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* **IN THE HIGH COURT OF DELHI AT NEW DELHI****RESERVED ON – 22.02.2024.**

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PRONOUNCED ON – 13.03.2024.

+ O.M.P. (T) (COMM.) 12/2024, I.A. 3620/2024

BHARAT PETROLEUM CORPORATION LIMITED..... PetitionerThrough: Mr. Rajshekhar Rao, Sr. Adv. with
Mr.Pradyuman Sewar, Adv.

versus

PUNJ LLOYD LTD.

..... Respondent

Through: Mr.Shambhu Sharan, Ms. Sneh Batra,
Adv.**CORAM:****HON'BLE MR. JUSTICE DINESH KUMAR SHARMA****J U D G M E N T****DINESH KUMAR SHARMA,J :****A. FACTUAL MATRIX**

1. The present petition has been filed under Section 14 of the Arbitration and Conciliation Act, 1996.
2. In brief, the case of the petitioner is that Bharat Petroleum Corporation Limited awarded the contract of composite works for the laying of the pipeline (Onshore & Offshore) for the LPG Pipeline from BPCR/HPCR, Mahul, Mumbai to Uran (hereinafter referred to as the Project) vide fax of Acceptance/Letter of Award and thereafter Agreement No. E&P/PL.PROJ.LPGLINE/02/11-12 dated 14.07.2011



("Contract") upon Punj Lloyd Ltd. ("Respondent"/Claimant in the arbitration).

3. The present petition has been filed with a prayer that an Order terminating the mandate of the learned Sole Arbitrator be passed and a former judge of the Hon'ble Supreme Court or a retired Chief Justice of this Hon'ble Court may be appointed as an Arbitrator.
4. The petitioner has stated that the arbitration Clause (Clause 91(b)) of the contract stipulates that the award shall be published by the arbitrator within two years after entering upon reference. It has been submitted that the Sole Arbitrator does not have jurisdiction to continue with the arbitration proceedings on account of the time limit provided in Clause 91 (b) of the General Conditions of Contract. It has been submitted that the notice of preliminary hearing was issued on 08.06.2017 and 2 year period mandated under the Contract expired on 07.06.2019 and therefore under Section 14(1)(a) of the Arbitration and Conciliation Act the arbitrator is unable to perform the functions.
5. It has further been submitted that no hearing took place between 09.04.2019 and 12.09.2023, on account of the Respondent's request for adjourning the arbitration *sine die* and the Respondent being under liquidation.
6. The petitioner has further submitted that on 06.06.2023 and 01.09.2023, a request was made on behalf of the Respondent to revive the arbitration and consequently a hearing was scheduled by the learned Arbitral Tribunal on 12.09.2023. During this hearing, the petitioner objected to the revival of the arbitration proceedings and also brought the terms of the contract to the notice of the learned Sole



Arbitrator. The objection as to jurisdiction was also taken.

7. The respondent filed an application for revival of the arbitration to which the objections were filed. However, the learned Arbitral Tribunal vide its order dated 04.01.2024 allowed the application and fixed the next date as 12.02.2024. The petitioner submitted that the learned Arbitral Tribunal allowed the application for revival on the basis of alleged waiver by the Petitioner.
8. It was further inter alia held by the learned Arbitrator that the objection by the petitioner was never raised for a period of 10 years even when none of the Arbitrators appointed prior to the present Sole Arbitrator have been appointed for a period of more than 2 years. It is pertinent to note that initially Ms. Monika Wadhani was appointed as an arbitrator on 15.07.2013. However, Ms. Monika Wadhani resigned on 14.01.2014. Thereafter, Mr. B. P. Singh was appointed as an Arbitrator to adjudicate the disputes between the parties. During this petitioner filed an application on 12.02.2015 under Section 16 of the Act challenging the jurisdiction of the Tribunal to decide certain claims which had either never been submitted to the Engineer or were pending determination before the Engineer. The said application under Section 16 was decided in favour of the Petitioner and the respondent was directed to file a revised statement of claim.
9. This order was challenged by the Respondent before the Delhi High Court and the court kept the directions to file a revised Statement of Claim ('SOC') in abeyance. While the matter rested thus on 31.03.2015, Mr. B. P. Singh resigned as an arbitrator. Subsequently, on 22.04.2015, Mr. R. P. Singh was appointed as an arbitrator.



