

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment pronounced on: 16th February, 2016

+ **OMP (T) (COMM.) No.18/2015**

VIRKARAN AWASTY Petitioner
Through Mr.Rajiv Nayar, Sr. Adv. with
Mr.Saurabh Seth, Mr.Ishaan
Chhaya, Mr.Aravind Verma &
Mr.V.K.Mishra, Advs.

versus

HASSAD NETHERLAND B.V. & ORS Respondents
Through Mr.Neeraj Kishan Kaul, Sr. Adv.
with Mr.Ashok Sagar, Mr.Samar
Kachwaha, Mr.Suryadeep Singh &
Ms.Aarushi Balani, Advs. for R-1
& 2.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The present petition has been filed by the petitioner under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") praying that the mandate of the Arbitral Tribunal be terminated on account of the Tribunal becoming *de jure* and *de facto* unable to perform its functions, mainly, on the reasons; firstly, the mandatory time period of three months prescribed under the arbitration agreement(s) for passing the award has come to an end; and secondly, the respondents No.1 and 2 have levelled allegations of fraud against the petitioner and his wife who is

respondent No.3 in its statement of claim. Thus, the allegations can only be tried by the Civil Court.

2. The petitioner and respondent No.3 herein are the respondents in the arbitration proceedings. The respondents No.1 and 2 are the claimants. The said proceedings are continuing despite of filing of the present petition. Notice in the petition has not yet been issued, rather two times, it was clarified by my learned Predecessor two Benches that the arbitration proceedings should continue.

3. The respondents No.1 and 2 submit that they are subsidiaries of the Qatar Investment Authority (a Government of Qatar entity). The Qatar Investment Authority is one of the largest investors in the world. In March 2013, they were wrongfully induced into making a large investment in an Indian Company called Bush Foods Overseas Private Limited (in short, called "Bush Foods"), promoted and incorporated by the petitioner and respondent No.3 in 2005. As part of the transaction, the respondents No.1 and 2 invested a total of US\$ 120.35 million and acquired 69.5% shareholding in the Company. Besides this, the respondent No.2 furnished a Corporate Guarantee to a Bank consortium securitising 70% of the loans availed of by Bush Foods.

It is alleged that at the time of the transaction, Bush Foods was represented to be a financially healthy company. In reality however Bush Foods was a near bankrupt company and the respondents No.1 and 2 have lost the entirety of their US\$ 120.35 million investment and suffered a further loss of Rs.441.68 crores plus US\$ 8.14 million

on account of invocation of the Corporate Guarantee furnished to the Bank consortium.

4. In view of the disputes arisen, the present ongoing arbitration under the LCIA India Rules, through a three member Tribunal, comprising of Hon'ble Mrs.Justice Sujata V. Manohar, Hon'ble Mr.Justice B.P. Singh (both former Judges of the Supreme Court) and Mr. William Jentes, nominated by the LCIA Court as the Presiding Arbitrator.

5. When the representation for Arbitration was filed on 23rd September, 2013, the petitioner and respondent No.3 filed their response on 21st October, 2014 and raised certain Preliminary Objections viz., alleged non-arbitrability of fraud, expiry period of three months period of Arbitration proceedings as prescribed in the agreement.

6. The LCIA Court by an order dated 12th January, 2015 decided that there was *prima facie* jurisdiction to constitute a Tribunal in this Arbitration and any unresolved issue pertaining to jurisdiction would be a matter for determination by the Tribunal.

7. The arbitration clauses are reproduced herein below:

"10.14.2 Arbitration

- (a) *Any and all disputes or differences arising out of or in connection with this Agreement or any breach thereof (the "Dispute") which cannot be settled by friendly negotiation and agreement between the Parties shall be referred to arbitration in terms of Clause 10. 14.2(b) to Clause 10. 14.2(e).*

- (b) *If after 30 days of consultation (or such shorter period if a Party wishes to apply for interim relief), the Parties have failed to reach an amicable settlement of a Dispute, the Dispute shall be submitted to arbitration at the request of either Party upon written notice to that effect to the other Party and such arbitration shall be conducted in accordance with the LCIA India Arbitration Rules in force at that time (the "LCIA India Rules"), which LCIA India Rules are deemed to be incorporated by reference into this Clause 10.14.2.*
- (c) *While submitting the Dispute to arbitration in accordance with this Clause 10.14.2, the Party so submitting shall, in its notice, specify the name of one arbitrator appointed by it. The arbitration proceedings shall be presided by a sole arbitrator if the Parties agree upon a sole arbitrator and failing such agreement by three arbitrators. Within 30 days of the receipt of notice, the other Party to the dispute shall appoint the second arbitrator, if it does not agree to the appointment of the sole arbitrator. The third arbitrator shall be nominated by the arbitrators appointed as aforesaid or, failing such nomination within 30 days of the appointment of one arbitrator by each Party to the dispute, shall be appointed in accordance with the LCIA India Rules.*
- (d) *Any such arbitration shall be conducted in English and the seat of arbitration shall be Delhi, India. The arbitration shall be concluded within three months of the appointment of the arbitrator(s) in terms of this Clause 10.14.2.*
- (e) *Any arbitral awards made in accordance with this provision shall be conclusive and binding on the Parties and none of the Parties shall be entitled to commence or maintain any action in a court of law*

