Bombay High Court
M/S Hindustan Wires Limited vs Mr. R. Suresh on 4 April, 2013
Bench: R.D. Dhanuka

acd

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 56 OF 2013

M/s Hindustan Wires Limited] ..Petitioner.

Vs.

1) Mr. R. Suresh, Sole Arbitrator,]
Dy. General Manager (TS-OEM),]
Indian Oil Corporation Ltd., 9]

Ali Yavur Jung Marg, Bandra (East)]
Mumbai-400 051. ig]

2) M/s Indian Oil Corporation Ltd.]
through Director (Marketing), 9]

Ali Yavur Jung Marg, Bandra (East)]
Mumbai-400 051.] ..Respondents.

Mr. D.H. Mehta with Mr. Ram U. Singh, for Petitioner.
Mr. Virag Tulzapurkar, Sr. Counsel a/w Ms. Jyoti Sinha

i/b Negandhi shah & Himayatullha, for Respondent No.2.

CORAM : R.D. DHANUKA, J.

JUDGMENT RESERVED ON:
12th MARCH, 2013.
PRONOUNCED ON: APRIL 04, 2013

JUDGMENT :

1. By this petition filed under section 14 of the Arbitration and Conciliation Act, 1996 (for short 'Arbitration Act 1996), the petitioner seeks 1 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 2 arbp.56-2013 declaration that the mandate of the learned Arbitrator, respondent no.1 herein stood terminated under section 14 of the Arbitration Act 1996, and the petitioner is entitled to approach the Micro and Small Scale Scale Enterprises Facilitation Council constituted under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'the Act of 2006) and the said Council is entitled in law to adjudicate the disputes between the parties.

2. The relevant facts for the purposes of deciding this petition are as under:

(a) On 12.4.1999 and 4.5.2000, two separate contracts were entered into between the petitioner and the 2 nd respondent for supply of LPG cylinders by the petitioner to the 2nd respondent for year 1999-2000 and 2000-2001. It is case of the petitioner that the 2nd respondent illegally and wrongly withheld/deducted the various amounts due and payable to the petitioner.

(b) By letter dated 31.10.2000, the respondent no.2 decided to revise the basic price of 14.2 kg. Cylinder to Rs.645/- with effect from 1.7.1999. By letter dated 3.11.2000, the respondent no.2 sent a circular stating that the differential amount towards revised price in previous basic price per cylinder at Rs.645/- with effect from 1.7.1999 would be recovered from future bills submitted by the petitioner subject to final adjustment upon finalization of the cylinder prices.

(c) Petitioner filed a petition under section 9 of the Arbitration Act

1996 in this Court seeking injunction against the 2 nd respondent from initiating recoveries pursuant to the letters/circulars dated 31.10.2000 and 3.11.2000. This court by an order dated 2.4.2001 dismissed the said petitions. By an order dated 11.6.2002, the Division Bench of this court dismissed the appeal filed by the petitioner.

(d) By letter dated 21.1.2003, the petitioner called upon the respondent no.2 to appoint an independent impartial Arbitrator including retired judge. On 10.4.2003, the petitioner filed arbitration application bearing no.156 of 2003 under section 11(6) of the Arbitration Act 1996 for appointment of the Arbitrator.

During the pendency of the said application, the respondent no.2 appointed Mr. A.M. Jagdale, Dy. General Manager (Cons.Sales) of the respondent no.2 as sole arbitrator. By an order dated 17.9.2003, the arbitration application filed by the petitioner came to be dismissed. Appeal filed by the petitioner against the said order dated 17.9.2003 was also dismissed.

(e) By letter dated 22.6.2003, Mr. A.M. Jagdale, the learned arbitrator appointed by the respondent no.2 accepted his nomination to arbitrate the disputes between the petitioner and the respondent no.2. On 9.1.2004, the petitioner filed an application under section 12 of the Arbitration Act 1996 challenging the appointment of the learned arbitrator. The respondent no.2 filed their reply to the said application on 2.3.2004. The petitioner filed written arguments before the learned arbitrator. By an order dated 18.6.2004, the learned 3 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 4 arbp.56-2013 arbitrator rejected the said application filed by the petitioner on 9.1.2004.

(f) On 28.7.2004, the petitioner filed statement of claim before the learned arbitrator. On 27.1.2005, the 2nd respondent filed written statement. On 25.2.2005, the petitioner filed its rejoinder before learned arbitrator.

(g) On 25.2.2005, the petitioner filed application under section 18 and 24 of the Arbitration 1996 for discovery and inspection. By an order dated 26.8.2005, the learned arbitrator rejected the said application and directed submission of affidavit in lieu of oral examination.

(h) There were several arbitration proceedings pending before the learned arbitrator Mr. A.M. Jagdale filed by various such suppliers against the respondent no.2 herein which were represented by the same Advocate. On 29.11.2005, the learned arbitrator Mr. A.M. Jagdale made and declared award in respect of 11 matters. No award could be made in respect of this matter. On 30.11.2005,

Mr. A. M. Jagdale retired.

