

IN THE HIGH COURT AT CALCUTTA  
Ordinary Original Civil Jurisdiction

Present: Hon'ble Justice Shampa Sarkar

**AP/422/2021**  
INDIA MEDIA SERVICES PVT. LTD.  
vs.  
SBPL INFRASTRUCTURE LIMITED

For the Petitioner : Mr. Ranjan Deb, Sr. Adv.  
Mr. K.R. Thakkar, Adv.  
Mr. Pradip Sancheti, Adv.  
Mr. Siddhartha Chatterjee, Adv.  
Mr. Deepan Sarkar, Adv.

For the Respondent : Ratnanko Banerji, Sr. Adv.  
Mr. Jishnu Chowdhury, Adv.  
Mr. Ratul Das, Adv.  
Mr. Gaurav Khaitan, Adv.

Judgment on: 01.09.2023

**Shampa Sarkar, J.:-**

1. The petitioner is the award debtor. This is an application under Section 14 of the Arbitration and Conciliation Act, 1996. The petitioner, *inter alia*, seeks a declaration that the mandate of the arbitrator terminated with effect from August 31, 2020 and the award dated October 27, 2020 was void ab initio. The prayers in the said application are quoted below:-

“a) A declaration that the mandate of the Learned Arbitrator former Justice Bhaskar Bhattacharya (Retired), appointed by an Order dated 28<sup>th</sup> January 2020 as the Sole Arbitrator in arbitration proceedings between the parties, had terminated on 31<sup>st</sup> August 2020.

b) A declaration that the purported award dated 27<sup>th</sup> October 2020 passed by the Learned Arbitrator after the termination of his mandate is illegal, void ab initio and non est.

c) Stay of operation of the purposed award dated October 27, 2020, pending disposal of the present application.

d) Stay of all further proceedings initiated pursuant to making and publishing of the purported award dated 27<sup>th</sup> October, 2020.

e) Ad-interim order in terms of the prayers made above; and

f) Such further order or orders and/or direction or directions be given as your Lordships may deem fit and proper.”

**2.** The arbitration proceeding was held as per the provision of the unamended Arbitration and Conciliation Act, 1996.

**3.** The parties had executed a nomination agreement on December 5, 2005 whereby and whereunder the petitioner nominated the respondent in its place and stead, to obtain conveyance of a property being the Indian Express Building situated at Hyderabad, directly from its owner, Express Publication (Madurai) Limited. The petitioner’s case is that the respondent failed to obtain the conveyance from Express Publication (Madurai) Limited within the time stipulated in the agreement. Disputes arose between the parties. The disputes were referred to arbitration in terms of the arbitration clause contained in the nomination agreement dated December 5, 2005.

**4.** The arbitration clause is quoted hereunder:-

“All disputes and differences by and between the parties relating to, arising out of or concerning the subject matter of this agreement shall be referred to the sole arbitration of Mr. Justice Umesh Chandra Banerjee, Retired Judge of Supreme Court of India in accordance with the arbitration and conciliation Act, 1996 and the decision of the arbitrator shall be final and binding on the parties. The venue of arbitration shall be Kolkata. The arbitration proceedings shall be concluded within 60 days from the date of entering into reference. In default the arbitrator shall stand discharged without remuneration and the party shall apply for appointment of new arbitrator on the same terms to the Hon’ble High Court at Calcutta.”

**5.** The arbitration clause provided a time frame of 60 days for conclusion of the proceeding. The arbitration proceeding was not concluded within the stipulated time and the learned named arbitrator published a Nil Award, on termination of mandate. The respondent filed an application before the High

Court under Sections 11 and 15 of the said Act of 1996, for appointment of a new arbitrator.

**6.** By order dated July 20, 2016, Justice Jayanta Kumar Biswas (Retired) was appointed as the sole arbitrator by the High Court. The arbitration proceeding resumed. After considerable progress, the learned arbitrator recused himself from the proceeding on April 4, 2019, in the 115<sup>th</sup> sitting.

**7.** AP 435 of 2019 was filed by the respondent before the High Court, for appointment of an arbitrator. By an order dated January 28, 2020, the High Court appointed Justice Bhaskar Bhattacharya (Retired), former Chief Justice of Gujarat High Court as the sole arbitrator.

**8.** The order of the High Court is quoted below:-

“In this application under Section 11(6) of the Arbitration & Conciliation Act, 1996 the petitioner prays for appointment of a new Arbitrator in place and stead of the sole Arbitrator appointed by this Court on July 20, 2016 who has recused himself from the arbitration proceeding.

Considering the above facts, I find that when the Arbitrator appointed by this Court has recused himself from the arbitration proceeding a new Arbitrator should be appointed to adjudicate the disputes between the parties as directed by the order dated July 20, 2016.

Accordingly, Bhaskar Bhattacharya, the former Chief Justice of Gujarat High Court is appointed as the sole Arbitrator to adjudicate the disputes between the parties. The new Arbitrator shall proceed with the arbitration proceeding on the basis of the pleadings already filed by the respective parties and the evidence of the respective parties already on record.

Needless to mention that the parties shall conclude their respective oral arguments and file their notes, if any, before the learned Arbitrator within June 10, 2020. Learned Arbitrator is requested not to entertain any prayer for adjournment of the sittings at the instance of either of the parties.

The parties shall render all co-operation to the learned Arbitrator to make and publish his award within the month of August, 2020.

The consolidated remuneration of the learned Arbitrator is fixed at Rs.30 lakhs (Rupees Thirty Lakhs only). The learned Arbitrator will be free to engage the necessary secretarial staff for conducting the arbitral proceeding. The fees of the learned Arbitrator and the

remuneration of the secretarial staff shall be borne by the parties in equal share.

