

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 42 OF 2024.**

Glencore India Pvt Ltd	.. Petitioner
Versus	
Amma Lines Limited	.. Respondent

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Mr. Navroz Seervai, Sr. Advocate, a/w Kartik Nayar, Aniesh Jadhav, Rishab Kumar, Nikhil Adkine, for the Petitioner.
Mr. Naushad Engineer a/w Mr. Mangal Bhandari i/b Pranjali Bhandari, for the respondent.

**CORAM: BHARATI DANGRE, J.
RESERVED ON : 2nd APRIL, 2024
PRONOUNCED ON : 5th APRIL, 2024**

JUDGMENT:-

1 The only point that arises for consideration in the present petition is whether the mandate of the Arbitral Tribunal has come to an end on 31/01/2024, as agreed by the parties in the Joint Application presented before the Tribunal, on 23/11/2022, and pursuant thereto whether the Sole Arbitrator is entitled to continue the arbitration proceedings, since it is the submission of petitioner that he has incurred *de jure* ineligibility to act.

2 The Arbitration arises out of an agreement dated 26/09/1996 entered between petitioner, Glencore India Pvt Ltd (hereinafter referred to as 'Glencore') and the respondent, Amma Lines Ltd (the original claimant) for constructions, operation and maintenance of a barge terminal for unloading coal and associates facilities for conveyance of coal from barge terminal to BSES Dahanu Thermal Power Station and for transshipment of coal from ocean going vessels anchored in open sea and for further transportation of coal to Thermal Power Station. Dispute arose between the parties in the year 1997 and as the contract was terminated by Glencore and Amma Lines, the claimant invoked arbitration, as a result the proceedings commenced before a three member tribunal in December, 1998, as the claimant raised several claims including monetary claims aggregating approximately to 52.65 Crores.

Glencore India filed its Statement of Defence (SOD) and raised a counter claim for an amount of Rs. 58 Crores.

On completion of pleadings in the year 1999, 29 issues were framed in the year 2000. The proceedings continued and witness on behalf of the parties were examined and cross-examined from 2000 to 2005 and thereafter oral arguments were heard, but on account of changes in composition of three member tribunal, the proceedings could not be concluded. On demise of one of the member, the question of filling the vacancy arose and upon the vacancy being filled up, by order of this Court dated

20/02/2015 appointing a Retired Judge, an SLP was preferred before the Apex Court.

The parties were stuck on the appointment of Arbitrator since the year 2014 and in the SLP filed by Glencore, the disputes were made over to Justice Mohit Shah, Retired Chief Justice of Bombay High Court, who was nominated as a Sole Arbitrator.

The Hon'ble Apex Court on 8/04/2022, specifically recorded as under:

“Considering the fact that the dispute between the parties is very old and parties are litigating since 1998, we request the Arbitrator to finally decide and dispose of the Arbitration proceedings at the earliest and preferably within a period of one year from the first sitting.

The first sitting may be within a period of four weeks from today.

All concerned are directed to co-operate the learned Arbitrator in early disposal of the arbitration proceedings within the time stipulated hereinabove”

3 Pursuant to the above order, the Sole Arbitrator conducted the first meeting on 4/05/2022, for fixing the schedule and for issuing procedural and practice directions. When the Arbitrator confronted the parties with the timelines, as indicated in the order of the Apex Court, it was noted that the arbitration is at the stage of final arguments of both the parties, on the claimant's claim and the respondent's counter claim. It was noted that after filing the respective pleadings including the Statement of Claim (SOC) and counter claim, the evidence was closed and

the oral arguments commenced before the erstwhile Tribunal, when it was substituted by the order passed by the Apex Court on 8/04/2022.

In the first meeting, the parties submitted the necessary documents before the Tribunal and also agreed to submit a convenience compilation. By consent of parties and their respective advocates, the Tribunal fixed the schedule of the proceedings and also determined the fees and expenses.

4 During the progress of the proceedings, before the Tribunal, the claimant filed two applications dated 4/10/2022 and 7/10/2022, seeking amendment in the Statement of Claim (SOC) in the facts and circumstances and to the extent set out therein, Glencore filed its reply opposing the same.

On 23/11/2022, a Joint Application was moved under instructions, from the respective clients, seeking an order on agreed terms as in principal, it was agreed amongst the parties, during the hearing held on 22/11/2022.

The application specifically recorded as under:

“4 It is stated that during the hearing held on 22.11.2022 the Parties have agreed that the Application dated 04.10.2022 and 07.10.2022 be allowed with liberty to the Respondents to raise all its objections and contentions, including those raised in the replies dated 23.10.2022, in its amended Statement of Defence, and subject to the agreement as set out hereunder.

5 As such, based on the agreement between the Parties the following timelines are being agreed upon for the various procedural formalities and for completion of all the pleadings in the present proceedings:

<i>SR. No.</i>	<i>Particulars</i>	<i>Date</i>
i.	<i>Copy of Amended Statement of Claim already furnished by Claimant to Respondent</i>	<i>02.12.2022</i>
ii.	<i>Amended Statement of Defence to be filed by the Respondent with additional documents (if any)</i>	<i>22.12.2022</i>
iii.	<i>Final Written Submissions to be filed by the Claimant, with liberty to file supplementary submissions, if any, with respect to further evidence, if any, which may be led by the Parties</i>	<i>31.12.2022</i>
iv	<i>Amended Rejoinder to the Statement of Claim to be filed by the Claimant with additional documents (if any) along with Affidavit of Admission and Denial of documents on behalf of the Claimant</i>	<i>06.01.2023</i>
v	<i>Affidavit of Admission and Denial of Documents by the Respondent (if any)</i>	<i>16.01.2023</i>
vi	<i>Exchanging Affidavit/s of Evidence, if any, by witness/es of the Parties</i>	<i>23.01.2023</i>
vii	<i>Cross-examination of Parties' Witness(s), if any</i>	<i>30.01.2023 31.01.2023</i>
viii	<i>Part-I Skeleton Written Submissions to be filed by the Respondent</i>	<i>07.02.2023</i>
ix	<i>Final Arguments by the Respondent</i>	<i>27.02.2023 28.02.2023 09.03.2023 10.03.2023</i>

6. As such, basis the agreement between the Parties herein, the Parties state that even though one year timeline has been requested by the Hon'ble Supreme Court vide Order dated 08.04.2022, the Parties agree to give consent and hereby modify the timeline(s) of the present proceedings and the mandate of the Hon'ble Arbitral Tribunal, in view of the events set out herein above.