(i) By letter dated 23.1.2007, the 2 nd respondent proposed to appoint Mr. C.P. Joshi as sole arbitrator. The petitioner objected to the said appointment by letter dated 31.1.2007. By letter dated 29.11.2007, the respondent no.2 appointed Mr. A.C. Das, Dy. General Manager (M & I) as sole arbitrator. By letter dated 10.1.2008, the learned arbitrator Mr. A.C. Das fixed a hearing on 28.1.2008.

(j) The petitioner by letter dated 27.1.2008 objected to the appointment of Mr. A.C. Das alleging that the respondent no.2 had forfeited its right to appoint another arbitrator in terms of clause 22(g) of the terms and conditions of the contract. On 8.2.2008, the petitioner filed an application under sections 13,14 and 16 of the Arbitration Act 1996 before the learned arbitrator.

(k) It is case of the petitioner that on 8.2.2008, the petitioner was registered as Micro Enterprise under the provisions of the Act of 2006. The said Act came into effect on 2.10.2006.

(l) By letter dated 12.3.2008, the Director (Marketing) of the respondent no.2 appointed Mr. R. Suresh, Dy. General Manager, the respondent no.2 as sole arbitrator in view of superannuation of Mr. A.C. Das. The respondent no.1 accepted this appointment as arbitrator on 14.5.2008.

(m) On 31.5.2008, the petitioner filed an application under section 13 and 14 read with section 16 of the Arbitration Act 1996 before the learned arbitrator contending that the respondent no.1 could not be appointed as arbitrator as time period of appointment had already expired.

(n) On 28.8.2009, the petitioner addressed a letter to the learned arbitrator stating that there was no progress in the matter though six years had expired and thus he shall direct the appointing authority to appoint retired judge of this court or supreme court as an arbitrator so as to expedite the proceedings.

(o) By letter dated 10.3.2011, the respondent no.1 fixed hearing on

26.3.2011. It is case of the petitioner that the learned arbitrator was once again requested to dispose of the application under section 13 and 14 read with section 16 filed by the petitioner which was pending before him.

(p) By letter dated 24.8.2012, the petitioner raised a plea that the mandate of the learned arbitrator had ceased and that he had become functus officio. It was stated that as the petitioner was registered under the provisions of the said Act of 2006, the petitioner would approach the Council appointed under the said Act which alone would have jurisdiction to adjudicate upon the disputes between the petitioner and the respondent no.2, petitioner being small scale enterprise. It is not in dispute that the petitioner has so far not made any application under the provisions of the said Act.

(q) On 10.9.2012, the petitioner filed this petition under section 14 read with section 11 of the Arbitration and Conciliation Act 1996.

3. Mr. Mehta, learned Counsel appearing on behalf of the petitioner placed reliance upon the clause 22(g) of the purchase order which provides for time to make an award by the learned arbitrator. The said clause 22(g) is extracted as under:

> "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 a further one year as the parties shall by writing agree. The parties here to shall be deemed have irrevocably given their consent to the Arbitrator to make and publish the award within the period referred to hereinabove and shall not be entitled to raise any objection or protest thereto under any circumstances whatsoever."

4. Mr. Mehta, leaned Counsel for the petitioner placed reliance upon the section 24 of the said Act of 2006 in support of his plea that the provisions of the said Act would have overriding effect over the Arbitration Act 1996. Section 24 of the said Act of 2006 reads thus:

"Overriding effect- the provisions of sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."

5. Learned Counsel for the petitioner submits that under clause 22(g) of the contract, it was mandatory on the part of the learned arbitrator to make an award in writing and to publish within two years after entering upon the reference or within such extended time not exceeding a further period of one year as the parties shall by writing agree. Learned Counsel submits that 3 years period has already expired from the date of initial appointment of the learned arbitrator by the 2nd respondent. It is submitted that the first arbitrator was appointed by the respondent no.2 on 10.6.2003 who had accepted his appointment by letter dated 25.6.2003. It is submitted that even three years period expired from the appointment of last arbitrator on 10.3.2008. It is submitted that the period of making an award mentioned in clause 22(g) of the Contract is mandatory. It is submitted that after the expiry of two years of the arbitrator entering upon the reference, extension could not and cannot be granted beyond further period of one year and that also only if both parties agree for grant of such extension in writing. It is submitted that the petitioner did not agree 7 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 8 arbp.56-2013 to grant any extension even of one year. It is submitted that the learned arbitrator become de jure or defacto unable to perform his function and failed to act without undue delay. It is submitted that in view of such situation, under section 14(1) of the Arbitration Act 1996, it is mandatory that the mandate of such an arbitrator shall terminate. Learned Counsel submits that in view of the termination of such mandate, the petitioner is entitled to apply for appointment of the arbitrator under the provisions of the said Act of 2006 by making an application to the Council appointed under the said Act, petitioner being Micro Enterprise. Section 14 of the Arbitration And Conciliation Act, 1996 reads thus:

"Failure or impossibility to act.

(1) The, mandate of an arbitrator shall terminate if-

(a) he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and

(b) he withdraws from his office or the parties agree to the termination of his mandate.

> (2) If a controversy remains concerning any of the grounds referred to in clause (a) of sub- section (1), a party may, unless otherwise agreed by the parties, apply to the Court to decide on the termination of the mandate. (3) If, under this section or sub- section (3) of section 1. 3, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, it shall not imply acceptance of the validity of any ground referred to in this section or sub- section (3) of section 12."