Mr. Debanjan Mondal, learned advocate with whom the records of the arbitral proceeding are presently lying, is requested to make over the same to the new Arbitrator upon notice to the parties.

With the above directions, AP No.435 of 2019 stands disposed of.”

**9.** It was directed that the learned arbitrator shall proceed with the arbitration proceedings on the basis of the pleadings already filed by the respective parties and on the evidence of the parties which were already on record. It was further directed that the parties **‘shall’** conclude their respective oral arguments and file their notes, if any, before the learned arbitrator within June 10, 2020. The learned arbitrator was requested not to entertain any prayer for adjournment of the sittings at the instance of either party. The order of the High Court contained the following directions:-

(a) Justice Bhaskar Bhattacharya (Retired) as the Sole Arbitrator, shall adjudicate the dispute between the parties.

(b) The new arbitrator shall proceed with the arbitration proceedings on the basis of the pleadings and evidence already on record.

(c) The learned Advocate, Mr Debanjan Mondal, should make over the records to the learned arbitrator.

(d) The parties were to conclude their oral arguments and file their written notes within June 10, 2020.

(e) The parties were to render all cooperation to the learned arbitrator, to make and publish the award within the month of August, 2020.

**10.** Preliminary sitting of the arbitration was held on March 3, 2020 in presence of the parties. The schedule and the steps to be taken as also the

procedure to be followed, were recorded in the minutes of the said meeting.

The same is set out below:-

“6. By the said order of the Hon’ble High Court, Calcutta dated 28<sup>th</sup> January, 2020, I have been substituted and appointed as the Sole Arbitrator to hear the respective cases of the parties with a direction to pass award by August, 2020. Accordingly, as discussed today, I direct the parties to adhere to and comply with the following directions for proceeding with and completion of this proceeding:-

- “a) All original records, including the records filed earlier by the parties pertaining to this proceeding before the erstwhile Arbitrator are to be filed by the parties at the next sitting before this Tribunal.
- b) All original Minutes from the 1<sup>st</sup> sitting to the 115<sup>th</sup> sitting recorded by the previous Arbitrators have been filed by the parties at the present sitting before this Tribunal.
- c) Both the parties would file their respective Vakalatnamas at the next sitting before this Tribunal.
- d) In the event, parties need to file anything in writing, they would use the A-4 size paper and file the same duly paginated.
- e) Parties would supply soft copy in Word Form their respective Statement of Claim, Statement of Defence, Counterclaim, Objection to the Counterclaim, Affidavits of Evidence of the witnesses and if possible, soft copy of the cross-examination of the witnesses deposed in this proceeding.
- f) Minutes of each sitting will be sent to the Advocate-on-Record of the respective parties through email and hard copy of the same will be served on the Advocate-on-Record on or before the next date of each sitting.
- g) The parties must take a note that the communication as and when necessary by this Tribunal to the parties may be made by e-mail to them on the e-mail addresses provided by them to this Tribunal as furnished below and such communications through email shall be treated as effective communications to the parties and their Learned Advocates.”

**11. The learned tribunal fixed a schedule for the proceedings:-**

(a) 25<sup>th</sup>, 26<sup>th</sup>, 27, March, 2020 for argument on behalf of the Claimant in support of the Claim. (b) 28<sup>th</sup> and 29<sup>th</sup> March, 2020 for Reply by the Respondent to the argument of the Claimant and also for submissions on the Counterclaim lodged by the Respondent. (c) 30<sup>th</sup> and 31<sup>st</sup> March, 2020 for reply by the Claimant against the submission of the defence case and also against the Counterclaim. (d) 25<sup>th</sup> and 26<sup>th</sup> April, 2020 for reply by the respondent to the submission of the claimant against the counterclaim, each day from 11 a.m. to 4 p.m. in two sessions for hearing. The last two dates viz. 25<sup>th</sup> and 26<sup>th</sup> April,

2020 could be advanced to an earlier date subject to the convenience of both the parties.

**12.** Thereafter, the Covid-19 pandemic hit the country which resulted in the lock down. The nationwide complete lock down was announced on March 24, 2020. The arbitral proceedings could not continue on the basis of the time schedule fixed by the tribunal and the hearing commenced virtually on and from July 9, 2020. The 1<sup>st</sup> and 2<sup>nd</sup> sitting of the arbitration was held on July 9, 2020, 3<sup>rd</sup> and 4<sup>th</sup> sitting was held on July 10, 2020, 5<sup>th</sup> and 6<sup>th</sup> sitting was held on July 11, 2020, 7<sup>th</sup> and 8<sup>th</sup> sitting was held on July 13, 2020, 9<sup>th</sup> and 10<sup>th</sup> sitting was held on July 14, 2020, 11<sup>th</sup> and 12<sup>th</sup> sitting was held on July 15, 2020, 13<sup>th</sup> and 14<sup>th</sup> sitting was held on July 16, 2020, 15<sup>th</sup> and 16<sup>th</sup> sitting was held on July 20, 2020, 17<sup>th</sup> and 18<sup>th</sup> sitting was held on July 22, 2020, 19<sup>th</sup> and 20<sup>th</sup> sitting was held on July, 27, 2020, 21<sup>st</sup> sitting was held on July 28, 2020, 22<sup>nd</sup> and 23<sup>rd</sup> sitting was held on July 30, 2020, 24<sup>th</sup>, 25<sup>th</sup> sitting was held on July 31, 2020, 26<sup>th</sup> and 27<sup>th</sup> sitting was held on August 1, 2020, 28<sup>th</sup> and 29<sup>th</sup> sitting was held on August 2, 2020, 30<sup>th</sup> and 31<sup>st</sup> sitting was held on August 3, 2020, 32<sup>nd</sup> and 33<sup>rd</sup> sitting was held on August 4, 2020, 34<sup>th</sup> and 35<sup>th</sup> sitting was held on August 6, 2020, 36<sup>th</sup> and 37<sup>th</sup> sitting was held on August 7, 2020 and 38<sup>th</sup> sitting was held on August 9, 2020. The parties filed their written submissions around August 20, 2020 and the award was published on October 27, 2020.

