



O.P.No.880 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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Date: 30.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

O.P. No.880 of 2015 &
Appln.No.4189 of 2022

Ion Exchange (India) Limited,
Environment Division,
R-14, T.T.C. MIDC, Rabale,
Navi Mumbai-400 701.

Versus

1. Chennai Petroleum Corporation Limited,
536 Anna Salai, Teynampet,
Chennai-600 018.

2. Mr.Rajendra Singh Solanki
Sole Arbitrator,
B-10/7269 Sector-B,
Vasant Kunj,
New Delhi-110 070.

... Respondent

PRAYER : Original Petition is filed under Sections 14 & 15 of the Arbitration and Conciliation Act, 1996, praying to declare that the mandate of the 2nd respondent as the Sole Arbitrator is terminated in



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respect of the arbitration proceedings between the petitioner and the first respondent arising out of the tender enquiry document No.6104 SPC DOC 700 022 – LSTK – 2 Sea Water Reverse Osmosis Desalination Plant in February 2005 which is a subject matter of arbitration in arbitration proceedings and for costs of the proceedings.

For Petitioner : Mr.Sathish Parasaran, Sr.Counsel for
M/s.Karthik Sundaram

For Respondents : Mr.Raghavendra Ross Divakar for R1

ORDER

This Original Petition has been filed under Sections 14 & 15 of the Arbitration and Conciliation Act, 1996, praying to declare that the mandate of the 2nd respondent as the Sole Arbitrator is terminated in respect of the arbitration proceedings between the petitioner and the first respondent arising out of the tender enquiry document No.6104 SPC DOC 700 022 – LSTK – 2 Sea Water Reverse Osmosis Desalination Plant in February 2005 which is a subject matter of arbitration in arbitration proceedings and for costs of the proceedings.

2.The facts in brief, necessary for disposal of this Original



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Petition, are herein below narrated:

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2.1. The first respondent had issued a Tender Enquiry for regularising Lumpsum Turnkey Contract (LSTK-2) Sea Water RO Desalination Plant for 5.8 MGD sea water desalination project for the first respondent at North Chennai. The scope of work was engineering, supply, erection, construction, Commissioning and performance testing of seawater RO desalination plant for the 5.8 MGD sea water desalination project. The petitioner herein had participated in the tender and the first respondent having satisfied with the qualifications of the petitioner, had accepted the bid vide their Fax dated 31.08.2005, which was followed by a letter of acceptance dated 23.09.2005. The parties thereafter signed an agreement dated 06.12.2005.

2.2. It appears that after the completion of the project, disputes arose between the petitioner and the first respondent relating to payments. Therefore, the petitioner had invoked the arbitration clause, namely, Clause 12 of the General Conditions of Contract of the Tender



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Document on 05.06.2012. Accordingly, the subject matters were referred to arbitration.

2.3. As per the terms and conditions contained in the Contract as agreed by both parties, appointment of the Arbitrator was to be done by the Standing Conference of Public Enterprises (SCOPE). The SCOPE had appointed the second respondent as the sole Arbitrator. When the arbitration was at the stage of conclusion of cross examination of C.W.1, the claimant came forward with this present Petition for terminating the mandate of the sole Arbitrator.

3. On behalf of the petitioner, Mr. Sathish Parasaran, learned Senior counsel entered appearance and made the following submissions, viz.,

(a) that the second respondent was not acting in a neutral manner as he was seated next to the counsel for the first respondent and suggesting questions for cross-examination, modification to questions



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asked and also modification to the witness's answers in this regard.

Further, frequently he prompted counsel while cross examining the witness and also the witness to give all answers and if there are contradictions between the witnesses evidence *vis-a-vis* the pleadings, it would be fatal to the case of the petitioner. The second respondent has also expressed lack of faith in the report of the consultant of the first respondent, and that second respondent had virtually given out that he wanted to get to the bottom of the case and discover the truth.