6. Mr. Mehta, learned Counsel placed reliance upon the judgment of the Supreme Court in the case of N.B.C.C.Ltd Vs. J.G. Engineering Pvt. Ltd.

[(2010) 2 SCC 385] dated 5.1.2010. Para 10 to 17 and 22 to 24 and 27 which read thus:

> "10. From the records before us, we have noticed that in spite of conducting a number of proceedings, the arbitrator was unable to 8 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 9 arbp.56-2013 conclude the proceedings within the time fixed by the High Court.

The arbitration clause in the contract enables the arbitrator to extend the time for making and publishing the award by mutual consent of the parties. From a perusal of the documents before us, we notice that the parties mutually agreed to extend the time till 31.8.2005 for making and publishing the award, which was further extended by the parties till 30.9.2005 on account of the arbitrator having failed to conclude the proceedings within the previous date fixed by the parties. But the arbitrator having failed to do so by 30-

9-2005, the respondent moved the High Court to terminate the mandate of the arbitrator on account of his failure to publish the award within the time fixed by the parties. We are of the opinion that the High Court was perfectly justified in doing so on an application filed by the respondent before it.

11.Quite interestingly, it has come to our notice that the arbitrator in question had appeared before the High Court and submitted that the award was ready but the same could not be published on account of the interim order passed by the same restraining him from publishing it. There was, however, no order of the Court restraining the arbitrator from publishing the award till almost three months after the expiry of the time fixed by the mutual consent of the parties to make and publish the award prior to the interim order passed by the High Court.

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.

13. The learned counsel contended that the arbitration proceedings involved questions of highly technical and complex issues which would required sufficient amount of time to be decided in a just and proper way. However, the records clearly illustrate that even after a passage of over nine years, the matter which was to be decided between the parties by way of arbitration, could not be 9 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 10 arbp.56-2013 resolved and the process lingered on.

14. Arbitration is an efficacious and alternative way of dispute resolution between the parties. There is no denying the fact that the method of arbitration has evolved over the period of time to help the parties to speedily resolve their disputes through this process and in fact the Act recognise this aspect and has elaborate provisions to cater to the needs of speedy disposal of disputes. The present case illustrates that in spite of adopting this efficacious way of resolving the disputes between the parties through the arbitration process, there was no outcome and the arbitration process had lingered on for a considerable length of time which defeats the notion of the whole process of resolving the disputes through arbitration. The contention of the appellant therefore cannot be justified that since the dispute was highly technical in nature, it had to be dealt with elaborately by the arbitrator and thus, he was justified in being late. The High Court had thus correctly fixed the time for the arbitration to be concluded within a period of six months from the appointment of the fourth arbitrator Shri A.K.

Gupta considering the time that had been spent for the arbitration process prior to Mr. Gupta's appointment.

15. That apart, even assuming that the arbitration process involved highly technical and complex issues, which were time consuming, even then, it was then for the arbitrator or for the parties to approach the Court for extension of time to conclude the arbitration proceedings which was not done either by the arbitrator or by any of the parties.

16. As had been correctly noted by the High Court in its impugned judgment, there was no cogent reason for the delay in making and publishing the award by the arbitrator. He already had the relevant materials at his disposal and could base his findings on the observations made by three arbitrator who were appointed prior to him. The arbitrator was bound to make and publish his award, within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time. Therefore, the condition precedent for enlargement of time would depend only on the consent of the parties, that is to say, that if the parties agree for enlargement of time. If consent is not given by the parties, then the authority of the arbitrator would automatically cease to exist after the expiry of the time limit fixed. In the present case, the arbitrator had failed to publish the award within the time limit fixed by the 10 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 11 arbp.56-2013 parties, and hence, the High court was justified in terminating the mandate of the arbitrator. We therefore do not find any fault with the impugned order of the High Court in this regard.

17. From a perusal of the records, we can see that the respondent had filed an application to terminate the mandate of the arbitrator before the High Court almost after three months from the date of expiry of the time to publish the award through the appellant did not choose to file any application for enlargement of time for conclusion of the arbitration proceeding. It is obvious that the respondent could not have possibly known about the outcome of the award. Even after the expiry of the time as mentioned above, 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 the part of both the arbitrator and the appellant who were well aware that the mandate of the arbitrator had already expired and it could only extended by a mutual consent of the parties according to the arbitration agreement. It has been correctly observed by the High Court that the arbitrator had become functus officio in the absence of extension of time beyond 30.9.2005 to make and publish the award. After the said date, arbitrator had no authority to continue with the arbitration 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.