10. This court on 09.05.2016 disposed of the petition by directing the Engineer to pass an order on the claims submitted by the Respondent to the Engineer within 4 weeks. However, the Ld. Arbitrator order dated 12.02.2015 was not set aside and thus, the Respondent was still required to file a revised Statement of Claim. Interestingly Mr. R. P. Singh also resigned as an arbitrator on 08.06.2016. Thereafter, Hon'ble Mr. Justice, Deepak Verma, retired judge of the Supreme Court was appointed as a Sole Arbitrator on 03.05.2017.
11. Learned Sole Arbitrator issued a notice of preliminary hearing on 08.06.2017. It has been submitted that till that time, none of the previous arbitrators had presided over the arbitration for a period of more than 2 years. It was submitted that as per law once the mandate of an arbitrator expires consequent to the withdrawal by an arbitrator, subsequent proceedings have to be treated as a fresh arbitration with the mandate of the arbitrator commencing de novo from the date he/she enters on reference.
12. The first hearing took place on 28.06.2017. However, the Respondent never filed any revised Statement of Claim in compliance with the order dated 12.02.2015 and thus the Petitioner was not required to file a Statement of Defence ('SOD'). During the preliminary hearing before the present learned Sole Arbitrator on 28.06.2017, the Respondent insisted on continuing with the SOC already on record. Before that, the Respondent never stated that it would not be filing a revised SOC. Pursuant to this on 29.09.2017, the Petitioner filed its Statement of Defence.
13. The petitioner submitted that on 08.03.2019, Corporate Insolvency



Resolution Proceedings were initiated and commenced against the Respondent. At that time, exactly 3 months were left in the expiry of the 2 year period from the date on which the Hon'ble Tribunal entered reference.

14. The respondent sent an email on 08.04.2019 seeking adjournment of the hearing scheduled for 16.04.2019. Learned Sole Arbitrator adjourned the proceedings *sine die* at the request of the Respondent and Petitioner was not given an opportunity to file a response to the said request. Meanwhile, on 27.05.2022, the NCLT directed that the Respondent be liquidated as a going concern.
15. The petitioner has submitted that the Respondent has been delaying the proceedings since the beginning for one reason or the other. The petitioner submitted that after a period of more than 4 years, on 06.06.2023, the Respondent wrote to the learned Sole Arbitrator for the revival of the arbitration proceedings which were reiterated on 01.09.2023.
16. Learned Sole Arbitral Tribunal vide its order dated 04.01.2024 inter alia held that since the dispute in the present matter arose in 2013 and the matter was referred to arbitration by this court on 04.07.2013 the Pre-Amendment Act being the law enforced at that time shall apply to the present arbitration proceedings.
17. Learned Sole Arbitrator after taking into account Clause 19(a) and Clause 19(b) of the Contract inter alia held that the conjoint reading of Clause 19(a) and Clause 19(b) of the Contract reveals that the mandate of the Arbitrator was to expire after the completion of two years from the date of entering upon the reference by the Arbitrator originally



appointed.

18. It was further inter alia held that as far as the proceedings before the arbitrator subsequently appointed are concerned, Clause 19(a) unambiguously states that the arbitrator subsequently appointed shall proceed with the reference from the point at which it was left by the predecessor.
19. Learned Sole Arbitrator finally concluded that the petitioner had failed to raise an objection regarding the jurisdiction of the present tribunal within the prescribed timeline, despite having ample opportunity and had voluntarily and knowingly participated in the arbitration proceedings across a span of eight years thereby, waiving its right to raise the said objection at this stage.

B. SUBMISSIONS OF PETITIONER

20. Mr. Raj Shekhar Rao, learned senior counsel for the petitioner submitted that Clause 19 of the MOA (Memorandum of Agreement) dated 14.07.2011 stipulates that the award shall be published by the arbitrator within two years after entering upon reference. It has been submitted that Clause 91(b) of the GCC provides that the award shall be in writing and published by the arbitrator within two years after entering upon the reference or within such extended time not exceeding further twelve months as the sole arbitrator shall be writing under his own hands appoint.
21. Learned senior counsel further submitted that in the present case notice of preliminary hearing was issued on 08.06.2017 and 2 years period mandated under the Contract expired on 07.06.2019. It has been submitted that therefore the learned Sole Arbitrator does not have



jurisdiction to continue with the arbitration proceedings on account of the time limit provided in 19 (b) of MOA or Clause 91(b) of the General Conditions of Contract.