7. It is also hereby agreed between the Parties that the mandate of the Hon'ble Arbitral Tribunal shall continue till 31.01.2024 and the present Joint Application by the Parties shall be treated as a joint extension of time with regard to the mandate of the Hon'ble Arbitral Tribunal."

5 In terms of the said application, the learned Arbitrator on 23/11/2022 passed the following order :

“3. The Joint Application dated 23rd November 2022 signed by the learned Advocates for the Parties is taken on record and marked as Annexure – X to this Minutes.

Order in terms of the Joint Application dated 23rd November 2022 for an Order on agreed terms.

4. The Parties shall accordingly abide by the schedule set out in Annexure X to this Minutes.

5. At the joint request of the learned Counsel for the Parties, the meetings fixed on 29th & 30th November 2022, in December 2022 and between 10th and 20th January 2023, 1st & 2nd February 2023 are cancelled.

6. The meetings will now be held on 30th & 31st January 2023, 27th & 28th February 2023 and 9th & 10th March 2023 as per the schedule set out in Annexure X to this Minutes.

7. Directions have already been given in the Minutes dated 12th October 2022 for the Meetings held in October 2022 (8 sessions) and also for 2 sessions in November 2022. That is to say, each Party has to remit its share (Rs. 16,50,000/-) of the fees and administrative expenses for total 10 sessions on or before 30th November 2022.”

6 It is in the wake of this order, Glencore, has based its submissions in the present petition, by claiming that the mandate of the Arbitral Tribunal has ended on 31/1/2024, in terms of the Joint Agreement and there can be no further extension, as the Arbitrator beyond this date has become *functus officio*, as his term has expired.

Learned senior counsel Mr. Seervai, who represent Glencore, assert that on 31/01/2024, the mandate of the Arbitrator stand terminated and he has become *de jure* unable to perform his functions.

It is his specific contention that the mandate of an Arbitrator in terms of Section 14 of the Arbitration and Conciliation Act, 1996, shall terminate and he shall be substituted by another Arbitrator if: (a) if he becomes *de jure, de facto* unable to perform his functions and (b) if he withdraws from his office or the parties agree to the termination of his mandate.

The learned senior counsel would invoke Section 15 of the Act, which provide for termination of mandate and substitution of the Arbitrator; (a) when he withdraws from office for any reason or; (b) by or pursuant to the agreement of the parties, the mandate of the Arbitrator stand terminated.

7 Learned counsel would further submit that on 23/11/2022, an understanding was reached between the parties and they submitted a Joint Application for an order on agreed terms and under *inter alia* Section 19(2) of the Act, to regulate the conduct of the arbitration and to fix a mutually agreed procedure for completion of pleadings and other formalities, including but not limited to an agreement with regards to mandate of the Tribunal. Accordingly, the Tribunal agreed and accepted that its mandate shall continue till 31/1/2024, and the Tribunal was time and again, reminded of these timelines including through several emails/applications preferred before it and even in the affidavits of its witnesses.

Relying upon the provisions in form of Section 14 and 15, and also Section 19, and applying the same to the facts of the case, the submission of Mr. Seervai, is that the mandate of the Arbitrator in this case stand terminated by operation of law as jointly the parties had agreed that the mandate of the Tribunal shall continue only till 31/01/2024 and the Joint Application filed shall be treated as a joint extension of time, with regard to its mandate.

According to him, the agreement between the parties to extend the mandate upto 31/01/2024, did not permit any further extension and even by consent of the parties, to get it extended, it is not permissible to grant extension, beyond 31/01/2024, when the mandate of the Arbitrator stand terminated by operation of law.

He would place reliance upon the decision of the Apex Court in case of *NBCC Ltd vs J.G. Engineering Pvt Ltd*¹ where it is held that where time limit fixed by the Court for concluding arbitration proceedings was extended by the parties in accordance with the procedure provided therefor in arbitration clause, but which was not further extended and if the arbitrator failed to conclude the proceedings within the extended timeline, then his mandate was liable to be terminated under Section 14(1) (a) and it stood automatically terminated under Section 14(1)(b).

¹ (2010) 2 SCC 385

He has also placed reliance upon another decision of the Apex Court in case of *Jayesh H. Pandya and anr vs Subhtex India Limited and ors*², where it is categorically held that the arbitration proceedings are supposed to be governed and run by the terms, as agreed between the parties and the Arbitrator cannot go beyond the clause of the arbitration agreement and therefore, when there is no consent accorded for extension of time, upon expiry of the period agreed between the parties, the mandate of the Arbitral tribunal must come to an end.

8 Mr. Seervai, would also place reliance upon a decision of learned Single Judge of this Court in case of *Teltech Instrumentation Pvt Ltd, Mumbai vs Bharat Petroleum Corporation Ltd., Mumbai*,³ which has in turn relied upon the decision in case of *NBCC* (supra), to hold that where the parties had not agreed to the extension of the mandate of the Arbitrator, it automatically gets terminated and according to him, the decision has gone ahead and held that in such a case, there is no question of extension of time, even by consent, as the parties themselves agreed to the time schedule, so fixed. In such a contingency, according to Mr. Seervai, what happens is, the mandate automatically gets terminated, and which cannot be extended unilaterally at the instance of either one party or even the Arbitrator himself.