in relation to the Dispute, except for the enforcement of an arbitral award granted pursuant to this Clause 10.14.2, or to the extent permitted under Law.

- (f) *The Parties agree that during the period of submission to arbitration and thereafter until the granting of the award, the Parties shall, except in the event of termination, continue to maintain the status quo. Neither the Parties nor the arbitral Tribunal may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of the remaining Parties....”*

8. The similar clause stipulated for dispute resolution in the SHA that the arbitration be concluded within three months of the appointment of Arbitrator(s) in clause 12.14.2 (v).

9. In view of the aforesaid clauses, the LCIA India Registry by its email dated 14th January, 2015 urged parties to *"agree on appropriate time lines for the conduct of the arbitration within the duration contemplated by the applicable arbitration clause"*. In response thereto, learned counsel for the respondents No.1 and 2 by their letter dated 15th January, 2015 informed the Registry that the case cannot be concluded within three months (considering *inter alia* the complexity of the matter and the stakes involved). They referred to and relied on Article 4.7 of the LCIA India Rules.

Article 4. 7 of the LCIA India Rules has been reproduced herein below:

"4.7 The Arbitral Tribunal may at any time extend (even where the period of time has expired) or abridge any period of time prescribed under the LCIA India Rules or under the Arbitration Agreement for the conduct of the arbitration or by the Arbitral Tribunal's own orders, including any notice or communication to be delivered by one party on any other party."

In reply thereto, learned counsel for the petitioner and respondent No.3 by their letters dated 27th January, 2015 agreed that the arbitration could not be completed within three months but they submitted for a limited scope and interpretation of Rule 4.7 of the LCIA India Rules. Counsel for respondents No.1 and 2, however, disputed the same by their rejoinder letter dated 28th January, 2015.

10. The Arbitral Tribunal, vide Procedural Order No.2 dated 20th February, 2015 dealt with this issue *inter alia* holding as follows:

"The Tribunal has carefully considered the Parties' positions regarding its power to grant extensions of any period of time prescribed in an arbitration agreement, such as those involved here. The Tribunal points out that Article 4. 7 is extremely broad in its grant of power to the Tribunal....."

"The Tribunal rejects Respondents' contention that the concluding clause of Article 4. 7 limits extensions to those involving notices and communications between parties. It is apparent that the last clause only makes clear that the power to extend includes notices and communications, not that the power is limited to them. As for Respondents' contention that the three month provision demonstrates that the arbitration clauses were not intended to apply to complex matters, such an intent is not expressed in the

agreements nor in any documents to which the Tribunal has been referred."

The other preliminary objection raised by the petitioner as to jurisdiction was duly considered and rejected by the Arbitral Tribunal by its unanimous Procedural Order No.5 dated 7th April, 2015 which also extended the date for conclusion of the arbitration to 2nd November, 2015.

11. The next objection raised on behalf of the petitioner that the Arbitral Tribunal has become *de jure* and *de facto* unable to perform its functions and mandate of the Arbitral Tribunal stands terminated on account of, *inter alia*, the respondent Nos.1 and 2 making serious allegations of fraud against the petitioner and further expiry of the mandatory time period in terms of the relevant clauses of the SPA, SHA and LA. The petitioner in support of its contention has relied upon the judgment of Three Judges Bench of the Supreme Court in the case of ***Lalitkumar V. Sanghavi (Dead) v. Dharamdas V. Sanghavi and Others.*** (2014) 7 SCC 255 (Para 10 to 14), it has been held that only the court has the Jurisdiction to decide legality of termination of mandate of Arbitral Tribunal.

12. It is also stated by the petitioner that the Arbitral Tribunal has wrongly interpreted Article 4.7 of the said Rules which has been incorporated in the arbitration clause by reference so as to override the express terms of the SPA, SHA and LA that has been agreed between the parties.