22. Learned senior counsel submitted that in *Jayesh H. Pandya vs. Subhtex India Limited* (2020) 17 SCC 383 it was *inter alia* held that if the agreement specifies a time limit for passing an arbitral award (even under the unamended Act), the arbitrator is bound by such a provision.
23. Learned senior counsel also submitted that the Arbitral Tribunal is a creature of contract, and the provisions of the contract are binding on it. Learned counsel submits that if there is such a stipulation in the contract even courts cannot extend the mandate.
24. Learned senior counsel further submitted that in case any of the eventualities mentioned in Section 14(1)(a) of the Arbitration and Conciliation Act, 1996 when the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions the aggrieved party has to approach the court concerned as defined under Section 2(1)(e) of the 1996 Act. Learned senior counsel submits that thus this court has to adjudicate on whether, in fact, the sole arbitrator has become de jure and/or de facto unable to perform his functions.
25. It has been also submitted that the learned Sole Arbitrator misread and misconstrued the terms of Clause 19(a) and selectively quoted Contract clauses without quoting the entire provision.

C. SUBMISSIONS OF RESPONDENT

26. Learned counsel for the respondent submitted that the learned Arbitrator has passed a reasoned order on the correct interpretation of



arbitration Clause 19 and there is no infirmity and the present petition under Section 14 is liable to be rejected.

27. Learned counsel for the respondent submitted that the matter was adjourned *sine die* by the Order dated 09.04.2019 and the application seeking revival of the arbitration was filed by the Respondent on 26.09.2023. It has been submitted that the delay in filing the application was duly explained.
28. Learned counsel further submitted that the terms of Clause 19 (a) of the Contract show that the intention was to bind either the Director, Marketing or the employee of Petitioner who would have acted as the Sole Arbitrator. It has been submitted that the present Ld. Arbitrator, who is not an employee of the Petitioner, is therefore not bound by the terms of Clause 19 of the Contract. Learned counsel also submitted that in the Preliminary hearing procedural order dated 28.06.2017, the parties gave their consent that further procedure in the matter would be decided by the learned Sole Arbitrator. It has further been submitted that the parties had consciously with consent deviated from the terms of the Contract and now Petitioner cannot selectively choose to belatedly fall back upon the same terms to the prejudice of the Respondent/Claimant.
29. Learned counsel for the respondent submitted that the learned Sole Arbitrator has rightly held that the present proceeding is governed by the old Arbitration & Conciliation Act, 1996 which did not provide any timeline for the completion of arbitration proceedings or for passing of award by the Arbitral Tribunal.
30. Learned counsel submitted that the petitioner continued to participate



in the arbitration proceedings and by its conduct waived off the applicability of Clause 19 (b) of the Contract in terms of Section 4 of the Arbitration and Conciliation Act 1996.

31. Learned counsel for the respondent further submitted that If it is the case of the Petitioner the present Ld. Arbitrator should have passed the Award within two years from the date of his appointment i.e., 03.05.2017 as on 09.04.2019 i.e., when the matter was adjourned, at that stage the arbitration proceedings were at the stage of recording evidence; the cross-examination of RW-1 was scheduled to commence and by no stretch of imagination the recording of evidence and arguments in the matter would have been concluded between the period 09.04.2019 and 03.05.2019 for the present Ld. Arbitrator to pass the arbitral award before 03.05.2019. Despite the same, the Petitioner did not bring to the attention of the present Ld. Arbitrator or the Respondent that in terms of Clause 19 (b) of the Contract, the mandate of the present Hon'ble Tribunal was allegedly about to expire on 03.05.2019.
32. Learned counsel for the respondent also submitted that the above fact is also pertinent to be noted in the context of the Order dated 09.04.2019 passed by the present Ld. Arbitrator when parties were directed "*to inform the Tribunal as soon as it would be legally possible to hear the matter*". If it was legally not possible to proceed with the matter, the Petitioner ought to have informed the Ld. Tribunal. In the absence thereof, the Petitioner is deemed to have waived off its right to now belatedly object and is therefore estopped from doing so. Even the Respondent through its email dated 08.04.2019 had merely requested



for a simple adjournment in view of the initiation of CIRP against the Respondent Company.