23. The counsel for the appellant further contended that the High Court could not have terminated the mandate of the arbitrator on the ground that the award was passed beyond the time limit fixed by it. It is clear from an apparent perusal of the judgment of the 11 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 12 arbp.56-2013 High Court and the records before us that the High Court had not terminated the mandate of the arbitrator on the ground that the arbitrator could not pass the award within the time fixed by it vide its order dated 20th of September, 2004. In fact, the arbitrator had continued to proceed with the arbitration procedure after the time fixed by the Court had expired on account of the mutual consent of the parties to extend the time limit. Such an action was clearly warranted under the arbitration agreement in force between the parties. On the contrary, the arbitrator had ceased to have any authority only after the time limit fixed by the parties had expired and the respondent did not give consent to the extension of the time for publishing the award. Thus, such a contention of the appellant cannot be accepted. The High Court had merely asserted this fact that the mandate of the arbitrator had automatically expired after t he time fixed by the parties to the effect that it had lapsed.

24. The Appellant further argued that the High Court had failed to appreciate that the parties had undergone the process of arbitration for a long time and it was not wise to terminate the mandate of the arbitrator when the award was ready and fit to be published, considering the fact that a huge

sum of money had been spent during the proceedings. Therefore, the High Court should not have ordered the appointment of a new arbitrator. It is to be noted that the High Court in its impugned judgment had ordered Shri A.K. Gupta to hand over the relevant materials relating to the proceedings to the newly appointed arbitrator. Thus, such an action would inherently make it clear for the newly appointed arbitrator to conduct the proceedings and it is not required from him to start the proceedings from scratch all over again. Further, if the award was ready as had been contended by the appellant, it is baffling that even after three months from the expiry of the period fixed by the parties for publication of the award, the arbitrator had not come out with the award or had notified the respondent that the award was ready. It was only when the High Court restrained the arbitrator from coming out with any award in the dispute that the arbitrator submitted before the Court that the award was ready to be published. At the risk of repetition, we may once again note, that the Court has no inherent power to enlarge the time for publication of the award once it has not been extended by the parties to that effect.

27. With reference to the contention made by the appellant that the 12 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 13 arbp.56-2013 arbitrator having concluded the proceedings couldn't be said to have failed to act so as to attract the provisions of Section 14 of the Act, which will call for termination of the arbitration proceeding. It is pertinent to mention here that the arbitrator had not concluded the proceedings as had been agreed to by the parties within the time fixed for doing so. The mandate of the arbitrator was terminated only because of the fact that the arbitrator having failed to conclude his proceedings within time did not warrant to be continued as an arbitrator in the absence of the consent of both the parties. It is clear from a bare reading of Sub-section 1(a) of Section 14 of the Act, the mandate of an arbitrator shall terminate if he fails to act without undue delay. "

7. Mr. Mehta, learned Counsel placed reliance upon the judgment delivered by the learned Single Judge of this court in case of Teltech Instrumentation Pvt. Ltd. Vs. Bharat Petroleum Corporation Limited [(2012) (4) Mah. L.J. 355] and reliance placed on para-9, 11 to 17 which read thus:

> "9 It is relevant to note Clause 21 (a) and (b) of the terms and conditions, which reads as under:
>
> "21(a) Any dispute or difference of any nature whatsoever any claim, crossclaim, counterclaim or set off of 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 of some 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 disputes or difference.

In the event of the arbitrator to whom the matter is originally referred being transferred or vacating his office 13 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 14 arbp.56-2013 he shall be entitled to continue the arbitration proceedings notwithstanding his transfer or vacating his office unless the Director (Marketing) at the time of such transfer, vacation of office or any time thereafter designates another person to act as arbitrator in his place in accordance with the terms of the agreement.

In the event of the arbitrator to whom the matter is originally referred, vacating his office or being unable or refusing to act for any reason the Director (Marketing) at the time of vacation of office or inability or refusal to act shall designate another person to act as an arbitrator in accordance with the terms of the said agreement.

The arbitrator newly appointed 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 provision of the Arbitrator 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 arbitrator proceedings under this clause.

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."

11 The learned counsel appearing for the Respondents has strongly relied on the Judgment of this Court Jayesh H. Pandya & Anr. Vs. Subhtex India Limited & Ors. whereby referring to Sections 4,11,14 and 16 it is observed as under:

"Parties to an arbitration agreement are entitled to stipulate the time within which an arbitral award is to be rendered. In the present case, the time which was 14 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 15 arbp.56-2013 prescribed was four months. In such a case, however, where a party intends to assert a rigid adherence to the time prescribed by the arbitration agreement, it must at the earliest opportunity make its intention known to ensure compliance with a rigid standard as to time."

"The petitioners stood by and allowed the Arbitrator to fix a time schedule for the filing of pleadings. If they had a serious intent of not allowing the proceedings to continue beyond the period of four months, it was the duty of the petitioners to inform the Arbitrator at the earliest when the time schedule was fixed by the Arbitral Tribunal. Counsel appearing on behalf of the petitioners, in fact, fairly stated before the Learned Arbitrator on 27th August, 2007 that the contention which was

sought to be taken up ought to have been urged on 4th May, 2007, but at that stage he had not read his papers. The petitioners' Advocate unfortunately sought to controvert the correctness of what was recorded by the Learned Arbitrator in his order dated 27th August, 2007. The Arbitrator, as the record would show, was constrained to set the record straight by a communication dated 27th September, 2007. The Learned Arbitrator is justified in coming to the conclusion that the petitioners have by their conduct waived their objection to enforce a punctilious observance of the time schedule of four months. To adopt any other construction would frustrate the object and purpose of arbitral proceedings and bring the whole machinery provided by the Act to facilitate an efficacious recourse to arbitration into grave peril. Speaking for myself, I would decline to accept a construction which would lead to that result. The Court is duty bound to effectuate the object and intent of Parliament in enacting the law and the view which I have taken is one which will protect the object which Parliament had in view.