(b) that since the second respondent had lost his neutrality and his mandate has to be terminated since he became *de jure* or *de facto* unable to perform his functions.

4. Subsequent to the filing of the present Original Petition, since the period of arbitrator was over in his Office, the mandate of the Arbitrator automatically gets terminated. Therefore, an amendment petition was filed with the pleadings to the effect that the mandate of the arbitrator stood terminated as on 04.12.2015 since the petitioner had not



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given any consent for extension of time to continue arbitration proceedings beyond 03.12.2015.

5. Further, the learned Senior counsel has referred to Clause 12.2(vi) of Section 48(3) of the General Conditions of Contract, which reads as under:

“The Arbitrator shall render the award within 6 months of the commencement of the Arbitral proceedings which period may be enlarged by consent of both parties.”

6. Therefore, he would contend that unless and otherwise the parties have given consent, the period of arbitration cannot be enlarged beyond the period of six months. He pointed out that in the present case, the petitioner invoked the arbitration clause on 05.06.2012 and the first sitting was held on 12.08.2013 and thereafter, it was extended from time to time till 03.12.2015 by consent of both parties, however, after 03.12.2015, since no consent was given by the petitioner, the mandate of the learned Arbitrator stood terminated as on 04.12.2015 and thereby,



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the 2nd respondent/Arbitrator became *de jure* or *de facto* incapable to perform his functions.

7. Alternatively, the learned Senior counsel for the petitioner would also advance his arguments, by referring to Arbitration Rules contained in SCOPE Forum of Conciliation and Arbitration (SFCA), wherein, Rule 32 envisages that the Sole Arbitrator/Arbitral Tribunal proceedings shall make the award as expeditiously as possible preferably within six months, but not later than one year from the date of receipts of complete set of pleadings from the Secretary and contended that in the present case, the pleadings were completed as early as on 12.01.2015 which fact was recorded in the Minutes of the Meeting held on the said date and hence, the learned counsel would contend that at any cost, the arbitration proceedings should have been completed in one year i.e. on or before 11.01.2016 and thereafter, it would have been terminated *de jure* automatically and the Arbitrator could not function his duties.



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8. On the other hand, the learned counsel appearing for the 1st respondent would submit that the ground on which the petitioner seeks to terminate the mandate of the Arbitrator is very flimsy inasmuch as the arbitral proceedings were initiated when the old provision was in force and in terms of the amended provisions of the Act, there is no time limit and the Arbitrator can extend the time limit from time to time. In the present case, even as per the agreed terms by both parties, the period was fixed initially for six months for completion of the arbitration proceedings. However, the same can be extended from time to time by way of mutual consent of the parties. Admittedly, in the present case, even after expiry of six months period, the proceedings have been continuing, which means, no consent was provided by any of the parties, but at the same time, both the parties have been effectively participating in the proceedings, which made it clear that the parties have waived off their consent. Therefore, the question of termination of the mandate of the Arbitrator by efflux of time does not arise.



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9. Further, the learned counsel has strongly contended that the petitioner has waived off his right to grant extension of time by virtue of participation in the proceedings before the Arbitrator beyond the period of six months. Therefore, he would submit that all other grounds raised with regard to the inquisitorial proceedings, he would submit that the learned Arbitrator has not at all conducted the proceedings in such manner and also he has not conducted the proceedings in a biased manner as alleged by the petitioner, but conducted in a neutral manner.