33. Learned counsel submitted that the reliance placed by the petitioner upon **Jayesh H. Pandya vs Subhtex (India) Ltd., (Supra)** is misconceived as the facts in those cases were totally different. It was further submitted that the reliance placed on **N.B.C.C. Ltd. vs. J.G. Engineering Pvt. Ltd.** (2010) 2 SCC 385 is also not correct as the arbitrator therein had exceeded the time in passing the arbitral award provided to him by the Hon'ble High Court, as well as the time limit that was extended with the mutual consent of the parties, without assigning any reasons for the same.
34. Learned counsel further submitted that in the case of **India Media Services Pvt. Ltd. vs. SBPL Infrastructure Limited**, MANU/WB/1871/2023, the issue before the Hon'ble High Court of Calcutta, was the validity of an arbitral award that was passed after the alleged expiry of the time limit within which the award had to be passed by the Arbitral Tribunal, as was envisaged in the relevant contract clause therein. The Hon'ble Court in this case categorically noted that the arbitration proceedings pertained to the unamended/old Arbitration and Conciliation Act 1996 (pre-2015 amendment) which did not provide any time for making or publishing the Award. The Court relied upon the case of **Efcalon The-Up Private Limited vs Startrack Agency Pvt. Ltd.** in G.A No. 2524 of 2017 arising out of AP No. 595 of 2016, wherein it was held that when the arbitration proceedings had commenced prior to the coming into force of the amended Arbitration and Conciliation Act, 1996 (i.e., post-2015



amendment) the Arbitrator need not have to think about any time limit to conclude the reference. It is reiterated that the present arbitration proceedings had also commenced under the un-amended Arbitration and Conciliation Act 1996, and the same finds duly recorded in the Order dated 28.06.2017 passed by the present Ld. Arbitrator and agreed by the Petitioner. Therefore, the question of the time limit within which the award had to be published by the present Ld. Arbitrator does not arise in the present case.

35. Learned counsel further submitted that Sections 12, 13 and 14 of the Act are the trinity provisions constituting a composite statutory scheme dealing with the subject of the challenge to an arbitrator and termination of the mandate. The said sections evidently construct separate causeways for a challenge that may be laid. It is submitted that to invoke Section 14 of the Act, the objecting party has to show that the arbitrator has become de jure unable or de facto unable to perform his functions or for other reasons fails to act without undue delay. When an arbitrator is appointed contrary to Section 12(5) read with the Seventh Schedule of the Act, he becomes ineligible to perform his functions and the mandate of such an arbitrator can be terminated by the Court under Section 14 of the Act. However, this is not at all the case of the Petitioner herein.
36. Learned counsel further submitted that the present petition is liable to be rejected and this objection can only be taken in a petition under Section 34 of the Arbitration and Conciliation Act.
37. Learned counsel submitted that in the interest of the justice may consider extending the mandate of the Ld. Arbitrator under Section



29A of the Act.

D. FINDING AND ANALYSIS

38. The Arbitration Laws have been amended from time to time to consolidate the law relating to domestic arbitration, international commercial arbitration, enforcement of foreign arbitral awards and to define the law relating to conciliation, taking into account the model law and conciliation rules adopted by the United Nations Commission on International Trade Law.
39. The basic intention of the legislature behind these enactments is to strengthen the alternative dispute resolution system and to ensure that commercial matters are settled on the basis of the agreement between the parties in an expeditious manner. The purpose is to make the arbitral procedure fair, efficient and capable of meeting the needs of the specific arbitration. The legislature and the judgments of the Constitutional Courts from time to time have also emphasised upon minimizing the supervisory role of courts in the arbitral process.
40. The arbitration agreement in Section 2(b) has been defined to mean an agreement referred to in Section 7. Section 7 of the Arbitration Agreement provides as under:

Arbitration Agreement__ (1)In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.