2 (2020) 17 SCC 383

3 2012 SCC Online Bom 318

He would further rely upon a Division Bench decision of this court in case of *Bharat Oman Refineries Ltd vs Mantec Consultants*,⁴ where it is held that the arbitrator is required to adjudicate the disputes in accordance with the agreed terms of contract and the agreed procedure and all are bound by agreed terms and the Arbitrator cannot go beyond the clauses in the agreement, and in the view of the agreed clause itself, it has been held that after lapse of agreed time, the arbitrator ceases to exercise his jurisdiction in terms of Sections 14 and 15 of the Act and such defect is incurable and implied consent cannot confer jurisdiction, once the agreed period has lapsed.

9 According to Mr. Seervai, he is not seeking termination of the arbitral proceedings, but what he seeks through the present proceedings, is a declaration that the learned Arbitrator is *de jure* and *de facto* incapable of acting as an Arbitrator over the disputes between the petitioner and the respondent, since his mandate stands terminated on 31/01/2024, in terms of the Joint Agreement between the parties and the court shall terminate his mandate and substitute him by appointing a new Arbitrator, to continue the adjudication of the disputes between the parties.

10 Contesting the stand taken by Mr. Seervai, Mr. Naushad Engineer representing the original claimant, Amma Lines would submit that there is no dispute amongst the parties

⁴ 2012 SCC online Bom 669

that Section 29-A of the Act of 1996 is not applicable to the proceedings being arbitrated between the parties.

By placing focus on the joint application moved on behalf of the parties, for an order on agreed terms, he would submit that the timelines are agreed between the parties for completion of procedural formalities and for completion of the pleadings and this arrangement was worked out, even though one year timeline was set out by the Apex Court on 8/04/2022, by consensus and the timelines were modified and it was agreed that the mandate of the Arbitral Tribunal shall continue till 31/01/2024.

As per Mr.Engineer, it is apparently clear from the minutes of the meetings held by the learned Arbitrator, that there was a consensus to push the mandate of the Arbitrator, beyond the agreed date, and for this purpose he has placed on record a compilation of minutes of the meetings of the Arbitral Tribunal and also the order passed by the learned Arbitrator, where the calendar was re-scheduled, and according to him, it was all done with a nod from the respondent and therefore, now turning back and objecting to the continuation of the proceedings before the Arbitrator, by contending that the mandate has come to an end, is an impropriety on part of Glencore.

Further, according to Mr. Engineer, all throughout, the respondent has participated in the proceedings before the

Tribunal and never bracketed their appearance, on no prejudice basis, and hence his argument is, that Glencore has waived its right to raise an objection of the mandate having come to an end.

He would place reliance upon the decision of this Court in case of *Snehdeep Auto Centre vs. Hindustan Petroleum Corporation Ltd*⁵ and also upon a decision of learned Single Judge of this Court in case of *Hindustan Wires Ltd vs. Mr. R Suresh and anr*,⁶.

11 In the wake of the rival contentions, advanced before me, the question arises, whether the mandate of Arbitrator, appointed by order dated 8/4/2022 by the Apex Court has come to an end by operation of law and whether there is a possibility of its extension, and this will certainly have to be determined in the light of the facts, which have emerged, through the proceedings before the Tribunal.

It is undisputed that the arbitration between the parties, is pending for a considerable long period of time and considering this scenario, the Apex Court, replaced the Tribunal with a Sole Arbitrator, with a request to decide and dispose off the arbitration proceedings, preferably within a period of one year from the first sitting.

Upon completing the formalities, the Sole Arbitrator conveyed his consent and completed the formalities under

5 2012 SCC Online Bom 580

6 2013 SCC Online Bom 547

Section 12 of the Arbitration and Conciliation Act, 1996, and the preliminary meeting was fixed on 4/05/2022, where the learned Arbitrator recorded as under:

“8 Learned Advocates for the Parties stated that the present arbitration is at the stage of final arguments of both parties on the Claimant’s claims and the respondent’s Counter Claims.

9 Learned counsel stated that after filing their respective pleadings including Statement of Claim and respondent’s Statement of Counter Claim, the Parties led the evidence of their respective witnesses (five witnesses of Claimant and four witnesses of respondent) and oral examination of the said witnesses is also complete. Parties have closed their evidence. Thereafter, the oral arguments commenced before the erstwhile Tribunal. However, thereafter the Arbitral Tribunal came to be reconstituted by the aforesaid order dated 08/04/2022 of the Hon’ble Supreme Court specifically stating that:

“It does without saying and as agreed between the parties, the arbitration proceedings will commence from the stage it was stopped”

12 The necessary documents were tendered before the learned Arbitrator and by consent of parties and their Advocates, he fixed the schedule accordingly, to commence the proceedings from the stage of filing of written submissions by the claimant to be followed by hearing of the claimants arguments, which was to be followed by filing of written submissions by the respondent and the arguments on its behalf. Thereafter, the proceedings were scheduled for claimant’s submission in rejoinder and respondent’s submissions in rejoinder to the counter claim, and the whole program was chalked out from 14/07/2022 to 2/12/2022.

It was made clear that the parties shall stick to the schedule once fixed and any prayer for cancellation of the date of hearing, if not made, at least four weeks in advance, was not to be entertained.

The learned Arbitrator also scheduled the meeting for case management conference and parties agreed that they shall stick up to the fix dates.

13 In the wake of the Joint Application, preferred before the Arbitrator, agreeing upon the timelines, wherein it was mutually agreed that the applications by the claimant be allowed, with liberty to the respondent to raise all its objections and contentions including those raised in its reply, in its amended Statement of Defence and the timelines were agreed upon for completion of procedural formalities and the pleadings.