13. It is argued that the Arbitral Tribunal derives its powers from the arbitration agreement and hence cannot travel beyond the confines of the agreement and extend the period. And once the parties have agreed that as to how their disputes are resolved in the arbitration agreement where the time schedule is also prescribed, the Article 4.7 and 10 of the Rules cannot be attracted. The interpretation of Arbitral Tribunal of the agreement and Article 4.7 is against the settled law that what has been incorporated cannot override or supersede the express provisions made by the parties in the arbitration agreement. This principle finds force in the judgment of the Supreme Court in ***M/s. Atlas Export Industries v. M/s Kotak & Company*** (1999) 7 SCC 61 (para 6 to 8), wherein the Supreme Court referred to 'Russell on Arbitration', 19th Edition.

14. It was submitted that the finding in the said Procedural Order No.2 and 5 (passed without hearing the parties and in violation of the rights to natural justice) that the Arbitral Tribunal has no power to extend time unilaterally is contrary to the provisions of the Act as well as the law laid down by the Supreme Court and Bombay High Court. The following decisions are referred on behalf of the petitioner:-

- a) ***NBCC Limited v. J.G. Engineering Services Pvt. Ltd.*** (2010) 2 SCC 385 (para 22 to 28);
- b) ***Bharat Oman Refineries Ltd. v. Mantech Consultants*** (2012) Arb.LR 482 (Bom) (para 11 to 14 and 20 to 26); and
- c) ***Teltech Instrumentation Pvt. Ltd. v. Bharat Petroleum Corporation Ltd.*** 2012 (2) Arb.LR 471 (Bom) (para 14 to 17).

15. Counsel for the petitioner has quoted the articles of the authors of Redfern and Hunter with Blackaby and Partasides, Law and

Practice of International Commercial Arbitration, 4th Edition, 2004 in Article 19(1) of the UNCITRAL Model Law (Model Law) which provides:

"Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". A broad and general provision is also found in section 1(b) of the Arbitration Act 1996 (UK) which states that the provisions of Part 1 of the Act are founded on stated principles including:

(b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."

16. Also the main argument of the petitioner is the mandate of the Arbitral Tribunal stands terminated on 13th April, 2015 upon the expiry of three months reckoned from the date of appointment of the Tribunal on 12th January, 2015 as communicated by the LCIA Registry to the Arbitral Tribunal and the parties on 14th January, 2015 and in the absence of an agreement between the parties extending the time, it has become de jure and de facto unable to act and therefore has no legal authority to continue with the proceedings.

17. It is stated that Article 4.7 of the LCIA Rules is a general clause that follows Articles 4.1 to 4.6, which are specific in nature and creates a genus or category. This is based on the principle that words take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general. Clause 10.14.2 (b) of the SPA, the provisions of the LCIA Rules must be read

harmoniously with those specifically agreed to by the parties, in terms of the arbitration agreement.

Even otherwise, the claim referred to the Arbitral Tribunal involve allegations of serious fraud as against the petitioner and it is an established principle of law that allegations of serious fraud are not arbitrable and can only be decided by Civil Court. It is pertinent to mention that at the time of hearing, no arguments were addressed on this issue.

18. Mr.Neeraj Kishan Kaul, learned Senior counsel appearing on behalf of the respondents No.1 and 2 submitted that the impugned order is not appealable by way of an interim recourse to the Courts. Upon rejection of a jurisdictional objection, the Arbitral Tribunal would continue with the arbitral proceedings and make an Arbitral Award which can then be contested under Section 34 of the Act. He has given the example of the other provisions of the Act, i.e. Section 16(5) & (6) read with Section 37(1)(B). Mr.Kaul, learned Senior counsel submits that the petitioner and respondent No.3 have resorted to a host of Court proceedings including by filing of civil suit before this Court prior to the present petition and they have miserably failed to get any interim order from any Court. As a matter of fact, they are adopting all types of tactics to stall the arbitration proceedings. He has referred the pleadings and orders passed by the Arbitral Tribunal and many decisions passed by the Supreme Court and High Courts.

19. The following issues have arisen for consideration:-

- (i) Whether it can be said that there is any "controversy" that an arbitrator has become, "*de jure or de facto unable to perform his functions ...*" in terms of Section 14 (1) (a) of the Act.
- (ii) Assuming that there is such controversy, this being an institutional arbitration (governed by the LCIA India Rules), is this challenge maintainable before a Civil Court at all (or does the petitioner's recourse lie before the LCIA Court (Article 10.1 of the Rules).
- (iii) Can the petitioner bring an interlocutory challenge (during the pendency of the arbitration), questioning the interpretation of Article 4.7 by the Arbitral Tribunal and rejecting the jurisdictional objection?