(4) *An arbitration agreement is in writing if it is contained in— _*

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegrams or other means of telecommunication 1[including communication through electronic means] which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

41. Thus the arbitrator is a creature of an agreement as entered into between the parties as defined under Section 7 of the Arbitration and Conciliation Act.
42. Section 8 of the Arbitration and Conciliation Act also makes it clear that if there is an arbitration agreement between the parties the judicial authority subject to the conditions mentioned therein shall refer the parties to arbitration. The court's judicial authority can refuse to refer to the arbitration unless it finds that *prima facie* no valid arbitration agreement exists.
43. Section 11 of the Arbitration and Conciliation Act provides a detailed procedure for the appointment of an arbitrator. The cumulative reading of the provisions in the Arbitration and Conciliation Act makes it clear that the arbitrator is a creature of an agreement between the parties and therefore the stipulations contained in the agreement shall always remain paramount and binding upon the parties. The only exception is



as contained in Section 4 of the Arbitration and Conciliation Act, 1996 which reads as under:

Waiver of right to object A party who knows that— _

(a) any provision of this Part from which the parties may derogate, or

(b) any requirement under the arbitration agreement,

has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to so object.

44. However, for such a waiver, it is a settled proposition that it must be a voluntary and intentional relinquishment of a right. This would also be based on the facts and circumstances of each case. Thus in order to infer the waiver on the part of a party to the agreement there has to be strong grounds that there was a voluntary and intentional relinquishment of a right.

45. Before proceeding further it is necessary to go through the relevant clauses of the MOA dated 14.07.2011 and Clause 91(b) of the GCC. Clause 19(a) of the MOA is as under”

“19. (a) Any dispute or difference of any nature whatsoever any claim, gross-claim, or set off the Corporation against the Contractor or regarding any right, liability, act, omission or account of any of the parties hereto arising out of or in relation to this agreement shall be referred to the Sole Arbitration of the Director (Marketing) of the Corporation or to an Officer of the Corporation who may be nominated by the Director (Marketing). The Contractor will not be entitled to raise any objection to any such arbitrator on the ground that the arbitrator is an Officer of the Corporation or that he has dealt with the matters to



which the contract relates or that in the course of his duties as an Officer of the Corporation he had expressed views on all or any other matters in dispute or difference. In the event of arbitrator to whom the matter is originally referred being transferred or vacating his office for being unable to act for any reason, the Director (Marketing) as aforesaid at the time to such transfer, vacation of office or Inability to act may in the discretion of the Director (Marketing) designate another person to act as arbitrator in accordance with the terms of the agreement to the end and intent that the original Arbitrator shall be entitled to continue the arbitration proceedings notwithstanding his transfer or vacation of office as an Officer of the Corporation If the Director (Marketing) does not designate another person to act as arbitrator on such transfer, vacation of office or inability of original arbitrator. Such persons shall be entitled to proceed with the reference from the point at which it was left by his predecessor. It is also a term of this contract that no person other than the Director (Marketing) or a person nominated by such Director (Marketing) of the Corporation as aforesaid shall act as arbitrator hereunder. The award of the arbitrator so appointed shall be final conclusive and binding on all parties to the agreement subject to the provisions of the Arbitration Act 1940 or any statutory modification or re-enactment thereof and the rules made thereunder for the time being in force shall apply to the arbitration proceeding under this clause.

Clause 91(b) of the GCC provides as under:

“91 (b). The award shall be made in writing and published by the Arbitrator within two years after entering upon the reference or within such extended time not exceeding further twelve months as the Sole Arbitrator shall by a writing under his own hands appoint. The parties hereto shall be deemed to have irrevocably given their consent to the Arbitrator to make and publish the award within the period referred to herein above and shall not be entitled to raise any objection or protest thereto under any



circumstances whatsoever.”