**13.** The petitioner challenged the award by filing an application for setting aside under Section 34 of the Act, on January 27, 2021. The proceedings for execution of the award being EC No.25 of 2022 also commenced. No prayer for stay of the execution case was made by the petitioner.

**14.** On September 27, 2021, after 11 months from the delivery of the award, the present application was filed. According to the petitioner, the order of the High Court in AP 435 of 2020 was a mandate upon the learned Arbitrator to “**make and publish**” the award within August 31, 2020. It was contended that the parties had mutually agreed to enlarge the time for publication of the award till the end of August 2020. That was why, the High Court had directed the arbitrator to make and publish the award by August 2020 by the order dated January 28, 2020. As the mandate of the arbitrator terminated on August 31, 2020, a declaration had been sought from the court with regard to the termination of mandate and further declaration that the award dated October 27, 2020 was illegal, void ab initio and non-est.

**15.** Mr. Ranjan Deb, learned Senior Advocate for the petitioner submitted that although the learned arbitrator was well aware of the fact that the mandate would expire on August 31, 2020, the award was not published within the time fixed by the High Court. Reference was made to the e-mails dated June 20 and July 5, 2020. According to Mr. Deb, the moment the time limit fixed by the Hon’ble High Court had expired, the arbitrator had become *functus officio* and all orders thereafter as also the award were null and void. Section 14(1)(a) and (b) of the said Act of 1996, laid down the situations when the mandate of an arbitration terminated. Section 14(2) provided that in case of controversy concerning any of the grounds referred to clause (a) of sub-section (1), the parties could apply before the Court, for a decision thereon. Therefore, the petitioner being the claimant in the arbitral proceeding, was entitled to apply under Section 14 by raising such controversy with regard to the termination of the mandate of the learned

arbitrator and unenforceability of the award, the award being a nullity. Moreover, the law did not provide any time limit within which such application could be filed. The application could be entertained even if the same was filed after the aggrieved party applied for setting aside of the award. Section 32 provided circumstances which would lead to termination of the arbitration proceedings, other than expiry of mandate due to efflux of time. Section 34 prescribed the grounds on which an application for setting aside an arbitral award could be filed. Section 14 was an exclusive and specific provision in the Act to deal with the termination of mandate of an arbitrator, if the arbitrator was de jure or de facto unable to perform. Such provision was neither subject to Section 32 nor Section 34 of the said Act. Section 14 was an independent provision. According to Mr. Deb, even if the application under Section 14 was filed belatedly, the same was maintainable in law. The contention of the respondents in their affidavit-in-opposition that the petitioner's claim was barred by law was incorrect. An application under Section 14, for termination of the mandate after the award had been published could be entertained by the Court, even if an application for setting aside the award was pending. The issue had already been answered by a coordinate Bench of the High Court in the case of ***AVA Merchandising Solutions Private Limited vs. Torero Corporation Private Limited*** decided in AP No.136 of 2019, AP No.59 of 2019 and GA No.339 of 2019, the relevant portion of the said order is quoted below:-

“Termination of mandate of arbitral proceeding is provided for in section 14. A further situation has been interpreted by Supreme Court, to automatically terminate the mandate, as on expiry of the period prescribed in section 29A. Facts in this case regarding

application of time period provided under section 29A are undisputed. The award, relied upon as such by respondent, was passed after prescribed time had expired. On making of award petitioner has come forward seeking a declaration that the mandate stood terminated before its publication. The petition is maintainable under sub-section(2) of section 14 since respondent has raised a controversy by contending that award has been made and there can be recourse to Court only under section 34.

What is clear distinction on facts in this case, from facts in any other case cited is that in this case there was no order made by the Tribunal under section 31 or 32 of the 1996 Act, within time prescribed. There thus is no difficulty in finding that on the expiry of prescribed time, mandate of the Tribunal had terminated. What the arbitrator went on to do after termination of mandate is of no consequence, if he did not have it."

**16.** Therefore, according to Mr. Deb, the High Court had specifically laid down the principle of law that an application under Section 14 of the said Act would be maintainable even when an award had been made and published. On the expiry of time prescribed, the mandate of the arbitator would terminate. What the arbitrator went on to do after termination of mandate, was of no consequence.

**17.** Having answered the preliminary objection with regard to maintainability, raised by the respondent in their affidavit-in-opposition, Mr. Deb went on to argue on the merits of the case. Drawing support from the doctrine of Kompetenz Kompetenz, Mr. Deb urged that arbitration was an alternative dispute resolution mechanism based on party autonomy. The jurisdiction of the arbitrator was governed by the agreement between the parties. Parties, *inter alia*, were at liberty to choose the applicable law, the place of arbitration, the rules of proceedings the time period for making the award and also name the arbitrator who would adjudicate any dispute

between such parties. The learned arbitrator was bound by the terms and conditions of the agreement between the parties and could not act *ultra vires* the terms and conditions of his appointment. The time period fixed by the High Court at the instance of the parties, was binding on the arbitrator. Upon expiry of such period, the arbitrator ceased to have jurisdiction over the dispute and was rendered unable to perform his function. Even courts were powerless to extend the time except where power was reserved under the law. Time of 60 days for conclusion of the proceeding was provided in Clause 12 of Nomination Agreement dated December 5, 2005. Such time was enlarged till August 31, 2020, at the behest of the parties and this court by order dated January 28, 2020 fixed the time upto August 2020.