20. Admittedly, on 20th April, 2015 prior to this petition, Mrs. Ritika Awasty (respondent No. 3) filed a suit being CS(OS) No.1088/2015 before this Court, seeking *inter alia* declaration that the arbitration proceedings are null and void and without jurisdiction and prayed for an *ex parte* ad-interim injunction seeking stay of the arbitration proceedings. However, no relief as of today has been granted.

21. Yet, the petitioner also filed a suit being CS (OS) No.1210/2015 on 27th April, 2015 before this Court seeking declaratory reliefs and interim stays of the arbitration proceedings. In both the suits, a challenge has been made *inter alia* on extension of time by the Arbitral Tribunal based on petitioner and respondent No.3's

interpretation of Article 4.7 of the LCIA India Rules. No relief has been granted. Now, the present petition under Section 14 of the Act has been filed.

22. It is settled law that an order by the Tribunal, which effectively negates a jurisdictional challenge, is not appealable nor can any interlocutory recourse be made to Court to assail the same.

23. In ***SBP & Co. v. Patel Engg. Ltd.***, (2005) 8 SCC 618 by Seven Judges Bench, it was held as under:-

“45. It is seen that some High Courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in-between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. It will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal is capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible.

46. The object of minimising judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

47. We, therefore, sum up our conclusions as follows:

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(vi) Once the matter reaches the Arbitral Tribunal or the sole arbitrator, the High Court would not interfere with the orders passed by the arbitrator or the Arbitral Tribunal during the course of the arbitration proceedings and the parties could approach the Court only in terms of Section 37 of the Act or in terms of Section 34 of the Act.

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(ix) In a case where an Arbitral Tribunal has been constituted by the parties without having recourse to Section 11(6) of the Act, the Arbitral Tribunal will have the jurisdiction to decide all matters as contemplated by Section 16 of the Act.” (Emphasis supplied)

24. The Division Bench has also negated such an approach and held that Section 14 cannot be widened contrary to the scheme and intent of the Act. In the case of ***Progressive Career Academy Pvt.***

Ltd. v. Fiit Jee Ltd., (2011) 2 Arb.L.R. 323 (DB), it was held as under:-

“16. On a reading of Section 13(5), the legislative intent becomes amply clear that Parliament did not want to clothe the Courts with the power to annul an Arbitral Tribunal on the ground of bias at an intermediate stage. The Act enjoins the immediate articulation of a challenge to the authority of an arbitrator on the ground of bias before the Tribunal itself, and thereafter ordains that the adjudication of this challenge must be raised as an objection under Section 34 of the Act. Courts have to give full expression and efficacy to the words of the Parliament especially where they are unambiguous and unequivocal. The golden rule of interpretation requires Courts to impart a literal interpretation and not to deviate therefrom unless such exercise would result in absurdity. In *Raghunath Rai Bareja v. Punjab National Bank*, (2007) 2 SCC 230, the Hon'ble Supreme Court, while emphasizing on the rule of literal interpretation, held as under:

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17. In the context of the A&C Act, especially keeping in mind the alternations, modifications or deviations with regard to the UNCITRAL Model Law, the following speech of the Earl of Halsbury in *Eastman Photographic Materials Co. v. Comptroller General of Patents*, (1898) AC 571 readily comes to mind - “*My lords, it appears to me that to construe the Statute in question, it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the later Act which provides the remedy*”.

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19. The Preamble to the A&C Act refers to the UNCITRAL Model Law on International Commercial

Arbitration adopted by the General Assembly of the United Nations in 1985. The Preamble further recites that the General Assembly has recommended that all countries give due consideration to the said UNCITRAL Model Law and Rules. The Preamble further recognizes the expediency of making laws with regard to arbitration, keeping in perspective the said UNCITRAL Model Law and Rules. The English Arbitration Act, 1996 is also predicated on the UNCITRAL Model Law and Rules. The Sections corresponding to the Indian statute are to be found in Sections 23 to 27 thereof. The Uniform Arbitration Act, 1989 passed by the Canadian Parliament, at its very commencement, mentions the UNCITRAL Model Laws and Rules. Section 12 prescribes the revocation of the appointment of an arbitrator. Section 13, containing provisions pertaining to the challenge of an arbitrators authority, broadly corresponds to the same Section in the Indian statute. Thereafter, Section 14 postulates situations in which the arbitrators mandate would terminate. The Canadian Act, however, in its Section 15, provides for an approach to the Court for the removal of the arbitrator. So far as Australia is concerned, its International Arbitration Act, 1974 prescribes in Section 16(1) that the UNCITRAL Model Law shall have the force of law in that country. Furthermore, Section 18A clarifies that it is necessary to locate a real danger of bias, and that justifiable doubts as to the impartiality or independence of the arbitrator may be insufficient for the Courts to interfere. We think it would be advantageous, for case of reference, to reproduce the provisions of the UNCITRAL Model Law for the reason that a departure therefrom cannot but be read as our Parliament's resolve to ordain its own and distinct arbitral regime:—