The procedural aspect therefore now contemplated filing of additional documents along with the affidavit of admissions and denial of documents on behalf of the claimant and also that of the respondent.

As a sequel, two stages were additionally introduced viz. exchanging of affidavit/s of evidence, of the witness/es of the parties, and their cross-examination, before submitting the written submissions and the final arguments.

14 The claimant submitted amended Statement of Claim (SOC) on 30/11/2022 and even Glencore submitted its amended

SOD on 30/12/2022, and this step was taken in accordance with the agreed terms dated 22/11/2022.

On 8/1/2023, the claimant raised an objection to the amended SOD, by alleging that it is far beyond the permissible extent as per law, and there was an attempt to improve the case set out on behalf of the respondent, which is not permissible. It was specifically contended that the amended SOD which deals with the SOC can be permitted and nothing more than that. The Claimant therefore, sought personal hearing to consider, whether the amended SOD as filed by Glencore, can be taken on record.

Glencore responded to the objection raised, by filing a reply on 23/1/2023, alleging that the attempt on part of the claimant is to delay the arbitral proceedings, and it would disturb the schedule of hearing as fixed by the Arbitrator by his order dated 23/11/2022.

It was contended that the amendment SOD is in terms of the Joint Agreement between the parties and in terms of the agreed terms dated 23/11/2022. The timelines under the mutual agreement were specifically referred to, and on merits, it was contended that the SOD must be permitted to be amended, and the purported application is vague and untenable.

15 The Tribunal pronounced upon the application/objection of the claimant, by a detailed order passed on 2/2/2023, expressing that the new plea of Glencore was materially different

from the stand adopted by it in its original SOD, and therefore, after a lapse of almost 18 years, it was not permissible to set up the new plea, particularly, when on completion of recording of evidence, the oral arguments of the counsel of the claimant is concluded and dates are already fixed for further hearing.

The learned Arbitrator therefore, declined the amendment to the SOD, except the amendment contemplated in paragraph nos.1, 2 and 3, which pertain to the pleadings in the earlier proceedings between the parties before the High Court and those paragraphs which raised the plea of maintainability and limitation as well as the consequential amendments pursuant to the claimants amendment application, regarding rate and mode of interest.

Resultantly, the Claimant's application dated 8/1/2023 was partly allowed, though the SOD and compilation of additional documents was permitted to be filed on or before 11/2/2023, and the Claimant to file the rejoinder on or before 18/2/2023.

16 The next Minutes of the Arbitral Tribunal, to which reference is necessary, is of 27/2/2023 which record as under :-

“10 Tribunal's Officer sent reminder email for the hearing fixed on 20.02.2023 (4.30 p.m) by video conferencing to consider amendment of issues consequent to amendment of rival pleadings. Learned Advocates for the respondent sent email dated 15.02.2023 indicating their inability to attend the meeting on the said date and time on the ground that they had a full day hearing before a three-member arbitral tribunal from 20.02.2023 to 25.02.2023. In view of the said email, the

Tribunal rescheduled the meeting on 20.02.2023 to 5.30 p.m by video conference.

11 *However, learned Advocates for the respondent again sent an email on 16/02/2023 reiterating their inability as already indicated in their email of 15.02.2023.*

12 *In view of the above, Tribunal was left with no other alternative but to cancel the meeting scheduled for 20.02.2023 and fixed the next meeting on 27/02/2023 at 11.30 a.m. today, as already scheduled with the consent of the parties and their learned Advocates.”*

During this meeting, the counsel representing Glencore, made it clear to the Tribunal that it is marking appearance, without prejudice to the order dated 2/2/2023 and it has not filed SOD, since it is yet to decide on future course of action.

The Arbitrator hence recorded that Glencore has not yet filed its amended SOD, as directed by its earlier order dated 2/2/2023.

17 The learned Arbitrator emphasized upon the history of the proceedings before him and record that the first sitting was held by him on 4/5/2022 and schedule was fixed with the consent of the parties, and as per their counsel, and as per the said schedule, the arguments of the counsel for the Claimant were to conclude on 8/9/2022 (subsequently revised to 10/12/2022) and the oral arguments of the counsel for the respondent were to conclude by 10/12/2022 as per the revised schedule submitted by the parties on 23/11/2022, the final arguments for the respondent was to be heard on 27/2/2023, 28/2/2023, 9/3/2023 and

10/3/2023. However, considering the controversy about purported amendment to respondent's SOD which was objected by the claimant, Claimant had now filed the written submissions, as per order dated 2/2/2023 and therefore, the learned Arbitrator once again re-scheduled the meetings and permitted the respondent to file its amended SOD and compilation of documents on or before 20/3/2023.

The Claimant was thereafter permitted to file amended rejoinder on or before 27/3/2023 and the meeting was scheduled on 31/3/2023, by video conferencing to consider amendment of issues, consequent to the amendment of the rival pleadings. The skeleton written submissions of the respondent were also directed to be submitted after commencement of oral arguments on 11/4/2023.

18 Being aggrieved by the order passed by the learned Arbitrator, on 2/2/2023 and 27/2/2023, Glencore preferred Writ Petition before this Court by invoking Article 226 and 227 of the Constitution of India on the ground that the orders passed are patently illegal and inherently without jurisdiction, and are passed in violation of Section 19(2) of the Act of 1996, and also in contravention of the Joint Agreement between the parties.

19 When the learned Arbitrator fixed the meeting on 29/8/2023, without prejudice to the respondent's contentions in the pending Writ Petition, the schedule was fixed for hearing the

oral arguments of the respondent by fixing it from 16/11/2023 to be concluded on 23/11/2023.