**18.** The learned arbitrator was *de jure* unable to perform. Thus necessary declaration should be made that the mandate of the sole learned arbitrator had terminated on August 31, 2020 and the award was rendered, illegal, void ab initio and non-est. The proper course for the learned arbitrator would be to wait for further extension by the Hon'ble High Court. Mr. Deb cited the following decisions:-

- (i) ***Ava Merchandising Solutions Pvt. Ltd. vs Torero Corporation Pvt. Ltd.***
- (ii) ***NBCC Limited vs J.G. Engineering Private Ltd.*** reported in ***(2010) 2 SCC 385***
- (iii) ***Jayesh H. Pandya and Anr. Vs Subhtex India Limited and Ors.*** reported in ***(2020) 17 SCC 383***
- (iv) ***Efcalon The UP Pvt. Ltd. vs Startack Agency Pvt. Ltd.***

**(v) *Sagufa Ahmed and Ors. vs Upper Assam Polywood Products Pvt. Ltd and Ors.* reported in (2021) 2 SCC 317**

**(vi) *Shree Shree Iswar Satyanarayanjee & ors. vs Amstar Investment Pvt. Ltd.* reported in 2013 SCC OnLine Cal15304**

**19.** Mr. Ratnanko Banerji, learned Senior Advocate appeared on behalf of the respondent. He referred to the minutes of the arbitration proceeding and submitted that in view of the unforeseen Covid-19 pandemic, followed by the lock down which was announced with effect from March 25, 2020, the arbitration proceedings could not be conducted as per the schedule contained in the minutes of the arbitral proceeding dated March 3, 2020. After the virtual platform was put in place, the hearing commenced virtually on and from July 9, 2020 and continued upto August 9, 2020. The parties submitted their written notes on August 20, 2020 and filed their respective statements on cost on August 23/24, 2020. The award was published on October 27, 2020. The instant application was filed in order to prevent the execution proceedings from continuing. The arbitration proceedings were governed by the law applicable prior to the 2015 amendment. It was further submitted that under Section 28 of the Arbitration Act, 1940, there was a time limit for completion of arbitration and one had to apply for extension of time. Under the Arbitration and Conciliation Act, 1996, no such time limit had been prescribed. By an amending act of 2015 which came into effect on October 23, 2015, Section 29A was inserted. The present arbitration commenced on October 13, 2011. The amending act would not be applicable unless the parties agreed. In this case, both parties agreed that the arbitral proceedings would be governed by the unamended Act of 1996. After the

termination of the mandate of Justice Umesh Chandra Banerjee (Retired) former Supreme Court Judge, Justice Jayanta Kumar Biswas (Retired) was appointed as the arbitrator. The proceedings continued for almost three years and the learned Arbitrator recused himself thereafter.

**20.** When the parties continued before the learned erstwhile arbitrator for almost three years from the first sitting upto the 115<sup>th</sup> sitting, the time limit of 60 days contained in the arbitration clause or any adherence to any time limit within which the arbitral proceedings were to be concluded, had been waived by the claimant/petitioner. The order dated January 28, 2020 did not direct that the mandate of the arbitrator would terminate on August 31, 2020. The correct interpretation of the order would be that the Court had expressed a desire that the award should be made and published within August 2020, subject to the cooperation by the parties and the parties completing their arguments and filing their written notes by June 10, 2020. The time schedule mentioned in the order was not adhered to by the petitioner, either. Thus, not having complied with the time lines for completing the oral arguments and filing written notes, and having participated in the arbitration proceedings, without raising any objection, which were concluded on August 9, 2020, the claimant had waived the right to challenge the award on the ground of termination of mandate on account of expiry of time. There was a conscious deviation from the time limit fixed by the High Court by the claimant. The time fixed by the learned arbitrator in the preliminary meeting, could not be adhered to due to the pandemic. For a mandate of an arbitrator to terminate, there should have been an express condition either in the statute or in the order of the High Court. In

this case, such mandate was absent. Moreover, the Hon'ble Apex Court had extended all periods of limitation including period of limitation under Section 29A of the Arbitration Act. The time limits fixed by conditional orders of courts were also extended. A Full Bench of the High Court also passed similar orders, on August 7, 2020 and January 17, 2022.

**21.** Mr. Banerji further submitted that after the award was published, the question of filing an application under Section 14, seeking declaration for termination of the mandate would not arise. Referring to the minutes of the 38<sup>th</sup> sitting of the proceeding dated August 9, 2020, Mr Banerji submitted that the minutes recorded the consent of the claimant for continuation of the arbitration proceeding. The relevant paragraphs 3, 5, 7, 9 and 10 of the said minutes have been pointed out to the Court. Even on August 9, 2020 the learned Advocate for the claimant had assured the learned arbitrator that the relevant paragraphs of the decisions relied upon by the claimant would be supplied to the learned Tribunal within the following Tuesday. Parties were also directed to file their written notes of submissions and send them to the learned Tribunal by e-mail. Paragraph 5 of the minutes would indicate that the learned arbitrator had asked the parties to forward the cross-examination of CW-1 and CW-2 in Word format instead of PDF format in order to facilitate preparation of the award. The learned Advocate for the claimant submitted before the learned arbitrator that after preparation and comparison with the originals by the learned Advocates for both the parties, the cross-examination of CW-1 would be forwarded to the learned arbitrator in the shortest possible time, by e-mail.

**22.** It was also recorded that the learned Advocate for the claimant had assured the learned arbitrator that the balance amount due, on account of remuneration of the Clerk and the Stenographer, would be paid.