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20. A comparison of the provisions dealing with the challenge to the arbitrator's authority in the A&C Act and

the UNCITRAL Model Law discloses that there are unnecessary and cosmetic differences in these provisions, except for one significant and far-reaching difference. The UNCITRAL Model Law, in Article 13(3), explicitly enables the party challenging the decision of the Arbitral Tribunal to approach the Court on the subject of bias or impartiality of the Arbitral Tribunal. However, after making provisions for a challenge to the verdict of Arbitral Tribunal on the aspect of bias, the UNCITRAL Model Law prohibits any further Appeal. It seems to us, therefore, that there is no room for debate that the Indian Parliament did not want curial interference at an interlocutory stage of the arbitral proceedings on perceived grounds of alleged bias. In fact, Section 13(5) of the A&C Act indicates that if a challenge has been made within fifteen days of the concerned party becoming aware of the constitution of the Arbitral Tribunal or within fifteen days from such party becoming aware of any circumstances pointing towards impartiality or independence of the Arbitral Tribunal, a challenge on this score is possible in the form of Objections to the Final Award under Section 34 of the A&C Act. Indeed, this is a significant and sufficient indicator of Parliament's resolve not to brook any interference by the Court till after the publication of the Award. Indian Law is palpably different also to the English, Australia and Canadian Arbitration Law. This difference makes the words of Lord Halsbury in *Eastman Photographic Materials Co.* all the more pithy and poignant.

21. In this analysis, we must immediately observe that the approach taken by one of us (Vikramajit Sen, J.) in *Interstate Constructions* is not correct as it transgresses and infracts the provisions of the A&C Act. Learned Single Benches have interfered and removed arbitrators obviously on pragmatic considerations, viz. the futility and idleness of pursuing arbitral proceedings despite lack of faith therein because of justifiable doubts as to the

independence or impartiality of the arbitrators. Clearly, Parliament has also proceeded on the compelling expediency and advisability of expeditious conclusion of these proceedings. Relief against possible mischief has been provided by making clarification in Section 13(5) that apart from the challenges enumerated in Section 13(4), an assault on the independence or impartiality of the Arbitral Tribunal is permissible by way of filing Objections on this aspect after the publishing of the Award. We, therefore, affirm the approach in *Pinaki Das Gupta, Neeru Walia, Ahluwalia Contracts (India) Ltd. and Newton Engineering and Chemicals Ltd.* We are of the opinion that the Single Benches who interfered with the progress of the proceedings of the Arbitral Tribunal in the pre-Award stage fell in error. Humans often fall prey to suspicions which may be proved to be ill-founded on the publication of an Award. There is compelling wisdom in Parliament's decision to allow adjudication on grounds of bias, lack of independence or impartiality of the Tribunal only on the culmination of the arbitral proceedings.”

(Emphasis supplied)

25. The decision of ***Alcove Industries vs. Oriental Structural Engineering's Ltd.***, reported in 2008 (1) ArbLR 393 referred by the learned counsel appearing on behalf of petitioner was disapproved by the Division Bench in the case of ***Progressive Career*** (supra) as discussed above.

26. With regard to objection taken by the petitioner that in view of allegations made by the respondent Nos.1 and 2 about the fraud committed by the petitioner and respondent No.3, no arguments on this aspect has been addressed by either side, however in the petition merely averments are made. Thus, in the absence of arguments, this objection is impliedly not pressed, thus is not being

decided. Even otherwise, the said objection at this stage is not permissible.

27. Coming to the main objection raised by the petitioner that the Arbitral Tribunal is *functus officio*; it was to complete its proceedings within three months and the time has expired, reliance is placed on Clause 10.14.2 (d) of the Share Purchase Agreement dated 9th March, 2013 which provides that the arbitration shall be concluded within three months of the appointment of arbitrators and once the time has expired, the arbitration cannot proceed further. Reliance is placed on ***Atlas Exports Industries v. Kotak & Company*** (1999) 7 SCC 61.

28. It is necessary to refer to the relevant extracts of LCIA India Arbitration Rules:

“2.4 If the LCIA Court is prima facie satisfied that an arbitration agreement under the LCIA India Rules may exist, any decision as to the jurisdiction of the Arbitral Tribunal, or final decision as to the interpretation and application of the LCIA India Rules, shall be taken by the Arbitral Tribunal itself.