46. The basic contention of the learned counsel for the petitioner is that Clause 91(b) provides unambiguously that the award shall be made in writing and published by the Arbitrator within two years after entering upon the reference. The only window available is an extension for a further twelve months. Further, Clause 91(b) further provides that the consent for the further period of a further twelve months shall be deemed to have irrevocable been given by the parties.
47. In ***Jayesh H. Pandya vs. Subhtex India Limited*** (supra) it was inter alia held as under:

“16. It is clear from the bare reading of sub-section (1)(a) of Section 14 that mandate of an arbitrator shall terminate if it fails to act without undue delay. In the present case, the first preliminary meeting was held on 4-5-2007 and the arbitrator in terms of the agreement was supposed to conclude and pass the award within a period of four months which undisputedly stood expired on 4-9-2007 and in the meantime the appellants recorded their objection of not consenting for extension of time beyond 4-9-2007 and thus, it can be construed that parties were not in agreement for extension to the mandate of the arbitrator failing which the arbitral proceedings automatically stood terminated.

17. Sub-section (2) of Section 14 clearly stipulates that if a controversy remains concerning any of the grounds referred to in clause (a) of sub-section (1), the party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate and the appellants rightly applied to the Court for termination of the mandate of the arbitrator pursuant to the provisions of this section and the Court was within its jurisdiction to decide accordingly.



18. It is true that the object of the scheme of the 1996 Act is to secure expeditious resolution of disputes and it is based on the fulcrum of promptitude but at the same time the arbitrator is required to adjudicate the disputes in view of the agreed terms of contract and the procedure. Therefore, the arbitration proceedings are supposed to be governed and run by the terms as agreed by the parties. The arbitrator, therefore, cannot go beyond the clause of the arbitration agreement. We all need to respect the legislative intent underlying the Act. The speedy and alternative resolution to the dispute thus cannot be overlooked but at the same time, proceedings have to be governed and run by the terms agreed between the parties in concluding the arbitral proceedings failing which it will frustrate the mandate of the object of the Act with which it has been legislated by Parliament to act upon on agreed terms and conditions of the agreement in concluding the arbitral proceedings. The exposition of law has been considered by this Court in NBCC Ltd. cases in paras 12 and 22 as under: (SCC pp. 391 & 393)

"12. A perusal of the arbitration agreement quite clearly reveals that the arbitrator has the power to enlarge the time to make and publish the award by mutual consent of the parties. Therefore, it is obvious that the arbitrator has no power to further extend the time beyond that which is fixed without the consent of both the parties to the dispute. It is an admitted position that the respondent did not give any consent for extension of time of the arbitrator. Thus given the situation, the arbitrator had no power to further enlarge the time to make and publish the award and therefore his mandate had automatically terminated after the expiry of the time fixed by the parties to conclude the proceedings. *

22. Taking into consideration the arguments of the appellant, it is necessary to mention here that the Court does not have any power to extend the time under the Act unlike Section 28 of the 1940 Act which had such a



provision. The Court has therefore been denuded of the power to enlarge time for making and publishing an award. It is true that apparently there is no provision under the Act for the Court to fix a time-limit for the conclusion of an arbitration proceeding, but the Court can opt to do so in the exercise of its inherent power on the application of either party. Where however the arbitration agreement itself provides the procedure for enlargement of time and the parties have taken recourse to it, and consented to the enlargement of time by the arbitrator, the Court cannot exercise its inherent power in extending the time fixed by the parties in the absence of the consent of either of them."

19. In the instant case, from the pleadings on record and noticed by the High Court in its impugned judgment dated 14-3-2008, the proceedings stood terminated as the appellants have not recorded their consent for extension of time which was the requirement and essence of the conditions of the agreement and the arbitrator became de jure unable to perform his functions after the expiry of four months from the date of first preliminary meeting held on 4-5-2007 but that was declined by the High Court on the premise that after the appellants have participated in the arbitral proceedings, that waived their right to question extension of time as it was impracticable for the arbitrator to conclude the proceedings within a period of four months and the High Court was of the view that the Act has been legislated with an object to facilitate an efficacious recourse to arbitration failing which it will be in grave peril.

20. 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. That apart, the doctrine of "waiver" or "deemed waiver" or "estoppel" is always based on facts and circumstances of



each case, conduct of the parties in each case and as per the agreement entered into between the parties and this exposition has been affirmed by this Court in NBCC Ltd. regarding adherence to the imposition of time-limit for the conclusion of the arbitral proceedings. The parties have to stand by the terms of contract including the arbitrator.