The learned Arbitrator further recorded as under:-

“3 In para 7 of the Joint Application on behalf of the parties for an Order on Agreed Terms dated 23/11/202 (Joint Application), it was agreed between the parties that the mandate of the Tribunal shall continue till 31/01/2024 and the Joint Application by the parties shall be treated as a joint extension of time with regard to the mandate of the Hon’ble Arbitral Tribunal.

4 Considering the fact that the additional issues will be framed only on 27/09/23 and thereafter reply arguments of learned counsel for the respondent will be heard on the Claimant’s claims and arguments of learned counsel for the parties on respondent’s Counter claims, it would not be possible for the Tribunal to make an award by January 2024.

5 Mr.Bhandari, learned counsel for the claimant, states and submits that since the present arbitration commenced in 1998-99 and while re-constituting the Tribunal from Three Member Tribunal to the Sole Arbitrator Tribunal, the Hon’ble Supreme Court directed in the Order dated 08/04/2022 that “arbitration proceedings will commence from the stage it was stopped’, the present arbitral proceedings are not covered by Section 29-A of the Arbitration and Conciliation Act, 1996 (the Act), as issued by the Arbitration and Conciliation (Amendment) Act, 2015 or any subsequent amendment of Section 29A.

Hence no outer limit applies for completion of arbitral proceedings. The above timeline of January 2024 was earlier indicated by the parite in view of the fact that the Hon’ble Supreme Court had by Order dated 08/04/2022 requested the present Tribunal to complete the proceedings within one year from the date of the first meeting (the first meeting before the first Tribunal was held on 04/05/2022) and looking to the schedule fixed in November 2022, it was not possible for the Tribunal to complete the proceedings by 04/05/2023”

On behalf of Glencore, the learned counsel made a statement that no representative of the respondent is present in the meeting and he would advance necessary submissions/ statement at the next meeting scheduled on 27/9/2023.

In the subsequent meetings of the Tribunal, the framing of additional points for determination/issues, consequent

to amendment of rival pleadings filed by the parties was discussed threadbare.

20 Glencore produced additional draft issue regarding inadequate/insufficiently stamped document and it was turned down on the ground that it was already covered by the Tribunal in its earlier order. Certain further issues were also raised and the Tribunal framed additional issue nos.15, 16 17 and 18 and further observation of the Tribunal must be taken note of;

“6 At the said 62nd meeting, as the respondent's Advocates were in a hurry to leave, the Tribunal gave liberty to the respondent to suggest any other proposed issues on the basis of the amended pleadings as per order dated 02/02/2023 read with clarificatory order dated 12/04/2023. The respondent was given time limit of one week from the date of receipt of the Minutes of the said Meeting. On account of the long weekend, the signed Minutes of the said 62nd Meeting were emailed to the parties and their Advocates on 4/10/2023. The respondent's Advocates prayed for an extension of the time limit upto 16/10/2023 and therefore, the respondent was given extension upto 16/10/2023.

7 Respondent filed an application dated 16/10/2023 suggesting various proposed additional issues. The Tribunal has considered the averments and submissions made in the said application. In the said application, respondent's Advocates have suggested in total 39 additional issues proposed on behalf of the respondent. After carefully going through all the proposed 39 additional issues, the Tribunal finds that the proposed issues at Sr.Nos.(i) to (xix) are the same as were suggested at the hearing on 27/09/2023 and the Tribunal has already considered the same as the Meeting held on 27/09/2023 or in the reasoned order dated 7/10/2023.”

21 The Arbitrator fixed the next meeting on 16/11/2023 for further consideration, by reflecting upon the additional issues which were appended as Annexure-A to the order, which included amended issues Nos.9A – 9B, 12 to 14 and issue no.15 to 18 as per order dated 7/10/2023.

22 In the order dated 17/11/2023, the Arbitrator recorded as under :-

“4 Claimant’s Advocates will respond to the Memo dated 9/11/2023 regarding evidence after the respondent provides them with the affidavits of evidence which can be opened. In any case, the respondent will keep the said witnesses available for cross-examination on 22/23/24.11/2023, in case the Claimant is in a position to cross-examine the said witnesses of the respondent on these dates on the additional issues framed by the Tribunal on 27/09/2023 and 7/10/2023.

The Tribunal may not be treated to have expressed any opinion.

5. Looking to the fact that the respondent has not indicated its position from 29/08/2023 till date regarding the mandate of the Tribunal, in order to avoid any ambiguity, the respondent is directed to submit in writing by 21.11.2023 its position regarding the mandate of the Tribunal.

6 The prayer made in the Memo dated 09/11/2023 of the respondent’s Advocates for deferring the hearings scheduled for 25/11/2023 and 4/12/2023 to 6/12/2023 will be considered after considering the position which the respondent may adopt regarding the mandate of the Tribunal and after hearing learned counsel for the parties on 22/11/2023 regarding the mandate of the Tribunal.”

23 In the arbitral meeting dated 22/11/2023, the Arbitrator noted that for almost three months i.e. from 29/8/2023 onwards, the counsel for the respondent has not submitted any response to the statement/submission of the counsel for the claimant, nor has it submitted anything in writing regarding mandate of the Tribunal, after the two issues were flagged in it’s meeting dated 27/9/2023 i.e. for framing of additional issues on the basis of amended pleadings and considering the matter regarding mandate of the Tribunal.

The learned Arbitrator clearly record in its procedural order dated 17/11/2023, that the respondent has not extended co-

operation for expeditious completion of the arbitral proceedings, which were pending since 1998-1999.

24 Even on this date, the counsel for the respondent sought time to deal with the objections on the ground that they were received only on 21/11/2023, and the learned Arbitrator painstakingly recorded that the hard copies of the two affidavits of evidence which were attached to its email dated 10/11/2023, reached the Tribunal and the Claimant, only on 20/11/2023, and even it could not be opened, as there was some technical error in the file formatting. Upon informing, the respondent's Advocate again sent two attachments containing the affidavit with email dated 17/11/2023, but the attachment containing the affidavit of Mr.Rahul Surve could not be opened and the only attachment with the affidavit of evidence of Mr.Rishabh Jain could be opened. The affidavit of Mr. Rahul Surve was again emailed on 18/11/2023.