**23.** Mr. Banerji heavily relied on the minutes in support of his specific contention that the parties, by their conduct and on the assurance given by their Advocates before the arbitrator, expressed their willingness to participate in the proceedings. Steps were taken even on August 23/24, 2020, in respect of the arbitration proceedings and in furtherance of such proceeding the parties indicated their intention that they were agreeable to cooperate so that the arbitral award could be made and published. The claimant did not raise any objection with regard to the expiry of the time period fixed by the High Court, at any point of time.

**24.** According to Mr. Banerji, the time limit fixed by the High Court was a desire or expression or a request by the High Court. Reference was made to the decision of ***Efcalon The Up Private Limited vs. Startack Agency Private Limited passed in GA No. 2524 of 2017 arising out of AP No. 595 of 2016***. He distinguished the decision in ***NBCC (supra)***.

**25.** Mr. Banerji, also referred to Sections 4 and 32 of the Arbitration and Conciliation Act, 1996 to assert that the claimant had waived his right to challenge the award on the ground of termination of mandate on account of expiry of time limit fixed by the High Court. Reliance was placed on the decision in ***Shree Shree Iswar Satyanarayanjee & Ors. Vs Amstar Investment Pvt. Ltd.*** reported in ***2013 SCC OnLine Cal 15304***, in support of the contention that the time limit imposed by agreement of parties could be waived by the parties by participating in the arbitration proceeding and

the arbitrator could continue to function. In the present case, such waiver of the time limit of 60 days contained in Clause 12 took place when the parties continued to participate in the arbitral proceedings for three years, before Justice Jayanta Kumar Biswas (Retired). The award was published under Section 32 of the Act. The mandate of the learned arbitrator also came to an end with the making of the award. Therefore, once award was passed, there was no question of filing a petition under Section 14 of the said Act.

**26.** The question which falls for consideration in the present application is whether the mandate of the learned arbitrator terminated on August 31, 2020. If the question is answered in the affirmative, what consequences would follow.

**27.** First and foremost, the time limit of 60 days as per the arbitration clause for completion of proceedings stood waived by the parties. The parties participated in the proceedings before Justice Jayanta Kumar Biswas (Retired) from July 22, 2016 till April 4, 2019. Therefore, the 60 days time limit in the agreement was no longer relevant after the first mandate terminated and the learned arbitrator Justice UC Banerjee, former Judge of the Hon'ble Apex Court, had recused. Secondly, the minutes of the meeting which have been strongly relied upon by the respondent, indicates that the first meeting was held on March 3, 2020 when the learned arbitrator fixed a schedule as hereunder:-

- (a) 25<sup>th</sup>, 26<sup>th</sup>, 27, March, 2020 for argument on behalf of the Claimant in support of the Claim. (b) 28<sup>th</sup> and 29<sup>th</sup> March, 2020 for Reply by the Respondent to the argument of the Claimant and also for submissions on the Counterclaim lodged by the Respondent. (c) 30<sup>th</sup> and 31<sup>st</sup> March, 2020 for reply by the Claimant against the submission of the defence case and also against the Counterclaim. (d) 25<sup>th</sup> and 26<sup>th</sup> April, 2020 for reply by the respondent to the

submission of the claimant against the counterclaim, each day from 11 a.m. to 4 p.m. in two sessions for hearing. The last two dates viz. 25<sup>th</sup> and 26<sup>th</sup> April, 2020 could be advanced on an earlier date subject to the convenience of both the parties.

**28.** Learned arbitrator fixed the entire schedule at short intervals so that the time limit mentioned in the order dated January 28, 2020 could be complied with. However, due to the pandemic, the schedule could not be adhered to. India underwent a nationwide lock down on and from March 25, 2020. Gradually, when people adapted themselves to the available technology, preparation was made for holding courts and other proceedings, virtually. The learned arbitrator fixed the arbitration proceedings day to day and also at times two sessions per day, on and from July 9, 2020. All the dates were fixed with consent of the parties. In view of the Covid-19 pandemic, there was a gap between the preliminary meeting and resumption of proceedings. The arbitral proceedings could not continue on the basis of the time schedule fixed by the arbitrator and the hearing commenced virtually on and from July 9, 2020.

**29.** Learned Advocate for the claimants and the respondents attended from their chambers/residences upto August 9, 2020. The proceedings continued and the learned Advocate for the claimant relied on new decisions and also undertook to reframe the notes by filing comprehensive notes of arguments. Such notes were sent to the learned arbitrator via e-mail around August 20, 2020. It was recorded that both the parties agreed that the written notes of arguments filed on various dates would create confusion and hence a comprehensive note containing all points would be filed within a week from August 9, 2020. The submissions of the learned Advocate for

the claimant were recorded in the minutes. Thus, the minutes would show that the parties were conscious of the dates and had agreed to participate in the proceeding. The obligation of completing the oral submissions by June 10, 2020 had long expired. The order of the High Court dated January 28, 2020 enjoined a duty upon the parties to complete their oral arguments and furnish their written notes within June 10, 2020. The fulfilment of the first part of the order was a pre-condition to the second part, i.e., the award be made and published by August, 2020. The inability of the parties to comply with the time limit fixed by the High Court is reflected from the schedule fixed by the learned arbitrator, after the pandemic hit the country. The principle of party autonomy had been followed in this case. Despite the High Court having mentioned a time frame for arguments/submissions and written notes, the parties continued to participate in the proceeding and take steps even upto August, 23/24, 2020. The claimant could have approached the learned arbitrator for orders under Section 32(2)(c) of the said Act. The relevant provision is quoted below:-

**“32. Termination of proceedings.—**(1) The arbitral proceedings shall be terminated by the final arbitral award or by an order of the arbitral tribunal under sub-section (2).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where—

- (a) the claimant withdraws his claim, unless the respondent objects to the order and the arbitral tribunal recognises a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings; or
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) Subject to section 33 and sub-section (4) of section 34, the mandate of the arbitral tribunal shall terminate with the termination of the arbitral proceedings.”

