within four weeks from the said date i.e, 31.03.2010. In addition thereto, certain amounts were directed to be deposited with each of the Arbitrators towards secretarial and other expenses of the Arbitral Tribunal which deposits were also directed to be made within the same period. The parties are accordingly directed to strictly adhere to the said time line for the deposit of fees of the Arbitrators and the costs inasmuch as the Tribunal is supposed to proceed with the adjudication of the claims only after the advance on costs have been paid vide Article 29 (4) of the IATA Arbitration Rules.*
>
> *As soon as the fees and costs as directed hereinabove are received by the Arbitral Tribunal, the Tribunal shall fix the dates for filing of the pleadings and for taking further steps in the arbitral proceedings."*

62. The fact that the ***"advance on cost was not paid in full"*** by that date gets further confirmed from the subsequent PO No.3 dated 1st June, 2012 which certifies that the ***advance on cost*** was still due. It is undisputed fact that advance on cost is due. Mere noting in the order of DG, IATA dated **<u>14th March, 2014</u>** that the ***advance on cost*** was ***paid in full*** on 17.04.2012 cannot change the factual position. Although letter dated 14.03.2014 notes that advance on cost was paid in full on 17.04.2012, there is no noting of DG dated 17.04.2012 showing such payments and various POs of tribunal show that advance on cost was still due. PO No. 11 dated 07.11.2012 as reproduced, shows that advance on cost was due till that time.

> *"The respondents have to deposit a sum of Rs. 50,000/- towards costs with the Presiding Arbitrator which they are yet to do. In addition to the same, one way air fare for the hearing held on 20th October, 2012, which the Presiding Arbitration has paid by himself, has to be reimbursed to him. The receipt issued by the Viceroy Travels has been handed over to the learned counsel for the Respondents. The said amount of air fare plus Rs. 50,000/- may be remitted by the Respondents immediately to the Presiding Arbitrator.*

63. The only conclusion that can be drawn is that the Article 19 of IATA Arbitration Rules has not become operative as its precondition that is ***"payment of advance on cost in full"***, was not fulfilled.

64. Both, the tribunal as well as the DG, have been acting on a understanding that Article 19 had become operative and passed several orders which were not called for including the impugned orders. All the stake holders have misunderstood the import of Article 19 of IATA Rules and took it as if the proceeding before the tribunal were required to be completed within six months, while it is not so. Since the period of 6 months to render an award has not yet started, there was no occasion for its further extension. The impugned orders, therefore, were not called for and are of no consequence. The race which has not yet begin cannot be said to have ended. The proceedings before tribunal can be only termed as hearings, under Article 17 of IATA Rules and operation of IATA Rule 19 will start only after the ***"advance on cost is paid in full"*.**

65. Pursuant to the present controversies, the tribunal had stopped its proceedings and had kept it in abeyance as noted in PO No.19. The tribunal should continue with the matter in hand since its mandate has not yet ended. However, it must render its award within 6 months from the date the advance on cost stood paid in full. The petitioners have also challenged the substantive jurisdiction of the tribunal. Under Section 16 of Arbitration & Conciliation Act, the tribunal is empowered to decide its own jurisdiction.

65. Both the petitions stands disposed of along with all the pending applications, in the above terms. Parties to bear their own cost.

DEEPA SHARMA
(JUDGE)

AUGUST 14, 2015
sapna