12 The Respondents' counsel, thereby contended that in the present fact also, the Petitioners have waived the rights and never objected to continue with the Arbitration Proceedings. The learned counsel appearing for the Petitioners, however, apart from raising objection, pointed out the recent Supreme Court Judgment in NBCC Ltd. (Supra) whereby while dealing with the provisions of Sections 14, 15, 21, 32 of the Arbitration Act, 1996, declared the law in the following terms by referring, relying and distinguishing 15 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 16 arbp.56-2013 various other Supreme Court Judgments, which were not referred and/or relied in the above judgment of this Court. The Apex Court has observed as under: "5. 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."

"Arbitration is an efficacious and alternative way of dispute resolution between the parties. There is no denying the fact that the method of arbitration has evolved over the period of time to help the parties to speedily resolve their disputes through this process and in fact the Act recognizes this aspect and has elaborate provisions to cater to the needs of speedy disposal of disputes. The present case illustrates that inspite of adopting this efficacious way of resolving the disputes between the parties through the arbitration process, there was no outcome and the arbitration process had lingered on for a considerable length of time which defeats the notion of the whole process of resolving the disputes through arbitration."

"7. 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." 11 The

mandate of the arbitrator was terminated only because of the fact that the arbitrator having failed to conclude his proceedings within time did not warrant to be continued as an arbitrator in the absence of the consent of both the 16 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 17 arbp.56-2013 parties. It is clear from a bare reading of Subsection 1(a) of Section 14 of the Act, the mandate of an arbitrator shall terminate if he fails to act without undue delay. In the present case, it is clear that the arbitrator had extended the time provided to it without any concrete reasons whatsoever and thus his mandate was liable to be terminated."

"Thus it can be construed that the parties had not agreed to the extension of the mandate of the arbitrator failing which, the mandate was automatically terminated." "12. Further, Subsection (2) of Section 14 of the Act stipulates that if a controversy remains concerning any of the grounds referred to under Clause (a) of Subsection 1, a party may, unless otherwise agreed to by the parties, apply to the Court to decide on the termination of the mandate. Thus the respondent rightly applied to the Court for the termination of the mandate of the arbitrator pursuant to the provisions of this section, and the Court was within its jurisdiction to decide accordingly."

"13. However, the contention of the Appellant that the High Court had erred in not allowing the appellant to decide upon the appointment of an arbitrator pursuant to Sub section (2) of Section 15 of the Act must be accepted. Section 15(2) of the Act provides that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator replaced."

13 The learned counsel appearing for the Respondents has relied on the Supreme Court Judgment, based upon the Arbitration Act Bhupinder Singh Bindra Vs. Union of India that the Petitioners having consented for extension directly and indirectly and also for adjournments from time to time and dragged on the case for considerable time, cannot raise such objection of latches or delay on the part of the Arbitrator. The Apex Court, on facts directed the Arbitrator to adjudicate upon the dispute within 6 months from the date of receipt of the order. Thereby also contended in view of the terms of the contract continuation of the Arbitration Proceedings cannot be stated to be bad in law, merely because time schedule was not adhered.

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14 Before adverting to the legal issue, it is necessary to consider the Arbitration terms and conditions between the parties. As recorded, apart from peremptory condition to complete the Arbitration proceedings within two years and/or within extension period of 12 months which in the

present case admittedly would expire by efflux of time and in view of clause itself. It is relevant to note that the parties have agreed specifically that in case the Arbitrator appointed by the Director (Marketing) and/or Respondents, if transferred or vacated its office unless such other Officer/Arbitrator is appointed, he shall continue the Arbitration proceedings notwithstanding his transfer. It is also specifically agreed that if such officer is unable and/or refused to act and vacate the office and/or expressed inability and/or refused to act, the Respondents shall designate another person to act as an Arbitrator in accordance with the terms of the said agreement. It is relevant to note that they have specifically agreed that the Arbitrator newly appointed, shall be entitled to proceed with the reference from the point at which it was left by his predecessor. If this is so, it is very clear that once the Arbitrator is appointed and a reference is commenced and in this case admittedly first time in the year 1982, the subsequent Arbitrators if appointed and/or not appointed, needs to complete the Arbitration proceedings within the mandate period of 2 years plus one year. The clause nowhere provides that if new Arbitrator and/or Officer is appointed as an Arbitrator, the Arbitration proceedings will recommenced from that date. On the contrary, the clauses so referred above provides that the new Arbitrator shall continue with the reference from the point at which it was left by his predecessor. This means, the parties have admittedly agreed that the time period so prescribed is final and binding. It means the Arbitration Proceedings should commence and end within the prescribed period, if not, in my view and basically in the present facts and circumstances, there is no question of continuation of Arbitration proceedings once the period of three years lapsed.