**30.** The claimant waived his right to object to the proceeding and pray for declaration of termination of mandate. The claimant did not derogate but continued to participate in the proceeding upon awarding consent to the dates fixed. Section 4 of the said Act, is quoted below:-

**“4. Waiver of right to object.**—A party who knows that—  
 (a) any provision of this Part from which the parties may derogate, or  
 (b) any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.”

**31.** Moreover, even if the order dated January 28, 2020 is taken as a direction upon the arbitrator to conclude the award published within August 31, 2023, the benefit of the orders passed by the Hon’ble Apex Court extending period of limitation in respect of all suits and proceedings before Courts and Tribunals including the time limits under Section 29A of the said Act of 1992 would also be applicable.

**32.** By order dated March 8, 2021, in Suo Moto writ petition (Civil) No. 3 of 2020, the Hon’ble Apex Court directed that the period of limitation in filing objections, applications and other proceedings irrespective of period of limitation prescribed under the general or special laws, stood extended with effect from March 15, 2020, till further orders. The relevant paragraph is quoted below:-

**“2.** In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.201, is greater than 90 days, that longer period shall apply.”

By order dated July 10, 2020, in Suo Moto writ petition (Civil) No. 3 of 2020, the Hon'ble Apex Court directed that the period of limitation in Section 29A of the Arbitration and Conciliation Act, 1996 shall also be extended. The relevant paragraphs are quoted below:-

"Parties have prayed to this Court for extending the time where limitation is to expire during the period when there is a lockdown in view of COVID-19 or the time to perform a particular act is to expire during the lockdown.

I.A. No. 49221/2020 -Section 29A of the Arbitration and Conciliation Act, 1996 Taken on Board.

In Suo Moto Writ Petition (C) No. 3/2020, by our order dated 23.03.2020 and 06.05.2020, we ordered that all periods of limitation prescribed under the Arbitration and Conciliation Act, 1996 shall be extended w.e.f. 15.03.2020 till further orders.

Learned Attorney General has sought a minor modification in the aforesaid orders. Section 29A of the Arbitration and Conciliation Act, 1996 does not prescribe a period of limitation but fixes a time to do certain acts, i.e. making an arbitral award within a prescribed time. We, accordingly, direct that the aforesaid orders shall also apply for extension of time limit for passing arbitral award under Section 29A of the said Act. Similarly, Section 23(4) of the Arbitration and Conciliation Act, 1996 provides for a time period of 6 months for the completion of the statement of claim and defence. We, accordingly, direct that the aforesaid orders shall also apply for extension of the time limit prescribed under Section 23(4) of the said Act.

The application is disposed of accordingly."

**33.** By order dated September 23, 2021, the Hon'ble Court disposed of MA 665 of 2021 and directed as follows:-

**"III.** The period from 15.03.2020 till 02.10.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of the Negotiable Instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

**34.** The outer limits for institution and conclusions of proceedings before any Court or Tribunal had been extended. When the time period prescribed by the amended Act of 1996 under Section 29A had been extended, it would be an absurd proposition that the order of the High Court dated January 28, 2020 directing publication of award by the end of August, 2020 would be treated as a mandate and the proceedings would not be protected by the extension of time granted by the Hon'ble Apex Court, which was also adopted by this High Court. The Full Bench of the High Court by order dated August 7, 2020 had directed all time limits prescribed in all conditional orders would also stand extended. The relevant portion of the order is quoted below:-

“All other conditional orders of Court will continue to remain in operation until further orders, notwithstanding the non-fulfilment of the conditions imposed. This will apply to non-fulfilment of the conditions for the period beginning 15<sup>th</sup> March, 2020 till 30<sup>th</sup> November, 2020 or earlier order of Court.”

**35.** The time limit in the order of the High Court dated January 28, 2020 stood extended, by virtue of the orders of the Apex Court and the High Court. There was no default clause to the effect that on the failure of the learned arbitrator to publish an award within August 31, 2020, the mandate would stand terminated. It has to be borne in mind that the proceeding was under the unamended 1996 Act, which did not prescribe any time for making or publishing of an award.

**36.** The mandate terminated with the publication of the award. The award has been challenged by filing an application under Section 34 of the Act. All points are open for the parties to agitate. At this stage, this application does not deserve to be allowed. The decision in ***Ava (supra)*** would not be

applicable. As the said decision was in respect of termination of a mandate by operation of the statute, that is, by the application of Section 29A of the amended Act of 1996.

**37.** The relevant portion of the decision is **AVA Merchandising Solution Pvt. Ltd. (supra)** is quoted below:-

“Termination of mandate of mandate of arbitral proceeding is provided for in section 14. A further situation has been interpreted by Supreme Court, to automatically terminate the mandate, as on expiry of the period prescribed in section 29A. Facts in this case regarding application of time period provided under section 29A are undisputed. The award, relied upon as such by respondent, was passed after prescribed time had expired. On making of award petitioner has come forward seeking a declaration that the mandate stood terminated before its publication. The petition is maintainable under sub-section (2) of section 14 since respondent has raised a controversy by contending that award has been made and there can be recourse to Court only under Section 34.

What is clear distinction on facts in this case, from facts in any other case cited is that in this case there was no order made by the Tribunal under section 31 and 32 of the 1996 Act, within time prescribed. There thus is no difficulty in finding that on the expiry of prescribed time, mandate of the Tribunal had terminated. What the arbitrator went on to do after termination of mandate is of no consequences, if he did not have it.”

**38.** Thus, the entire decision was on the effect of Section 29A of the amended Act and consequential termination of the mandate of the arbitral proceeding.