10. The learned counsel has relied upon a decision of the Delhi High Court in the case of “*Army Welfare Housing Organisation versus M/s.Mathur & Kapare Associates Pvt.Ltd.*” reported in 2016 SCC OnLine Del 6162, wherein, it has been held in para 21 as under:

“21. At this stage, it is important to note that it is not AWHO's contention that the arbitrator's mandate had



ceased on 03.02.2014, that is, with the expiry of four months from the date on which the arbitrator entered reference. On the contrary, it was contended that since AWHO participated in the proceedings till 10.10.2015, the arbitrator's mandate should be deemed to have continued till then; but, as AWHO declined for any further enlargement of time, the arbitrator's mandate would cease on that date. In my view, this contention is unmeritorious and does AWHO no credit to raise it. The object of specifying the time period in the arbitration clause is to ensure expeditious resolution of the disputes. The fact that both the parties continued to participate in the proceedings without either raising any objection clearly indicates that both the parties had waived the stipulation as to the time period in the arbitration clause. The import of AWHO's contention is that parties could continue to participate in the proceedings as long as they wished to do so but either party could terminate the arbitral proceedings at will at any time after four months of the arbitrator entering reference. This clearly cannot be accepted. Having agreed for resolution of the disputes by arbitration, it is not open for any party to unilaterally



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withdraw from the proceedings contrary to their agreement. It was certainly open for AWHO to decline to participate in the arbitral proceedings with the expiry of four months of the arbitrator entering upon the reference but, having participated in the proceedings and thereby having waived the stipulation as to time for making the award, it is not open for AWHO to unilaterally terminate the arbitration proceedings or to unilaterally restrict the time for making the award.”

11. With the above contentions, the learned counsel for the 1st respondent sought for dismissal of the petition.

12. In reply to the above, the learned Senior counsel for the petitioner would submit that the 2nd respondent who is the Arbitrator has not at all filed any counter statement and also no one appeared on behalf of him when the matter is called, which shows that the 2nd respondent has admitted all the facts narrated in the petition. The learned arbitrator had effectively contested the sub-application filed in the main O.P.,



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however, he has not come forward to contest the main O.P., which means that he has admitted all the averments as contained therein. It is very clear that the 2nd respondent had conducted the proceedings in inquisitorial manner by merely going through the Minutes of the Meeting which was held on 30.09.2015 wherein, after cross examination, as he was not satisfied, he called the parties to furnish the documents. The learned counsel would submit that the system that would follow in India is adversarial system of conducting legal proceedings and not by inquisitorial system of conducting legal proceedings. Therefore, he would submit that when the adversarial system is being followed, both the parties are required to file pleadings and make their submissions and based on the submissions and with the available documents, the Arbitrator has to pass the award and he is not supposed to go beyond the pleadings and the documents filed and enquire into further state of affairs, which means that he is going beyond his mandate. Therefore, he would contend that since the Arbitrator has acted beyond his mandate and on this ground also his



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appointment is liable to be terminated.

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13. Heard Mr.Sathish Parasaran, learned Senior counsel appearing for the petitioner as well as the learned counsel for the first respondent and perused the entire materials available on record. None appeared for the second respondent.

14.The main ground that raised by the petitioner was that the Arbitrator failed to act in neutral manner while conducting examination of the witnesses and that he conducted the proceedings by not following the adversarial system but on the other hand in the form of inquisitorial system contrary to the interest of the petitioner. In the main O.P., the petitioner has specifically made certain allegations against the arbitrator at para nos.11 to 27, which are extracted herein:

“11.During the first day of the arbitration sittings for cross examination of the petitioner's witness, the second respondent stated that he was as a retired Executive Director of Indian Oil Corporation Ltd and as an engineer by qualification, the second respondent stated that he did not have any experience as an arbitrator and that the present



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proceedings was his first experience as an arbitrator. The second respondent therefore sought assistance from the learned counsel for both parties in guiding him in the arbitration proceedings.

12. When the learned counsel for the first respondent commenced the cross examination of the petitioner's witness WI, the second responder enquired from the learned counsel for both parties whether the second respondent was entitled to ask questions to the witness. The learned counsel for both parties explained that the second respondent was entitled to ask questions however this should be an exception rather than the rule.

13. The second respondent restrained himself during the first day of cross-examination. Thereafter, the second respondent started to actively participate in the cross-examination of CW1.