4.7 The Arbitral Tribunal may at any time extend [even where the period of time has expired] or abridge any period of time prescribed under the LCIA India Rules or under the Arbitration Agreement for the conduct of the arbitration or by the Arbitral Tribunal's own orders, including any notice or communication to be delivered by one party on any other party.

10.1 If either [a] any arbitrator gives written notice of his desire to resign as arbitrator to the LCIA Court, to be copied to the parties and the other arbitrators [if any] or [b] any arbitrator falls seriously ill, refuses, or becomes

unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators, the LCIA Court may revoke that arbitrator's appointment and appoint another arbitrator. The LCIA Court shall decide upon the amount of fees and expenses to be paid for the former arbitrator's services [if any] as it may consider appropriate in all the circumstances.

23.1 The Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement.....

23.4 By agreeing to arbitration under the LCIA India Rules, the parties shall be treated as having agreed not to apply to any court or other judicial authority for any relief regarding the Arbitral Tribunal's jurisdiction or authority, except with the agreement in writing of all parties to the arbitration or the prior authorisation of the Arbitral Tribunal or following the latter's award ruling on the objection to its jurisdiction or authority.

32.5 The parties entering into an arbitration agreement under the LCIA India Rules are taken to confirm that the LCIA India Rules are an integral part of their arbitration agreement and constitute their agreement on the matters contained herein.”

29. It is apparent from the above said clauses that as per Rule 4.7 which mandates that the Arbitral Tribunal may at any time extend even if period of time has expired. Section 2(8) of the Act reads as under:-

“2.8 Where this Part...

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(b) in any other way refers to an agreement of the parties, that agreement shall include any arbitration rules referred to in that agreement.”

30. On the face of plain reading of Rule 4.7 and Section 2(8) of the Act, it appears that the clause 10.14.2 and 12.14.2 in the SPA, are to be read with Rule 4(7) of LCIA which became part and parcel of the agreements. The situation in the referred case ***Transair and Others v. Kuwait Airways***, 205 (2013) DLT 64 is different, rather, I am of the view that the said judgment does not help the case of the petitioner as it was held that once both parties were relying upon IATA Rules for their advantage, parties were estopped from pleading contrary. In the present case, the petitioner with his open eyes has accepted the Rule-4(7) of LICA, the arbitration is being conducted as LCIA rules, now the petitioner cannot take a different stand, as in the present case the Rules 2.4, 4.7, 10.1. 23.1, 23.4 and 32.5 speak for themselves that the Arbitral Tribunal may extend the time in the said case, instead of filing the petition before IATA for extension of time as per rules. Thus, the petition was disposed of and the party was asked to approach before IATA.

31. None of the other judgments referred by the learned Senior counsel for the petitioner are applicable to the facts of the present case. In ***NBCC Ltd.*** (supra) the facts were that there was a time provided for conclusion of the arbitration and a provision in the agreement that the arbitrator could render an award beyond such period, provided the parties mutually agreed to such an extension. The parties consented twice for an extension of time, but the arbitrator was unable to conclude the proceedings and at the third instance, one party did not give its consent for any further extension,

and instead filed an application under Section 14 read with Section 15 of the Act. The High Court held that the mandate stood terminated, and appointed a substitute arbitrator. This was upheld by the Supreme Court, holding that since the clause provides that parties may by mutual consent extend the time for rendering an award, the moment one party does not give such consent, the arbitrators mandate terminates and he becomes *functus officio*. The Court held as under:

“7. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time limit under the Act unlike Section 28 of the 1940 Act which had such a provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an Award. It is true that apparently there is no provision under the Act for the Court to fix a time limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them.”

32. Distinguishing features in the said case are that firstly, the clause expressly provided for mutual consent as the mode for extension of time. This is not the case here. Secondly, this was an ad hoc arbitration and there was no provision akin to Article 4.7. In the present case, Article 4.7 of the LCIA India Rules grants the Tribunal

the necessary powers with wide discretion (and the same has been duly exercised). No appeal or other petition, assailing such an exercise of power by the tribunal, is permitted at the present stage under Indian law and lastly the Court expressly held, that when there is a procedure agreed to be adopted by the parties for enlargement of time, the Court cannot interfere. Therefore, the said decision does not help the case of the petitioner.