The Claimant's Advocate objected and re-iterated that the conduct of the respondent in circulating the affidavit of evidence of Mr.Rahul Surve is highly objectionable, as it aims to delay the proceedings, and the intention was very apparent since the evidence affidavit could not be opened till 18/11/2023, when the cross-examination of the witness was scheduled on 22/11/2023. Apart from this, it was also objected on the ground that the evidence is taking the case of the respondent beyond the scope of the pleadings, and attempt is made to seek production of

documents beyond their compilation of documents filed along with the SOD. Apart from this, it was also objected on the ground that the evidence affidavit contain certain paragraphs which have already been rejected/expunged by the erstwhile Tribunal by detail order/s. Similar objection was raised, as regards the affidavit of evidence of Mr.Rishabh Jain, by contending that evidence beyond pleadings is sought to be adduced.

25 Learned counsel for the respondent prayed for 10 days time because the Claimant had responded to the Memo dated 10/11/2023 on 20/11/2023. The Tribunal, therefore, construed this attempt, a deliberate one, and it was noted, that though Mr.Rahul Surve, the respondent's first witness was present before the Tribunal for cross-examination, the Claimant objected on the ground that it did not get sufficient time to go through the affidavit and to make formal application in writing, to raise objections before the dates fixed for cross-examination.

The Claimant's Advocate also placed on record the order dated 28/6/2005 of the erstwhile Tribunal, when the Tribunal had declined to take the affidavit of evidence of Mr.Rahul Surve on record and on perusal of the said order, the Arbitrator took note of the substantial objections raised on behalf of the Claimant, to accept the evidence on affidavit of Mr. Rahul Surve and Mr. Rishabh Jain. However, taking into account that the Supreme Court had requested the Tribunal to complete the

proceedings expeditiously, the Arbitrator called upon the counsel for the Claimant to commence his arguments regarding his objection on the two affidavits, facing the time constraint and directed that after the arguments of Claimant's are over, the respondent's counsel will be heard. The Claimant made it very clear that it did not wish to file any evidence affidavit in support of the amendments in its SOC under the Application dated 4/10/2022 and 7/10/2022, but reserved right to lead evidence in rebuttal. The counsel for the Claimant commenced his oral submissions on the objections raised, and the proceedings continued on 24/11/2023.

26 On this date, the Tribunal highlighted the timelines as indicated in the Joint Application dated 23/11/2022 and the actual dates on which the steps were taken by the parties and this chart is the crux of the decision of the Tribunal, in holding that its mandate shall continue till 31/12/2024, and there is no question of seeking consent of parties for continuing the arbitral proceedings beyond 31/1/2024.

The learned Arbitrator categorically recorded the dates to be adhered to as per the joint request and the steps taken till date, and it was reflected as under:-

Sr. No.	PARTICULARS	DATEAS PER JT.APPLN. dt.23.11.2022	STEP ACTUALLY TAKEN ON
i.	Copy of Amended Statement of Claim already furnished by Claimant to Respondent.	02.12.2022	30.11.2022

	<i>Hard copy of Amended Statement of Claim with verification to be filed by Claimant with the Tribunal and copy to be served on the Respondent</i>		
ii.	<i>Amended statement of Defence to be filed by the Respondent with additional documents (if any)</i>	22.12.2022	06.09.2023
iii.	<i>Final Written Submissions to be filed by the Claimant, with liberty to file supplementary submissions, if any, with respect to further evidence, if any, which may be led by the parties</i>	31.12.2022	26.02.2023
iv.	<i>Amended Rejoinder to the Statement of Claim to be filed by the Claimant with additional documents (if any) along with the Affidavit of Admission and Denial of documents on behalf of the Claimant</i>	06.01.2023	18.09.2023
v.	<i>Affidavit of Admission and Denial of documents by the Respondents (if any)</i>	16.01.2023	-
vi.	<i>Exchanging Affidavit/s of Evidence, if any, by witness/es of the Parties</i>	23.01.2023	10.11.2023 17/18.11.2023
vii.	<i>Cross-Examination of Parties' Witness(s), if any</i>	30.01.2023 31.01.2023	Dec, 2023 4,5,6
viii.	<i>Part-1 Skeleton Written Submissions to be filed by the Respondent</i>	07.02.2023	-
ix.	<i>Final arguments by the Respondent</i>	27.02.2023 28.02.2023 09.03.2023 10.03.2023	-

7 Learned Counsel for the parties are not in position to dispute the fact that there has been a delay in the present Arbitral Proceedings in spite of the best efforts made by the Tribunal for expeditious completion of the proceedings in view of the long pendency and also in view of the request of the Hon'ble Supreme Court. The Tribunal has indicated in the Procedural order dated 17th November 2023 how and why the matter has been delayed, hence nothing further is required to be stated in the present order.

8. The amended statement of Defence of the Respondent was taken on record on 6th September 2023 and the Claimant filed its amended Rejoinder on 18th September 2023. thereafter, the additional issues were framed on 27th September 2023 and on 7th October 2023. the Respondents

has filed affidavits of evidence of two witnesses on 10th November 2023, which became available to the Claimant only on 17th and 18th November 2023. the Claimant has raised objections to the said affidavits of evidence which objections are being heard since 22nd November 2023 and hearing on the objections will conclude on 28th November 2023. the Tribunal has fixed meetings in the month of December 2023 for recording oral evidence of the witnesses.”

Along with the procedural order dated 23/11/2023, the Annexure-A set out the subsequent steps to be taken by the parties from this date onwards.