14. The second respondent sat next to the learned counsel for the second respondent. The witness WI, the petitioner's representatives and its learned counsel were seated on the opposite side. The second respondent, sitting next to the learned counsel for the first respondent started suggesting questions for cross-examination to the learned counsel for the first respondent. The second respondent also suggested modifications of questions asked in cross-examination by the learned counsel for the first Respondent. When the witness started answering, the second respondent frequently intervened in the answers and suggested modifications to the witness' answers. The second respondent also frequently hurried at the witness taking time to consult the volume of records and give his answers.

15. The witness discovered some discrepancies in the calculations given in the claim statement and those found in the drawings. The witness pointed out these discrepancies and filed a memo for amendment of the pleadings to reflect the correct calculations. The memo was not opposed by the



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first respondent. Accordingly the second respondent passed orders allowing the amendments.

16. Thereafter, the second respondent was frequently cautioning the witness that the petitioner will lose its case if there are contradictions between the witness's evidence and the pleadings. The second respondent did not have any experience on the impact of his frequent admonitions on the witness.

17. On 4 September 2015 the petitioner sent a notice to produce to the counsel for first respondent and to direct the first respondent to produce letter dated 20 May 2014 between first respondent and its consultant, which according to the petitioner clearly supports the case of the petitioner. The first respondent produced the aforesaid letter on 29 September 2015.

18. The second respondent perused the document produced by the first respondent and observed that he did not really have any faith on the consultants or on their letters. The petitioner's representative pointed out to the second respondent that the consultant was engaged by the first respondent and was in fact representing the first respondent in the contract execution. Despite this, the second respondent maintained his lack of faith in the consultant.

19. The second respondent decided that he would single-handedly "to get to the bottom of everything and find out truth" and required both parties to produce various documents which were not disclosed and not relied upon by either of them. Not content with this, the second respondent directed both parties to send the document only to him and not serve copies on the other party. The learned counsel for the petitioner pointed out that this was not the procedure followed. However, the second respondent refused to modify his instructions saying that "the parties would copy the documents if the documents were disclosed to either of them".



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20. On 30 September 2015 the second respondent passed the following orders:

'It would be necessary for the Claimant and the Respondent to submit the following documents in the ascending order (starting from the beginning of the project till the commissioning including PGTR) by 10.10.2015;

a. Claimant shall submit to project schedule indicating critical activities at start of the project work and also furnished the major milestone plans vs. actually achieved for the project.

b. Claimant shall submit the mobilization of resources mainly equipments and manpower and site and its demobilization during and after completion of the project

c. Claimant and Respondent shall independently submit minutes of the project review meetings held at project in charge level and also at higher management level starting from the kick-off meeting till the commissioning of the plant. The minutes should include any referred document in the minutes.

D. Claimant and Respondent shall independently submit minutes of the meetings and between IEIL with FI/CPCL on technical issues other than project review meeting.

21. Subsequently, the first respondent sent an e-mail dated 14 September 2015 protesting against this procedure. The second respondent grudgingly relented. The second respondent blamed both parties for the belated disclosure of the documents which were not received by him and gave directions that copies of the document should be exchanged between the parties.

22. The petitioner received the email dated 14 September 2015 from the second respondent stating that " since the first respondent needs time to go through the documents being submitted by the Claimant (petitioner) as requested by the Respondent (first Respondent), the proceedings scheduled on 16th Oct- 17 Oct 2015 is cancelled. Now CWI further examination shall be on 19th



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Oct & 20th Oct 2015. If time will be available then RW-1 shall be cross examined. Claimant /Respondent to send the required documents immediately and also copies are to be given to the Claimant/Respondent (either parties)".

23.As a consequence of the confusion caused by the second respondent's directions the arbitral hearing scheduled on 16 October 2015 and 17 October 2015 have now been adjourned to 19 October 2015 and 20 October 2015 for further cross-examination of CW1 and thereafter cross-examination of RW1 and RW2.