**39.** In the decision of **NBCC Ltd. (supra)**, although the time limit to conclude the arbitration proceedings in terms of the order of the High Court had expired, both the parties extended the time for conclusion of arbitration proceedings upto September 30, 2005. The award was not passed within September 30, 2005. The time limit agreed between the parties, was not adhered to by the learned arbitrator. After three months from expiry of such

agreed period of time, the arbitrator passed the award. The respondent before the Supreme Court, moved an application before the High Court for a declaration that the mandate of the arbitrator stood terminated. The High Court terminated the mandate of the arbitrator on the ground of delay in making the award. The said order of the High Court was challenged before the Hon'ble Apex Court. Under such fact scenario, the Apex Court held that the arbitrator had extended the time provided to him without any concrete reason whatsoever and thus, the mandate was liable to be terminated. The agreement between the parties did not indicate that the mandate of the arbitrator had been extended beyond September 30, 2005. Thus, it was construed that the parties had not agreed for extension of the time and the mandate stood automatically terminated.

**40.** In the present case, there was no such agreement apart from one contained in Clause 12 of the Nomination Agreement. Parties agreed that the award should be published within 60 days from reference. Such time had long expired. Thereafter, the parties continued to participate in the proceedings before Justice Jayanta Kumar Biswas (Retired) for a period of almost three years. The proceeding continued before Justice Bhaskar Bhattacharya (Retired) upto end of August 2020. It would be a preposterous argument in the facts of the given case that within 11 days from filing of the composite written notes, the learned arbitrator would prepare and publish the award by August 31, 2020. Moreover, the claimant did not comply with the direction of the High Court to complete oral arguments and file notes within June 10, 2020. All dates from July to August, 2020 were fixed by the learned arbitrator on the consent of the parties. At no point of time did the

claimant raise any objection. Thus, Section 14 of the said Act for termination of the mandate before the learned arbitrator, would not apply. The ratio of **NBCC Ltd. (supra)** would also not apply.

**41.** The decision of **Jayesh H. Pandya (supra)** does not come to the aid of the petitioner. In the said case, the appellants before the Hon'ble Apex Court had filed a written objection before the learned arbitrator, inter alia, stating that as the period of four months for making and publishing the award had expired on September 4, 2007, the arbitral tribunal had become *functus officio* and did not have the jurisdiction to proceed with the arbitral proceedings. The said objection was rejected by the learned arbitrator. Such rejection was challenged before the Bombay High Court by invoking Section 14 of the 1996 Act, seeking a declaration that the arbitrator had become *de jure* unable to perform his functions and the mandate should be terminated. The application was dismissed by the Bombay High Court, *inter alia*, holding that the objectors had waived their right, by their conduct. In this case, the Hon'ble Apex Court held that as the arbitrator was required to conclude and pass the award within four months which stood expired on September 4, 2007, and in the meantime, the appellant before the Supreme Court had recorded an objection to the extension of time, it could be construed that there was no agreement for continuation of the mandate of the arbitrator. The application for termination of mandate was found to be rightly filed and it was held that the arbitrator could not go beyond the clause of the agreement.

**42.** In the said case, the arbitration agreement provided that the arbitrator was under obligation to make the award within four months from

the date of service of copy of the agreement with a further condition that the arbitrator would have the power to extend the period for making and publishing the award with the consent of both the parties. One of the parties refused to consent to such extension. The learned arbitrator fixed a date later than four months. At this stage, one of the parties filed an application, *inter alia*, stating that the mandate had terminated and the learned arbitral tribunal had become *functus officio*. The said application was rejected by the learned arbitrator and thereafter by the Bombay High Court. The Apex Court held that the mandate had expired as the time period agreed upon had expired and one of the parties objected to extension of time.

**43.** In ***Shree Shree Iswar Satyanarayanjee (supra)***, it was held that even if participation in the arbitration proceedings amounted to waiver, such issue would have to be raised before the learned arbitrator and not before the High Court. The High Court left the issue of waiver to be decided by the Arbitrator. The decision in ***Sagufa Ahmed and ors. vs. Upper Assam Polywood Products Pvt. Ltd and ors.*** reported in **(2021) 2 SCC 317**, does not apply. In the case in hand, all dates were fixed by the learned arbitrator on and from July 9, 2020 to August 9, 2020 with the consent of the parties. Thus, the parties indicated their intention to continue with the arbitration proceedings and wanted the learned arbitrator to prepare and publish the award. The claimant had a choice to either oppose or object to such time schedule being fixed by the learned arbitrator, but they chose not to. Rather, by their conduct, the claimant exhibited willingness and a desire to allow the arbitrator to publish the award.

**44.** In this regard, the following paragraphs of the minutes of the meeting dated August 9, 2020 are quoted below to demonstrate conduct of the claimant:-

“1. Pursuant to the liberty given to Mr. K.R. Thakker, Learned Counsel for the Claimant, at the 37th sitting held on 7th August, 2020, today Mr. Thakker has made his submissions on the decisions which were relied on by Mr. S. Ravi, Learned Senior Counsel for the Respondents, in reply. Mr. Thakker has also made his submissions relating to the execution proceeding, being Execution Case No.1 of 2006, which had been referred by Mr. Ravi in his reply.

2. Regarding the chart which Mr. Ravi had referred to and relied on in course of his argument with regard to the shareholding of the CW-1, Mr. Thakker fairly concedes that there is no document on record in this proceeding to show that CW-1 had 99% shareholding in the holding company. Mr. Ravi submits that in view of the admission of Mr. Thakker that the 99% shareholding of the CW-1 is not borne out from any record in this proceeding, he is withdrawing the chart prepared by client and at the same time, since the said chart produced by the Respondent was based on the un-exhibited portion of the entire document, being RD-3, the same should not form part of the record of the Tribunal.