27 The Claimant’s objection against the affidavit of evidence of the respondent’s witness Mr.Rahul Surve and Mr.Rishabh Jain was decided by the Tribunal on 3/12/2023, by declining to take the affidavit on record and expunging certain paragraphs, though leaving it open to the Claimant to cross-examine the witness with reference to the remaining paragraphs. Similarly, as regards the documents sought to be produced along with the affidavit, some documents are permitted to be taken on record, whereas some are declined. Same is the case, in case of affidavit of evidence dated 10/11/2023 of Mr.Rishabh Jain.

28 Upon this order being passed on 3/12/2023, on expiry of the period, as agreed in the Joint Application on 31/1/2024, on 1/2/2024, Glencore moved an exhaustive application before the Tribunal, contending that the parties agreement as per Section 19 of the Act is supreme, and cannot be varied by other party, except by mutual consent and in no event, the same can be varied by the Tribunal unilaterally.

This is precisely the thrust of the arguments of Mr.Seervai before me, that the Joint/Mutual Agreement between the parties is mandatory and cannot be overridden by the Arbitral Tribunal *suo motu* without seeking express consent of the parties, as the Tribunal is a creature of the agreement and it cannot act beyond, either the contract or the understanding between the parties.

29 The learned Arbitrator in the background facts rejected this application, by specifically referring to the various stages through which the proceedings passed after the Joint Application was submitted and it was agreed mutually that the mandate of the Arbitral Tribunal shall stand concluded on 31/1/2024.

The Arbitrator continued with its earlier reasoning and once again reiterated that as per the Joint Agreement between the parties, the Tribunal was to make an Award within 12 months, of recording oral evidence of witnesses of the parties in January 2023, after amendment of the pleadings, and since the oral evidence of the witnesses is now recorded in December 2023, the Tribunal is entitled to avail period of one year and was duty bound to declare the Award by 31/12/2024.

The Arbitrator has in unequivocal terms, referred to the delay in the proceedings, which to some extent, is attributed to Glencore and reference is made to the procedural order of the

meeting dated 24/11/2023, where the counsel for both parties jointly prepared schedule for various stages of arbitral proceedings which was marked as Annexure A.

The learned Arbitrator has blamed the respondent for this situation and it was expressed in the following words:-

“17 As per the stages indicated in the above schedule dated 24.11.2023, recording an oral evidence of RW-1 Mr. Rahul Surve commenced on 05.12.2023 and was to continue on 06.12.2023, but on account of an accident in the evening of 05.12.2023 in which the witness sustained some injuries, at the request of the Respondent, recording of oral evidence of the said witness was resumed and completed on 24.01.2024. Similarly at the request of the Respondent, oral evidence of RW-5 Mr. Rishhabh Jain was recorded on 24.01.2024 and 25.01.2024. Thus, a period of one month and three weeks was taken by the Respondent for convenience of its witnesses.

18. Notwithstanding the above, and even after having been responsible for delay for a total period of at least eight months, the Respondent has now come out with the present application dated 01.02.2024 contending that the Tribunal does not have the authority to proceed with the arbitration after 31.01.2024.”

30 It is in these above facts, the law placed before me by Mr.Seervai will have to be appreciated.

In NBCC Ltd (supra), with reference to the provisions of Section 14 and Section 11(6), a proposition of law has been laid that where the time limit fixed by the Court for conducting arbitration proceedings, was extended by the parties in accordance with the procedure provided in the arbitration clause, but which was not further extended, then the Arbitrator without any concrete reasons, when failed to conclude the

proceedings within the extended time, his mandate stood automatically terminated.

In paragraph no.17 of the decision, it is categorically held that after the expiry of the time for completion of the proceedings, when the Arbitrator did not make any effort to publish the Award, nor was anything conveyed on behalf of the appellant to the respondent for extending the time of the Arbitrator to publish his Award, it was a clear lapse on part of the Arbitrator and the appellants who were aware that the mandate is expired and it could only be extended by mutual consent of the parties, according to the arbitration agreement and the High Court was right in holding that the Arbitrator had become *functus officio*, in absence of extension of time beyond 30/9/2005 to make and publish the Award and he had no authority to continue with the arbitration proceedings.

31 The present case before me is however, clearly distinguishable on facts, as on marshalling the progress of the proceedings before the learned Arbitrator, it has become evident that the parties at the meeting held on 22/11/2022, which was fixed for hearing on the two amendment Applications filed by the Claimant, seeking amendment in its SOC, submitted a Joint Agreement on 23/11/2022 for fixing the Schedule of amendment of pleadings at various stages.

Accordingly, the Claimant amended its SOC on 30/11/2022, but the purported SOD by the respondent dated 30/12/2022 was seriously objected to, by the Claimant and on extensive hearing of arguments, the Tribunal passed an order on 2/2/2023, declining to take on record the purported SOD and permitted amendment only to the extent of raising the plea of *res judicata*, maintainability, limitation and waiver and estoppel, based on the pleadings filed in the Suit between the parties.

The Tribunal had directed Glencore to submit its amended SOD in conformity, on or before 11/2/2023 and fixed a meeting on 20/2/2023 for framing of additional issues on the anvil of amended pleadings.

Glencore, the respondent, being aggrieved by the order dated 2/2/2023, preferred a Writ Petition before the High Court, where, it was unable to seek any orders.

The Tribunal offered several opportunities to the respondent to commence its oral arguments, without prejudice to its rights and contentions in the Writ Petition or at least to submit oral arguments on issues framed in the year 2000. However, it did not avail of this opportunity, and it is only on 6/9/2023, the amended SOD was filed. The Arbitrator therefore, was constrained to record that it has failed to extend co-operation for six months and two weeks, despite directions from the Apex Court, for expeditious completion of the arbitral proceedings.