24. The petitioner submits that the judicial procedure followed in arbitral proceedings throughout India is the adversarial process where the arbitrator acts as a neutral person and decides the claim based on the evidence oral and documentary presented by both parties. Therefore, it is important for the arbitrator not to enter into the arena. The arbitrator Cannot actively participate and stat asking questions of the witnesses arbitrator cannot also ask for large number of documents not relied on by both parties. The arbitrator cannot issue directions that the document should be disclosed only to him and not to the other parties.

25.Unfortunately, each of these fundamental principles of arbitration has been completely negated by the second respondent in his conduct of the present arbitration proceedings.

26. As stated earlier, the second respondent was habitually sitting next to the learned counsel for the first respondent and actively participating in the cross-examination of CW1by giving suggestions on the questions and modifying the questions asked by the learned counsel for the first respondent. The second respondent was also giving suggestions to the witness on how to give answers in a manner suitable and acceptable to the second respondent.

27.The second respondent has decided single-handedly to get to the bottom of everything and find out truth disregarding all established norms of conduct of the



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arbitral proceedings. The second respondent instead of acting as a neutral arbitrator deciding on the basis of oral and documentary evidence submitted by both parties, has converted the proceedings into a departmental fact-finding mission where the second respondent has assumed the role of an Inquisitor.”

15. As against the above allegations narrated against the second respondent in the O.P., despite service of notice, he has not come forward either to file counter or to contest the matter, but on the other hand, admittedly he appeared to contest the sub-application filed in the main O.P. Therefore, when the Arbitrator was able to appear and counter the allegations levelled in the sub-application, this Court is unable to understand why he had failed to appear before this Court to counter the allegations levelled against him in the main O.P. particularly, when the allegations are so serious in nature.

16. Though, the learned counsel for the first respondent denied all the allegations levelled against the second respondent, but it is for the second respondent, who shall come forward to deny those allegations because the petitioner was aggrieved only against the manner in which



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the second respondent conducted the proceedings since according to the petitioner, he conducted the proceedings in an inquisitorial forum. To substantiate these allegations levelled against the second respondent, the petitioner referred to the Minutes of the meeting held on 30.09.2015, wherein, in para 3, the learned Arbitrator has sought for the following details:

“3. It would be necessary for the Claimant and the Respondent to submit the following documents in the ascending orders (starting from the beginning of the project till the commissioning including PGTR) by 10.10.2015;

a) Claimant shall submit project schedule indicating critical activities at the start of the project work and also furnish the major mile stone plans vs. actual achieved for the project.

Claimant shall submit the mobilization of resources mainly equipments and manpower at site and its demobilization during and after the completion of the project.

Claimant and Respondent shall independently submit minutes of the project review meetings held at project in-charge level and also at higher management level starting from the kick-off meeting till the commissioning of the plant.

The minutes should include any referred document in the minutes.



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d) Claimant and Respondent shall independently submit minutes of the meetings held between IEIL with FI / CPCL on technical issues other than project review meetings.

4. The cross examination of CW-1 and re-examination of CW-1, if any, will continue on 16.10.2015 and 17.10.2015.

5. The cross examination of RW-1 will be commencing on 19.10.2015 and 20.10.2015,

6. The further cross examination of RW-1, if required, and the cross examination of RW-2 will commence on 28.10.2015 and 29.10.2015.

Further forward plan for the proceedings shall be firmed up after the completion of cross examination of RW-1 and RW-2 and their re- examination, if any.”

17. On a perusal of the above, it is clear that the Arbitrator had sought for the particulars, which were not at all available before him but he asked so many other details as if he is conducting inquisitorial system of legal proceedings while our system of conducting the legal proceedings is in the form of adversarial system and not inquisitorial system. When he does not know how to conduct legal proceedings, it is doubtful that the conducting of the proceedings is in accordance the

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legal system which we are following in the country and in these circumstances, this Court is in agreement with the apprehension of the petitioner about the manner of the 2nd respondent in conducting the proceedings that would affect the petitioner's interest in the event of passing any Award since conducting the legal proceedings by the 2nd respondent was not in accordance with established legal system in India.