21. The clause so referred indicates that the parties have admittedly agreed and the time period so prescribed is final and binding. It means the arbitration proceedings should commence and end within the prescribed period of time which in the instant case was of four months and expired on 4-9-2007 and, there was no occasion for either party to raise an objection as long as the time was available at the command of the arbitrator to conclude the arbitral proceedings and pass an award within the time schedule fixed under the terms of contract as agreed by the parties.

22. That apart, there is no provision under the arbitration agreement to condone the delay when agreement between the parties binds them to see that the arbitration proceedings should be concluded within the time prescribed. This time restriction is well within the scope and purport of the 1996 Act at national and international arbitrations.

23. The time fixed for the arbitration and/or schedule of time-limit in such arbitration proceedings, as it is recognised by law, there is no reason not to accept the same, basically in the present facts and circumstances where the parties themselves agreed to bind themselves by the time-limit. Section 14 read with Section 15 of the 1996 Act also recognise this mechanism and after the expiry of four months' period from the date of first preliminary meeting held on 4-5-2007, the arbitrator indeed became de jure unable to perform his functions and the mandate to act as an arbitrator in the arbitral proceedings between the parties as prayed for stood terminated."



48. Even at the cost of repetition, certain dates are important.

S. No.	Date	Event
1	15.07.2013	Ms. Monica Widhani appointed as an arbitrator.
2	14.01.2014	Ms. Monica Widhani resigned as an arbitrator.
3	06.01.2014	Mr. B.P. Singh was appointed as an Arbitrator
4	31.03.2015	Mr. B.P. Singh resigned as an arbitrator
5	22.04.2015	Mr. R.P. Singh was appointed as an arbitrator
6	08.06.2016	Mr. R.P. Singh resigned as an arbitrator
7	03.05.2017	HMJ Deepak Verma, retired judge of the Supreme Court was appointed as an arbitrator.
8	08.06.2017	Notice of preliminary hearing was issued by the present sole arbitrator
9	28.06.2017	The first hearing took place
10	29.09.2017	Petitioner filed its Statement of Defence
11	03.01.2019	Last effective hearing.
12	08.03.2019	Corporate Insolvency Resolution Proceedings were initiated and commenced against the respondent. Therefore the Moratorium came into effect.
13	09.04.2019	Proceedings in the arbitration were adjourned <i>sine die</i> .



14	27.05.2022	NCLT directed that the Respondent be liquidated as a going concern.
15	06.06.2023	Respondent requested the learned Sole Arbitrator for revival of the Arbitration Proceedings.
16	01.09.2023	Respondent reiterated the request for revival of the arbitration proceedings.
17	12.09.2023	First hearing after adjourning the arbitration <i>sine die</i> on 19.04.2023.

49. After adjourning the arbitration on *sine die* on 09.04.2019 the petitioner objected to the revival of the arbitration proceedings. On 04.01.2024 learned Sole Arbitrator allowed the respondent's request for revival of the arbitration proceedings.
50. The conjoint reading of Clause 91(a) of MOA and Clause 91(b) of the GCC makes it clear that it was agreed upon between the parties that the award shall be made in writing and published by the Arbitrator within two years after entering upon the reference which was further extendable to 12 months.
51. It is a matter of record that none of the previous arbitrators completed two years. In these circumstances, there were no possibility for the petitioner to have raised the objection for termination of the proceedings. In respect to the non-maintainability of the present petition, In ***Swadesh Kumar Agarwal v. Dinesh Kumar Agarwal & Ors, etc., etc.*** 2022 10 SCC 235 which inter alia held as under:



21. Therefore, on a conjoint reading of Sections 13, 14 and 15 of the Act, if the challenge to the arbitrator is made on any of the grounds mentioned in Section 12 of the Act, the party aggrieved has to submit an appropriate application before the Arbitral Tribunal itself. However, in case of any of the eventualities mentioned in Section 14(1)(a) of the 1996 Act and the mandate of the arbitrator is sought to be terminated on the ground that the sole arbitrator has become de jure and/or de facto unable to perform his functions or for other reasons fails to act without undue delay, the aggrieved party has to approach the “court” concerned as defined under Section 2(1)(e) of the 1996 Act. The court concerned has to adjudicate on whether, in fact, the sole arbitrator/arbitrators has/have become de jure and de facto unable to perform his/their functions or for other reasons he fails to act without undue delay. The reason why such a dispute is to be raised before the court is that eventualities mentioned in Section 14(1)(a) can be said to be a disqualification of the sole arbitrator and therefore, such a dispute/controversy will have to be adjudicated before the court concerned as provided under Section 14(2) of the 1996 Act.