33. Similarly, in the case of ***Surender Pal Singh v. Hindustan Petroleum Corporation Ltd.***, (OMP No.552/2013, decided on 6th July, 2009 by this Court), the facts were that the petitioner preferred an application under Sections 14 and 15 of the Arbitration Act, 1996, contending *inter-alia* that it was a term of the arbitration clause that "*the award shall be made in writing within six months after entering upon the reference or within such extended time not exceeding further four months as the sole arbitrator shall by a writing under his own hands appoint*". The said period having expired, the petitioner contended that the mandate of the Tribunal stood terminated. The Court held as under:

"12. In view of the judgment of this Court in Shyam Telecom Ltd. and with which I am not inclined to disagree, the aforesaid contention of the counsel for the respondent cannot be upheld. There is nothing in the 1996 Act which prevents/bars the parties from agreeing to the time limit for making the award. Several of the provisions of part I of the Act are subject to the agreement to the contrary between the parties. The Bombay High Court, Judgment whereof I respectfully concur, has also held that it is open to the parties to provide for termination of mandate of arbitrator i.e. the mandate of the arbitrator can be subject

to agreement between the parties. The consent order in that case providing for time for making the award was held to be an agreement that the authority of arbitrator shall come to an end thereafter. Similarly, though the agreement in the present case does not provide that the mandate of arbitrator shall terminate after expiry of ten months but an agreement of time for making the award would in the absence of consent implied or explicit, terminate the mandate of arbitrator on expiry of such time. Same is not repugnant to the Act. I am also of the view that irrespective of the above, failure of the arbitrator to make the award within the agreed time would also fall within the ambit of the other ground under Section 14(1)(a) of termination of mandate i.e. of failure to act without undue delay, which is found to be made out in present case. Thus it has to be necessarily held that the mandate of Mr. S.P. Chaudhry has terminated."

34. In the said case, it was a case of an ad hoc arbitration. The arbitration agreement between the parties provides for arbitration under the LCIA India Arbitration Rules (which includes Article 4.7). The Tribunal has duly exercised its powers and the said Article and such decision is not assailable under Section 14 or 15 of the Act. Thus, the facts are materially different.

35. In ***Shyam Telecom Ltd. v. Arm Ltd.***, 2004 (3) ArbLR 146 (Delhi), the arbitration clause read as under:-

"In the event of any dispute, difference of claim arising out of or in connection with or in relation to this agreement then as such disputes shall be referable to the sole Arbitration of a mutually agreed Arbitrator. The Arbitrator shall conduct the Arbitration in accordance with the provisions of the Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The Arbitrator shall make and pronounce a reasoned Award. The Arbitrator

shall render his Award within a period of 6 months from the date of entering upon reference. The Arbitrator shall be entitled to Award interest during the pendency of the Arbitration and pendente lite any proceedings arising there from. The Arbitrator shall file his Award in the Courts at Delhi. The agreement shall be specifically enforceable, by an injunction, or a claim in damages, or both."

It was also held that:

"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 unclothed 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. "

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"17.The method of Arbitration to resolve the disputes/differences between the parties certainly aims at expeditious resolution of the disputes because it is considered that the time taken by the Courts established by the State for resolution of the disputes is unduly long and cumbersome. It must, therefore, be held that the provision of time limit for rendering Award by the

Arbitrator in an Arbitration agreement is not hit by the provisions of the Act and is to be given effect unless the parties agreed to modify or extend the same by mutual consent. The learned sole Arbitrator while disposing of the application of the petitioner by the impugned order has not adverted to this argument and rightly so because had the provision in regard to time limit for rendering the Award in the agreement been redundant or overridden by the provision of the Act, there was no need for the Arbitrator to record a finding about waiver of right to object by the petitioner."

The said case also was concerned with the ad hoc arbitration. No arbitral institute or rules were involved and for the reasons set out hereinabove is clearly distinguishable. Thus, the same is not helpful to the case of the petitioner.

36. In ***Bharat Oman Refineries Ltd.*** (supra), the learned single Judge set aside the award on the ground that the arbitrator had no authority to proceed after the stipulated time provided in the agreement had expired. The Court also came to the conclusion that in view of section 15 (1) (b) of the Act, the mandate of the arbitrator would automatically stand terminated in terms of the arbitration agreement when the time limit for making the award expired. The Division Bench upheld the order stating as under:

"15.We are of the opinion that the time limit provided in the arbitration agreement in a given case cannot be said to have been extended by the act of one side or by conduct of one side and the arbitrator may not get jurisdiction to proceed further with the matter in case the arbitration agreement provides particular time limit and the same is not extendable as per the arbitration clause in the agreement. In our view, the jurisdiction of the

arbitrator therefore depends upon the arbitration clause in the agreement itself. In any case, each matter is required to be decided as per the clauses in the arbitration agreement in connection with providing particular time limit and in a given case the arbitrator becomes functus officio if the arbitration agreement stipulates that in no circumstances time can be extended beyond particular time. In view of the judgment of the Supreme Court in the case of NBCC (supra), the mandate of an arbitrator shall terminate if he fails to act without undue delay.”