18. As regards the other issue pertaining to the termination of the mandate of the Arbitrator by virtue of efflux of time is concerned, in terms of Clause 12.2(vi) of Section 48(3) of the General Conditions of Contract, the parties have agreed as follows:

“The Arbitrator shall render the award within 6 months of the commencement of the Arbitral proceedings which period may be enlarged by consent of both parties.”

19. Further, the parties also agreed for conducting the arbitral proceedings in accordance with SCOPE Rules of Arbitration, wherein,



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Rule 33 envisages the following:

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“33. The Sole Arbitrator/Arbital Tribunal proceedings shall make the award as expeditiously as possible preferably within six months but not later than one year from the date of receipts of complete set of pleadings from the Secretary. The arbitral tribunal shall not give adjournments to any party without sufficient reason and may impose an exemplary cost on those seeking adjournments without sufficient cause. If the circumstances are beyond the control of the parties and the Sole Arbitrator or Arbital Tribunal is satisfied that reasons and circumstances are justified, Arbitrator/Arbital Tribunal may grant adjournment.”

20. A cogent reading of the above Clauses, it is explicit that the Arbitrator shall render the award within 6 months of the commencement of the Arbital proceedings, but the period can be enlarged by consent of both parties. In the present case, admittedly, it was not completed within the time frame agreed to by both parties. However, both parties without making any objection, have continued with the proceedings. Even in terms of the SCOPE Rules of Arbitration, wherein, Clause 33 stipulates that arbitral proceedings shall be completed preferably within a period of six months, but not later than one year from the date of receipt of complete set of pleadings from the Secretary. In the present case, both



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the parties have completed their pleadings and the same was recorded in the Minutes of the second Sitting held on 12.1.2015 and based on the same, final issues were also framed. Therefore, in terms of Rule 33 of the SCOPE Rules of Arbitration, the arbitration proceedings should have been completed on or before 11.01.2016 and with effect from 12.01.2016, the arbitration proceedings stood terminated automatically unless and otherwise, the period is extended by consent of both parties or by virtue of adjournments granted by the Arbitral Tribunal by citing sufficient reasons, which are justifiable for grant of the adjournment. According to the petitioner, consent had been accorded on their behalf till 03.12.2015 and thereafter, they have not given any consent to enlarge the period of arbitral proceedings, however, the arbitral proceedings have been conducted subsequent to 03.12.2015. Therefore, continuation of the arbitral proceedings beyond the stipulated period of six months was without express consent of the parties which would mean to say that the parties have granted implied consent for continuation of the proceedings. But on no stretch of imagination, one



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can come to the conclusion that the parties have waived off their right to object for the continuation of the arbitral proceedings.

21. The learned counsel for the 1st respondent referred to the decision of the Delhi High Court in ***“Shyam Telecom Limited versus ARM Limited”*** reported in 2004 (77) DRJ 91, wherein, in para 22, it has been held as under:

“22. In the opinion of this Court, these arguments of the learned counsel for the petitioner cannot be accepted ; firstly, because having regard to the totality of the facts by no stretch it can be said that the Article IV(3) of the Divestment agreement was not to the knowledge of the petitioner and, therefore, they could not object to the continuation of the proceedings after the expiry of the stipulated period. Not only that, no objection was raised about the continuation of the Arbitral proceedings but the petitioner continued to participate in substantive proceedings before the Arbitrator up till the final stage of the proceedings. In the opinion of this Court, these facts and circumstances are so glaring so as to attract the doctrine of waiver within the meaning of Section 4 of the Act. It is a settled legal position that waiver will be deemed to have taken place when a party knowing that an irregularity has been committed, did not object to the same but participated in the Arbitration proceedings without protest. Section 4 of the 1996 Act corresponds to Article IV of 'UNCITRAL Modern Law'. The principle of waiver is not new in the Arbitration law as it was so far contained in the case law and has been codified in the statute. Besides, in the opinion of the Court the right to