15 As recorded above, the Hon'ble Supreme Court in NBCC (supra) recently after considering the provisions of Section 14 and 15 reiterated that where the parties had not agreed the extension of the mandate of the Arbitrator, the mandate automatically gets terminated. In the present case, in view of the agreed clauses as referred above, there is no question of extension 18 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 19 arbp.56-2013 of time even by consent of the parties as the parties themselves agreed the time schedule, so fixed. The Court, even otherwise, in such situation cannot direct and/or compel any one of the parties to continue with the Arbitration and when the clauses are so clear. There is no reason to accept the submission made by the learned counsel appearing for the Respondents that from time to time the parties appeared before the other Arbitrators and sought time on many occasions. The concept of "Waiver" so defined under the Arbitration Act, is applicable in a situation where there is any vagueness in the contract between the parties. The conduct may be relevant, but in view of the clauses specified time, apart from the law now declared by the Supreme Court recently, I am not accepting the submission that the appearance of the Petitioners before the subsequent Arbitrators, even in the year 2007, 2008 and 2009 that itself is nothing but the acquiescence or waiver of the basic clause. A time, if extended by consent of the parties, if provided, is one thing but if the Agreement clauses itself mandated that Arbitration proceedings should be concluded within two plus one year, and further provide that even subsequent Arbitrator should continue from the point at which his/her predecessor left the Arbitration, itself means the intension was that it should be finished within three years from the date of commencement. In the present case, it was in the year 2002. Therefore, further proceedings, in my view, after 2005 even if any, is unsustainable.

16 There is no provision under the Arbitration Act to condone the delay when agreement between the parties binds them to see that the Arbitration proceedings should be finished within time prescribed. This time restriction is well within the scope and purpose of Arbitration Act, at national and international arbitrations.

17 I would have, in a given case, refer the matter to the Larger Bench in view of the judgment of this Court Jayesh H. Pandya (Supra) cited by the Respondents, but considering the peculiar clauses of the agreement between the parties and in view of the fact that the Supreme Court recently in NBCC (Supra) considering the provisions of the Arbitration Act, reiterated the position by referring and distinguishing even earlier Judgments of the Hon'ble Supreme Court and reiterated that there is no question of unilateral extension 19 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 20 arbp.56-2013 of mandate of the arbitration, the mandate automatically gets terminated. Such mandate cannot be extended specifically at the instance of only one party. In view of this, I am not inclined to refer the matter to the Larger Bench, as it is not necessary in view of distinguishing facts and circumstances and the clauses so referred in both these judgments."

8. Mr.Mehta placed reliance upon the judgment delivered by the learned Single Judge of this court on 2.9.2011 in the case of Verny Containers Pvt. Ltd. Vs. Hindustan Petroleum Corporation Ltd. in Arbitration petition no.

248 of 2006 and particularly para 2 and 3 of the said judgment, which read thus:

> "2. The learned Counsel submitted that the Arbitrator entered a reference on 30-8-2001 and therefore in terms of clause 17(g) an award should have been made within a period of two years from 30- 8-2001. The learned Counsel submitted that there is no written consent given by the Petitioner for extension of one year as contemplated by Clause 17(g). The learned Counsel 2 page 19-20 of the compilation. also relied on the judgment of the Supreme Court in the case of NBCC Limited v/s. J.G.Engineering Pvt.Ltd., (2010) 2 SCC 385, in support of his contention that as the time fixed under agreement between the parties had expired long before the date on which the award had made, the award was made i.e. 4th October, 2004, the learned Arbitrator had no jurisdiction to make the award and therefore his mandate had come to an end on expiry of a period of two years from the date of entering of reference.
>
> 3. I have heard the appearing for the Respondent. I have so perused the record. It is clear that under Clause 17(g) of the agreement the award has to be made within a period of two years from the date of reference by the Arbitrator, unless the parties by a written agreement extends the term by one year. In the present case, there is no written agreement extending the term. Therefore, the award had to be made within two years. Admittedly, the award has been made beyond that date. Threfore, in view of the law laid down by the Supreme Court in its judgment in NBCC Ltd., referred to above, the award will have to be set aside. The award impugned in the petition is, therefore, set aside. Petition disposed of. No order as to costs."

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9. Mr. Mehta, learned Counsel placed reliance upon the judgment delivered by the Division Bench of this court on 2.5.2012 in the case of Bharat Oman Refineries Ltd. Vs. Mantech Consultants Pvt. Ltd [(2012) (2) Arb. L.R.