32 The learned Arbitrator framed additional issues on 27/9/2023 and 7/10/2023. In between, the Tribunal in its procedural orders, specifically the orders dated 17/11/2023, 24/11/2023, 3/12/2023, clearly reflected upon the conduct of the parties and specifically, Glencore.

In the meeting of 24/11/2023, the Tribunal clarified its position that it is not possible to conclude the proceedings, since the proceedings are already running beyond time as the respondent has filed the affidavit of evidence of two witnesses on 10/11/2023, which is made available to the Claimant only on 17th and 18th November 2023, to which the Claimant raised objection and on hearing the parties, partly the objection of the Claimant, was sustained, though cross-examination of two witnesses of the respondent was permitted on certain points.

Accordingly, the meeting was fixed in the month of December 2023 for recording oral evidence of the witnesses.

33 It is amply clear from reading of the order dated 24/11/2023 itself, that the learned Arbitrator indicated that since the evidence which was actually to be recorded in January 2023, is now postponed in December 2023, as it was agreed that the Tribunal shall be allowed a period of one year from recording of evidence for conclusion of the proceedings, there was no question of seeking consent of the parties in continuing the Arbitral proceedings beyond 31/1/2024.

It is worth to note that in the facts of the case, as per the Joint Agreement between the parties, the Tribunal was to make an Award within 12 months after recording of oral evidence of witnesses of the parties, in June 2023, after amendment of the pleadings and if the oral evidence is to be recorded in December 2023, the Arbitrator has rightly concluded that it has time to pronounce his Award by 31/12/2024.

Worth it to note that in all the proceedings recorded by the Tribunal, the presence of the respondents through its Advocate, is clearly marked and even their conduct upon which the learned Arbitrator has commented upon, is taken note of.

I must note that it is the respondent who dragged the proceedings at every stage and the Arbitrator has taken note of the glaring lapse on its part as it filed its SOD only on 6/9/2023 and the proceedings did not progress for six months and two weeks, for the reason solely attributed to it.

It is only on completion of pleadings, the additional issues are framed on 27/9/2023 and 7/10/2023 and thereafter, the evidence of the two witnesses by the respondent is made available on 17/18th November 2023, and once again on 24/11/2023, a fresh schedule was agreed upon. Though all the while, the respondent staked its claim that it is subject to the orders in the Writ Petition filed by it, no orders are ever secured in its favour, restraining the Tribunal from proceeding ahead.

Even upon filing of the evidence of witnesses, the recording of oral evidence of RW 1 – Rahul Surve commenced on 5/12/2023, and which was to be continued on 6/12/2023, but the evidence was delayed once again, on account that the witness had sustained some injuries in an accident and it was completed only on 24/1/2024. Once again, at the request of the respondent, evidence of its witness Rishabh Jain was recorded on 24/1/2024 and 25/1/2024 and thus, period of one month and 3 weeks was consumed by the respondent, in examining its witnesses and now the endeavour is to put the entire blame on the Arbitrator for the delay and attempt to derive benefit from the position of law laid down by the Courts, to the effect that when the period as agreed by the parties, has come to an end, the mandate of the Tribunal shall automatically come to an end, and this in my considered view, is nothing but an attempt to approbate and reprobate.

Reliance on the decision by Mr.Seervai in case of Mr.Jayesh Panda (supra) which undisputedly have held that the arbitration proceedings are to be governed and run by the terms as agreed between the parties, and the Arbitrator cannot go beyond the clause of arbitration agreement, there can be no second view about this well settled position of law, but in the present case, when impliedly, the respondent continued to participate in the proceedings and in fact, it itself was the cause for pushing the proceedings beyond the agreed timelines, I do not

think that it can take advantage of the proposition of law laid down in the aforesaid decisions.

34 The law as laid down to the above, is not an absolute proposition that a moment an award is made after the expiry of mandate, it must be set aside. In concluding as above, I may not hold against the respondent that it has waived its right on participation, but since I find that it is the respondent, who is responsible for pushing the timelines, that were agreed and since it did not make a clear statement ever before the Tribunal about conclusion of its mandate, but impliedly, as recorded in the Minutes dated 24/11/2023, agreed for a new calendar, the conduct of the respondent may be construed as a waiver, to the objection of time limit, being mandatory requirement of pronouncement of the Award.

Despite filing Writ Petition before this Court, no orders were ever obtained and the proceedings continued before the learned Arbitrator, and even the respondent permitted its witnesses to be cross-examined but immediately, after 31/12/2024, i.e. on 1/2/2024, it has filed an application, which is rightly rejected by the learned Arbitrator.

35 Mr. Engineer who has placed on record the decision of this Court in case of *Snehdeep Auto Centre (supra)*, as well as the decision in case of *Mascon Multi Services and Consultants Pvt Ltd Vs. Bharat Oman Refineries Ltd and Anr.*⁷ are the fact

⁷ 2008 SCC Online Bom 723

based decisions, though it do not disturb the legal position that an Arbitrator is a creation of an agreement between the parties and shall operate within the framework of the contract.

However, in the facts of this case, though Mr.Seervai has graciously submitted that he is not seeking termination of the arbitral proceedings, but is merely seeking substitution of the Arbitrator, at this stage, when the cross-examination of the respondent's witnesses is complete and for all purposes, the procedural part is over and what now remains is hearing of arguments and declaration of the award. Keeping in mind the history of the litigation, I deem it appropriate that the learned Arbitrator, who has conclusively held that his mandate shall continue for a period of one year, from the date of recording of evidence, till 31/12/2024, shall continue with the arbitral proceedings till this date.

Upholding the order passed by the learned Arbitrator on 2/2/2024, on the application filed by Glencore, claiming that the mandate of the Arbitrator stand terminated and the plea that he has become *functus officio*, being untenable, the Arbitration Petition No.42/2024 is dismissed.

No order as to costs.

(SMT. BHARATI DANGRE, J)