3. Pursuant to the liberty given to Mr. Thakker earlier for filing a short note, in the event, on final analysis he found that some points needed to be clarified and brought to the notice of this Tribunal, the Claimant through emails on 5th and 6th August, 2020 has forwarded total six notes. Mr. Ravi draws the attention of this Tribunal to the fact that several new decisions have been incorporated in such note without, however, indicating the paragraph nos. of those decisions on which the Claimant intends to rely. Mr. Thakker assures that the relevant paragraph nos. of those decisions shall be supplied by his client to this Tribunal as well as to the Respondents by Tuesday next. Both the parties are also directed to prepare notes of their respective submissions on Clause Nos.10 and 11 of the agreement and send the same to this Tribunal by email. In view of reframing of the notes by the Claimant, the Respondents are given liberty to deal with all those new decisions cited by the Claimant and furnish a note in reply thereto by Friday next by email.

4. This Tribunal directs that the notes now to be prepared and submitted by the parties would include only the decisions actually cited and relied on by the respective parties and the arguments made by them in this proceeding and no other decisions or new points should be included in such notes. It may also be recorded that till date various notes have been forwarded by the parties

through emails. Both the parties agree that this Tribunal should not take note of those piecemeal submissions forwarded through emails; instead, the parties would file a comprehensive note containing all those points within a week from today.

5. To facilitate preparation of the award, this Tribunal asked the parties to forward the cross-examinations of the CW-1 and CW-2 in Word format instead of PDF format. Mr. Thakker submits that after preparation and comparison with the originals by the Learned Advocates of both the parties, those would be forwarded to this Tribunal at the shortest possible time by email.

6. It is submitted on behalf of the Respondents that after the Preliminary sitting before the present Arbitrator, there was no scope of the Respondents to file or handover the Vokatnama to the present Tribunal which is still lying with them. The Respondents are directed to send the said Vokatnama through Speed Post at the residential address of the Arbitrator.

7. The Respondents are directed to supply the recorded video of today's sitting immediately.

8. In the event this Tribunal requires any further clarifications in any matter pertaining to the subject matter of this reference, the same would be communicated to the parties through email and the parties will send the required information to this Tribunal also through email with a copy to the other side.

9 Parties are directed to furnish the entire statement of accounts of costs incurred by them since inception of the arbitration proceedings before the erstwhile Arbitrators and the present Arbitrator, indicating the payments made by them towards the fees of the Arbitrators, remuneration of the Clerk and the Stenographer or any other staff, Venue charges as well as other incidental expenses, if any, and forward such statement of account by Speed Post within a fortnight from today at the residential address of the Arbitrator. It is pertinent to mention, that all such expenses must be supported by documentary evidence showing actual payment. Today, Mr. Thakker on behalf of the Claimant assures that the balance amount due and payable on account of the remuneration of the Clerk and the Stenographer shall be paid by his client within a week from today. Mr. S. Ravi on behalf of the Respondents assures that his clients shall make the entire payments of the Secretarial Staff by Monday next.

10. Parties are also directed to send through Speed Post along with their respective statement of accounts of costs, the Stamp Paper worth Rs.150/- each at the residential address of the Arbitrator within fortnight from today.

11. Hearing concluded. Award reserved.

12. Before concluding, this Tribunal records appreciation of the co-operation rendered by the parties and their Lawyers during the entire proceeding.”

**45.** Rather, in this case, the principle laid down in the decision in ***Efcalon The-Up Private Limited (supra)*** with regard to the spirit of a direction of the High Court upon an Arbitrator (Retired Judge of the High Court) to publish an award within a particular time frame, is pressed into service. The relevant paragraph is quoted below:-

“This court is deeply embarrassed.

By its order dated 15<sup>th</sup> September, 2016 it had appointed the Hon’ble Mr. Justice Tapen Sen, a retired Judge of this court as the arbitrator. At the outset, I make it absolutely plain that there was no time limit set by this order to make and publish his award. This court had only made a request to the learned arbitrator ‘to conclude the reference within a period of ten months of the statement of claim being lodged before him.’ This part of the order was absolutely directory.

It was very gracious on the part of the learned arbitrator to consider the request made by the court as a command and direct the parties to seek extension of time.

In spite of this belief of the learned arbitrator this court would not treat the said direction as mandatory. Under the Arbitration and Conciliation Act, 1996, prior to its amendment on 23<sup>rd</sup> October, 2015 there was no time limit to make and publish the award. There is no dispute that the arbitral proceeding commenced before coming into force of the Amendment Act. It was sought to be contended that the provision in the amendment Act with regard to the time limit upon the learned arbitrator to make and publish the award was procedural and was not covered by the protection of section 6 of the General Clauses Act, 1897. In other words, the said new provision could have retrospective operation. I am unable to agree. Take the case of an arbitral reference which had commenced 363 days before coming into force of the new Act. So, let us assume that 23<sup>rd</sup> October, 2015 was the 363<sup>rd</sup> day of the reference. If the old Act had continued the arbitrator would not have to think about any time limit to conclude the reference. When the amendment Act came into force on 23<sup>rd</sup> October, 2015, the arbitrator would have just two days to make and publish the award or become absolutely functus officio. This kind of an absurdity was never intended by the legislature. At any rate, the right to obtain an award from a particular arbitrator, without being bound by time is usually a part of an agreement between the parties. It cannot be said that this kind of a right is procedural. Therefore, in my opinion, the Arbitration and Conciliation Act, 1996 prior to its amendment applied to this arbitration. There was no requirement for

the learned arbitrator to obtain an extension of time from this court to make and publish the award.”

- 46.** Under such circumstances, the application is dismissed.
- 47.** There shall be no order as costs.
- 48.** Parties to act on the server copy of this judgment.

**(Shampa Sarkar, J.)**