482] in Appeal No.702 of 2011. Mr. Mehta, learned Counsel submits that the Division Bench of this court has considered the judgment of the Supreme Court in case of N.B.C.C.Ltd (Supra), judgment of the Division Bench in case of M/s Snehdeep Auto Centre Vs. Hindustan Petroleum Corporation Ltd. in appeal no.143 of 2012 decided on 16.4.2012, judgment of the learned Single Judge in the case of Teltech Instrumentation Pvt. Ltd.(Supra) and various other judgments and after considering the same in para 17 to 23, 27 and 28 of the said judgment dismissed the appeal. Para-17 to 23 and 27 and 28 of the said judgment in the case of Bharat Oman Refineries Ltd. Vs. Mantech Consultants Pvt. Ltd read thus:

"17 After the conclusion of arguments, there is no question of either side to participate further in the proceedings as the effective hearing in the arbitration proceedings can be said to be over on conclusion of arguments. Thereafter what was required was only to pronounce the award. It is true, after a considerable delay, the arbitrator wrote a letter on 14 th March, 2006 to the respondent pointing out that he is trying his best to publish his award in the matter by 31st March, 2006 and in any case latest by 30 th April, 2006 and he requested the respondent to send him a stamp paper of Maharashtra State for Rs. 100/ preferably by 23rd March, 2006 to enable him to publish the award. As stated above, the arguments were concluded on 21st April, 2004. The arbitrator wrote another letter on 19 th May, 2006 to the parties wherein he has stated that on his inability to publish the award till 21 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 22 arbp.56-2013 30 th April, 2006, he received a telephone call from one V.P. Patel of Mantech (respondent herein) when he requested the said Patel to publish the award as quickly as possible. The arbitrator has pointed out in the said letter that he had drafted the award in respect of certain claims and expected to complete the same in respect of all the other claims shortly and as requested by respondent he is expected to publish his final award by 31st May, 2006. Subsequently, the respondent wrote a letter dated 24 th May, 2006 acknowledging the said letter dated 19 th May, 2006. The arbitrator vide his letter dated 10th August, 2006 addressed to the appellant and the respondent stated that he has now finalized the award and requested the parties to remain present on 17th August, 2006 at 10.30 a.m. in his office. The arbitrator thereafter published his award on 17 th August, 2006 in the presence of both the sides. The respondent thereafter also sent acknowledge to the arbitrator regarding receipt of the award dated 17th August, 2006.

18. Considering the clause in the arbitration agreement that after a period of one year from the date of conclusion of arguments, there was no scope for further enlargement of time and considering the fact that the proceedings before the Arbitrator were concluded on 21st April, 2004, there was no

question of either parties to participate in the arbitration proceedings. In our view, therefore, it can be construed as an act of waiver or active participation in the arbitration proceedings as after the arguments are over, there was no question of any other party to take part in the arbitration proceedings and simply because stamp paper might have been produced by the respondent or might have written a letter of acknowledgement after receipt of the arbitration award itself cannot be treated as an act of waiver in any manner. In any case, after the arguments were concluded, the arbitrator gave his award after about 2 years and four months. As per the clause in the arbitration agreement, even extension was permissible only for one year and admittedly the award was not published within the extended time.

In view of the above, the arbitrator becomes functus officio to proceed further and it cannot be said that the respondent had participated in the arbitration proceedings as after conclusion of arguments, there is no question of participating further in the proceedings. Even sending a stamp paper to the arbitrator can be said to be a ministerial act on the part of the respondents and it cannot be said to be in any manner an effective participation in the arbitration proceedings after the conclusion of the arguments. The 22 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 23 arbp.56-2013 award of the arbitrator, therefore, has rightly been set aside by the learned single Judge on the ground of undue delay. In any case, as stated above, the matter is required to be considered on the basis of the clause in the arbitration agreement, which we have incorporated above. It is clear that after the aforesaid extended period is over, the arbitrator could not have proceeded further in the matter of even publishing the award, unless both the sides agree by a fresh agreement in writing giving authority to the arbitrator to declare the award even after the stipulated time, in furtherance of the original arbitration agreement. It is also clear that the arbitrator has no authority to pronounce the award after the stipulated time. So far as the Division Bench judgment of this Court is concerned, the said case is, therefore, distinguishable on the facts as in the said case one of the sides actively participated in the proceedings by filing written statement while in the instant case after the conclusion of the arguments, the arbitrator gave his award on 17th August, 2006. Every case ultimately depends upon the nature of the arbitration agreement and in the instant case simply because the respondent has provided stamp paper or might have entered into telephonic conversation with the arbitrator itself cannot be treated as an act of waiver or cannot be construed as an active participation in the judicial proceedings before the arbitrator.

19. So far as the argument of Mr. Seervai that the order of the Division Bench is per incurium and contrary to the Supreme Court judgment in NBCC Ltd. (supra) is concerned, in our view, there is no substance in the said argument as the order of the Division Bench of this Court is binding to this coordinate Bench. The Division Bench has interpreted the judgment of the Supreme Court in a particular manner. It is not a case where the Supreme Court judgment has not been taken into account by the Division Bench and, therefore, there is no question of per incurium. However, the facts of the aforesaid case were entirely different as we have indicated above. Since we are of the opinion that in the instant case there cannot be said to be an active participation after the arguments are concluded, the ultimate decision taken by the learned single Judge regarding setting aside the award is required to be upheld. It cannot be said that the respondent had waived its right of proceeding further with the arbitration proceedings as there has been inordinate delay after conclusion of argument and after the arguments were concluded there was no question of either side

to have further participation and it can never be said to be a 23 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 24 arbp.56-2013 participation in a pending proceeding before the Arbitrator. Since the award of the arbitrator can be said to be against the mandate given to him in the agreement, the subsequent proceeding after conclusion of arguments, in our view, cannot be said to be legal and valid and, therefore, on the ground of lacking inherent jurisdiction at a later stage i.e. after conclusion of argument and before publishing the award, the point in issue can certainly be raised in a petition under Section 34 of the Act.