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object the continuance of the proceedings on the ground of expiry of the stipulated period is one which falls in Part-I of the Act and which is derogable. The object of providing time limit for rendering an Award by the Arbitrator is aimed at expeditious resolution of the disputes rather than to leave the disputes unsettled or inconclusive on the expiry of the stipulated period. -Thus, looking at the matter from any angle, this Court is of the opinion that having regard to the entirety of the facts and circumstances, the petitioner will be deemed to have waived its right to object about the continuation of the proceedings or alleging the termination of the mandate of the Arbitrator simply on the ground that the time prescribed under Article IV(3) of the Divestment agreement for making the Award had expired.”

22. The learned counsel also referred to a decision of the Bombay High Court in the case of “**Mascon Multiservices & Consultants Pvt. Ltd. Versus Bharat Oman Refineries Ltd. & another**” reported in 2008 SCC OnLine Bom 723, wherein, the Bombay High Court, after extracting the observation (para 22) made in judgment of the Delhi High Court, which was extracted above, has observed as under in para 42 & 43 as under:

“42. I am in respectful agreement with the judgment. It is applicable to the present case.

43. Finally, Mr.Kamdar submitted that the terms of Clause 901(b) do not permit the parties to agree to an extension of time beyond the period of three years even by



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consent. He based his submission on the last sentence of the clause. The argument is unfounded. The second sentence of the clause correctly construed merely provides that in the event of the arbitrator extending the time by a further 12 months the parties had irrevocably given their consent to his making and publishing the award within the extended period and they would not be entitled to raise any objection or protest thereto under any circumstances whatsoever. There is nothing in the clause which even remotely indicates that the parties cannot be consent agree to waving the stipulation as to time within which the award was to be made and published.”

23. The above cited judgments would emphasize that even after expiry of the stipulated period, since no objection was raised about the continuation of the arbitral proceedings and the aggrieved party continued to participate in substantive proceedings before the Arbitrator upto the final stage of proceedings, it would attract the doctrine of waiver within the meaning of Section 4 of the Act and such waiver will be deemed to have taken place when a party knowing that an irregularity has been committed, did not object to the same, but participated in the arbitration proceedings without protest and that the concept of waiver is not new in the Arbitration law as it was so far contained in the case law and has been codified in the statute. Further, in the said case, there is no



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clause in the agreement to extend the period by mutual consent beyond the expiry of the terms specified in the agreement. However, in the present case, the parties can extend the term by mutual consent.

24. Having regard to the totality circumstances of the present case, with respect, I am not in agreement with regard to the applicability the proposition of law laid down in the above cited judgments to the present case for more than one reason, firstly, there is no dispute that as per agreed terms, the mandate of the Arbitrator can be enlarged by consent of both parties after expiry of the stipulated period and in fact, the petitioner had given consent till 03.12.2015 only and thereafter, the petitioner had not given consent to enlarge the period, but participated in the arbitral proceedings. But merely participating in the arbitral proceedings by the petitioner, would not *ipso facto* enable the Arbitrator to extend the time to proceed with the arbitral proceedings and for making the award by construing that the petitioner as if he waived off his right to object. It is pertinent to mention here that the role of the



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Arbitrator is to arbitrate within the terms and conditions of the contract agreed by both parties and he had no power apart from what the parties had given under the contract. If he has travelled beyond the contract, he would be acting without jurisdiction and in fact, an arbitral Tribunal is not a Court of law and cannot exercise power *ex debito justitiae*, meaning 'by reason of an obligation of justice.