22. So far as the termination of the mandate of the arbitrator and/or termination of the proceedings mentioned in other provisions like in Section 15(1)(a) where he withdraws from office for any reason; or (b) by or pursuant to an agreement of the parties, the dispute need not be raised before the court concerned. For example, where the sole arbitrator himself withdraws from office for any reason or when both the parties agree to terminate the mandate of the arbitrator and for substitution of the arbitrator, thereafter, there is no further controversy as either the sole arbitrator himself has withdrawn from office and/or the



parties themselves have agreed to terminate the mandate of the arbitrator and to substitute the arbitrator. Thus, there is no question of raising such a dispute before the court. Therefore, the legislation has deliberately provided that the dispute with respect to the termination of the mandate of the arbitrator under Section 14(1)(a) alone will have to be raised before the “court”. Hence, whenever there is a dispute and/or controversy that the mandate of the arbitrator is to be terminated on the grounds mentioned in Section 14(1)(a), such a controversy/dispute has to be raised before the “court” concerned only and after the decision by the “court” concerned as defined under Section 2(1)(e) of the 1996 Act and ultimately it is held that the mandate of the arbitrator is terminated, thereafter, the arbitrator is to be substituted accordingly, that too, according to the rules that were applicable to the initial appointment of the arbitrator. Therefore, normally and generally, the same procedure is required to be followed which was followed at the time of appointment of the sole arbitrator whose mandate is terminated and/or who is replaced.

52. The present learned Sole Arbitrator entered into reference on 03.05.2017 which was continued till 03.05.2019. Even if we exclude the period from 08.03.2019 to 27.05.2022 (the period of moratorium) the learned Sole Arbitrator as per the agreement could have de jure held the proceedings till 27.08.2022 and thereafter, if further extended period of twelve months is taken into account the mandate was only upto 27.08.2023.
53. In terms of the stipulation of the award the learned Arbitrator was supposed to conclude and pass the award within the period prescribed



in the agreement. The contention of the learned counsel for the respondent that the petitioner could not have taken this matter under Section 14(1)(a) is also not sustainable in the eyes of the law, in view of the findings in *Swadesh Kumar Aggarwal (Supra)* Section 14(1)(a) specifically confers the jurisdiction upon the court to terminate the mandate of an arbitrator if he becomes de jure and/or de facto unable to perform his function.

54. It is not disputed that the present court falls within the definition of “Court” as defined in Section 2(1)(e) of the Arbitration and Conciliation Act. It cannot be forgotten that the purpose and object of the act is to secure expeditious resolution of disputes. The learned Arbitrator under the Act is required to adjudicate the dispute in view of the agreed terms of the contract. The parties are bound to be governed by the same. The waiver as defined under Section 4 can only be resorted to if it is a voluntary and intentional relinquishment.
55. Without advertent to the order passed by the learned Sole Arbitrator dated 04.01.2024. This court is of the considered view that in view of the Clause 91(a) of the MOA and Clause 91(b) of GCC the mandate of the learned Sole Arbitrator stands expired. Hence the present petition is allowed.
- i) The disputes between the parties under the said agreement are referred to the arbitral tribunal.
 - ii) Justice Anil R. Dave, former Judge, of Hon’ble Supreme Court of India is substituted as the Sole Arbitrator. Learned Sole Arbitrator shall conduct the proceedings in accordance with the terms of the agreement between the parties.



- iii) The remuneration of the learned Arbitrator shall be in terms of fee rules of the DIAC Schedule or as the parties may agree.
 - iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - v) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - vi) The parties shall approach the learned arbitrator within two weeks from today.
56. In view of the above, the present petition along with pending application stands disposed of.

DINESH KUMAR SHARMA, J

MARCH 13, 2024/AR/AK