It was also an ad hoc arbitration. However, in the present case, the parties have agreed to the LCIA India Arbitration Rules and the procedure therein (including Article 4.7 thereof) which mandated that the Arbitral Tribunal may extend the time. Therefore, the same is not applicable to the facts of the case.

37. In ***Altas Export Industries*** (supra) the facts were that the appellant entered into a contract with one M/s Oceandale Company Limited, Hong Kong, for the supply of 200 MT of Indian groundnut extractions of the specifications as to quantity, quality and packages detailed in the contract. The goods were to be supplied through the respondent. The letter of credit was opened by Oceandale in favour of respondent who then transferred it in favour of the appellant. The contract incorporated an arbitration clause in the following manner:

"This contract is made under the terms and conditions effective at date of Grain and Food Trade Association Ltd., London, Contract 15 which is hereby made a part of this contract ... both buyers and sellers hereby acknowledge familiarity with the text of the GAFTA contract and agree to be bound by its terms and conditions. "

“GAFTA” stands for Grain and Food Trade Association Ltd., London. Clause 27 of Standard Contract 15 of GAFTA provides for arbitration. An arbitration was initiated as per the arbitration clause (which stood incorporated by reference) and an award rendered. The respondent moved an application under the Foreign Awards (Recognition and Enforcement) Act, 1961 before the High Court of Bombay seeking enforcement of the award. The only objection raised by the appellant was that there was no agreement in writing between the parties requiring the disputes arising out of the contract being referred to arbitration in accordance with the arbitration rules of GAFTA. This contention came to be rejected by the High Court as well as the Supreme Court, holding that an incorporated term is part of the contract, unless it is inconsistent with any express provision of the contract. It was held as under:

"6The parties knew that excepting the terms specifically set out therein in the contract dated 3-6-1980, the rest of the terms and conditions were to be the same as were incorporated in Standard Contract No. 15 of GAFTA as effective on the date of the contract. Clause 27, entitled Arbitration, and finding its place in Standard Contract No. 15 is also not in dispute. The law on the subject is stated in Russell on Arbitration (19th Edn., at p. 50) as under:

'The agreement may arise by the incorporation of one document containing an arbitration clause in another under which the dispute arises. 'Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety ... but subject to this: that if any of the imported terms in

any way conflicts with the expressly agreed terms, the latter must prevail over what would otherwise be imported."

The said case does not help the petitioner, as there is no conflict between an "express term" and an "incorporated term" in the present case.

The petitioner in the present case has relied on Clause 10.14.2 (d), which provides that the Arbitration shall be completed in 3 months. Before that clause is Clause 10.14.2, which provides that the Arbitration shall be conducted in accordance with the LCIA India Arbitration Rules: *"...which LCIA India Rules are deemed to be incorporated by reference"* thereafter is Clause 10.14.2 (e) by which parties commit themselves to arbitration and specifically affirm that none of the parties shall have the right to commence or maintain any action in a Court, regarding the subject matter covered by the Agreement. As per the LCIA India Rules, Article 32.5 thereof clarifies that the parties by entering into an arbitration agreement under the said Rules are taken to confirm that the LCIA India Rules, "are an integral part of their arbitration agreement and constitute their agreement on the matters contained herein."

38. In the present matter, it is not a case where there is incorporation by reference. There is also no inconsistency between Article 4.7 of the LCIA India Rules and Clause 10.14.2(d) if Section 2(8) of the Act is read together with any other provision of the agreement between the parties. On a plain reading of the said

provisions themselves, the petitioner would get the answer that his plea has no force.

39. In case the Clause would have contained categorical language to the effect that the "said period of 3 months cannot be extended save by mutual consent". Such situation in the present case is not available as there is no conflict or inconsistency between the arbitration agreement and the power of the Tribunal under the Rules to extend time. Both can co-exist and be harmoniously construed. Article 4.7 of the LCIA India Rules is meant precisely for such cases, where a clause provides for a time period and is silent on the mode/method/possibility of extension of the same. Article 4.7 anticipates such situation and allows a Tribunal, to extend such a time period. Therefore, the ***Atlas's*** case (supra) does not help the case of the petitioner in view of Specific Article 4.7 of the LCIA India Rules.

40. Thus, there is no merit in the petition, the same is dismissed.

41. No costs.

42. *Dasti to the parties under the signatures of the Court Master.*

(MANMOHAN SINGH)
JUDGE

FEBRUARY 16, 2016