25. In the present case, admittedly, as per the agreed term, i.e. Clause 12.2(vi) of Section 48(3) of the contract, time fixed for completion of arbitral proceedings and for passing the award by the Arbitrator is six months, however, the same can be enlarged by consent of parties. Admittedly, no consent was given by the parties in writing agreeing for enlargement of the period of arbitration, but participated in the arbitration proceedings even after expiry of the mandate of the arbitrator, by which, even if it is construed that the parties had not insisted upon time limit originally agreed to, such act can at best be construed as '**implied consent**' provided by the parties, which can be withdrawn at any point of time during the arbitration proceedings by the



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parties and in that event, the defence of waiver cannot be taken. In fact, the essential element of waiver is that there must be a voluntary and intention relinquishment of a right. But the present circumstances as narrated above would clearly demonstrate that there was no voluntary waiver on the part of the petitioner and hence, the Arbitrator cannot proceed further by drawing waiver on the part of the petitioner.

26. Admittedly, in the present case, the Arbitrator has not concluded the arbitral proceedings within the time frame as agreed by both parties, however, the Arbitrator proceeded further beyond his mandate only based on the implied consent of the parties since they participated in the arbitral proceedings even after expiry of the mandate of the Arbitrator. Here it is pertinent to note that such implied consent by virtue of mere participation by parties in the proceedings, does not *ipso facto* construe that the parties have given mutual consent by waiving off their right to object the mandate of the Arbitrator beyond the agreed terms. As already observed by this Court *supra* that the 'implied



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consent' can be withdrawn at any point of time during arbitration proceedings by the parties, this Court is of the view that the same cannot be taken to mean that the parties have waived off their right to object the mandate of the Arbitrator once for all till the passing of the final award by the Arbitrator.

27. As already stated above, in the present case, the agreement as mentioned in Clause 12.2(vi) of Section 48(3) of the General Conditions of Contract, clearly spelt out that the arbitral proceedings would continue beyond six months period only by mutual consent of both parties. Therefore, the arbitral proceedings if at all should continue only by way of mutual consent, but in the present case, there is no express of 'mutual consent' and in the absence of same, it would be considered as 'implied consent' and except this construction, no other construction could be made in view of the terms and conditions mentioned in the above Clause.



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28. In fact, the essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was involuntary. Exactly, in the present case also, if at all the participation and continuing with the arbitral proceedings by the petitioner though indicates waiver on his part, but the same was involuntary, especially when the Arbitrator has been alleged to have been conducting the proceedings in inquisitorial manner, by which, the petitioner apprehended that their right and interest would be in jeopardy if the same Arbitrator continues to arbitrate further and in fact, this had prompted the petitioner to restrain themselves from participating and continuing with the arbitral proceedings beyond 03.12.2015 and has been constrained to approach this Court by way of present Original Petition, raising very many allegations against the Arbitrator (extracted



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supra in para 14), demonstrating the way of conducting the arbitral proceedings by the Arbitrator in an inquisitorial manner. But despite notice, the 2nd respondent/Arbitrator has not come forward to counter the allegations made by the petitioner and in the absence of the same, this Court is of the view that the apprehension expressed by the petitioner is justifiable.

29. As regards the case laws cited on behalf of the 1st respondent are concerned, wherein, the Courts drawn the waiver and implied consent taking note of the conduct of the parties who are continuing with the arbitral proceedings even after expiry of mandate of the Arbitrator and never raised objection till passing of the final award, but later came forward agitating that the mandate of the Arbitrator stood terminated as the parties have not given consent. Therefore, those case laws cannot be applied to the facts of the present case.

30. In view of the foregoing reasons, this Court has no hesitation



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to hold that the the 2nd respondent indeed became de jure unable to perform his functions and the mandate to act as Arbitrator in terms of the agreement dated 5.6.2012 stands terminated.

31. In the light of above discussion, this Court is of the considered view that the Original Petition deserves to succeed and is accordingly allowed. The mandate of the sole arbitrator stands terminated. There will be no order as to costs.

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