20. The object and the scheme of the Arbitration Act is to secure expeditious resolution of disputes. Its foundation is based upon National and International Commercial Arbitration practice. The Arbitrator is required to adjudicate the disputes in view of the agreed terms of contract and the agreed procedure. All are bound by the agreed terms. Therefore, the Arbitration proceedings should be governed and run by the terms. The Arbitrator, therefore, cannot go beyond the Arbitration Agreement clauses. We all need to respect the legislative intent underlying the Act. The speedy and alternative solution to the dispute just cannot be overlooked. Delay occurred, if any, may destroy the arbitration scheme itself.

21 In view of the agreed clause itself, after lapse of agreed time, the Arbitrator looses his jurisdiction as per the mandate of Sections 14 and 15 of the Act. Such defect is incurable. The implied consent cannot confer jurisdiction once the agreed period is lapsed. There is no provision to raise objection to the constitution of the Arbitral Tribunal except Sections 14 and 15 of the Act. But, once the Arbitration is closed for award, that stage also goes and the parties have no choice but to wait for the award. There was no reason and/or occasion for the respondent to raise any such objection before the Arbitrator under Section 16 of the Act and/or even before the Court under Section 14 of the Act. Once the matter is closed for judgment/order, a call for stamppaper is nothing, but a ministerial procedure. It cannot be stated to be judicial proceedings to be attended by all the parties. Even otherwise, how party can presume that the arbitrator would not follow the mandate of the arbitration agreement, once the agreed period is over. The arbitrator could have and/or might have, after expiry of two years, and as extendable by consent one year more, refused to pass Award or terminated the arbitration proceedings suo motu. Any judgment and/or order cannot be 24 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 25 arbp.56-2013 presumed or assumed by the parties after closing of the matter unless actual order is passed and/or circulated to the parties.

22. The delay by the Arbitrator, to pass the award in such fashion itself, in our view, is a misconduct as contemplated under the Act. It is also illegal as it is not in pursuance of the agreed clause and is in breach of terms. The Arbitrator himself must refuse to continue first and/or ask for extension if parties want to. The permission and/or consent which is required to be in writing as per the agreement clauses cannot be deemed to have been granted on the basis of alleged unilateral waiver by only one party.

23. Another factor is that in a situation like this, the party is bound by the clauses and so also the arbitrator. Once the agreed period is over, they even would not be in a position to appoint or substitute a new Arbitrator, unless by fresh consent in writing if they fail to appoint a new Arbitrator, if required, during the agreed period of 2+1 year. We are not concerned with the fresh

agreement between the parties to settle the dispute after expiry of the agreed period of three years. Therefore the respondent has no choice and/or option but to challenge the Award even on these grounds, apart from substantial delay in passing the Award in Section 34 of the Arbitration Act.

27. In Snehadeep, (Supra) the Written statement was filed before the Arbitrator, though period was expired. Both the parties, participated, before the Arbitrator, even after expiry of mandatory period. The facts are totally different here. The clause also very distinctive in the present case. There is no conflict of law in view of clear distinguishable facts. The law is binding if facts are similar and not when facts are different. In the present case such objection was raised and the Court had decided the same. Even the challenge about mandate of Arbitration was not raised in Section 34 Petition. The fact based decision cannot be treated as precedents, specially when those are distinct and distinguishable.

28. The doctrine of "waiver" or "deemed waiver" or "estoppal" 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. The Apex Court Judgment in NBCC Ltd. (Supra) in fact recognized the importance of imposition of time limit for the conclusion of the Arbitration proceedings. The parties have 25 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 26 arbp.56-2013 to stand by the terms of the contract including the Arbitrator. "

10. Mr. Mehta, learned Counsel submits that though Special Leave Petition has been filed against the order and judgment of the Division bench of this Court in case of Bharat Oman Refineries Ltd.(supra), the Supreme Court has issued notice. The operative part of the order dated 31.8.2012 passed by the Supreme Court in the case of Bharat Oman Refineries Ltd. Vs. Mantech Consultants Pvt. Ltd in Special Leave to Appeal (Civil) no.23966 of 2012 reads thus:

> "Issue notice.
>
> Since the sole respondent is represented on caveat, service on the s aid respondent is dispensed with.
>
> The respondent will be entitled to file counter affidavit to the Special Leave Petition, within four weeks; rejoinder, thereto, if any, may be filed within two weeks thereafter.
>
> In the meantime, the proceedings under Section 11 of the Arbitration and Conciliation Act, 1996, pending before the High court, shall remain stayed."

11. It is submitted that the said Act of 2006 is a special enactment and would have override effect and in case of inconsistency between the provisions of the said Act and the Arbitration Act 1996 and thus provisions of the said Act of 2006 would have overriding effect over the Arbitration Act 1996. It is submitted that the petitioner having registered under the provisions of the said Act, the disputes between the petitioner and the respondents are required to be adjudicated upon only by the Council appointed under the said Act and not by an arbitrator appointed under the Arbitration Act 1996. In

support of the said plea, 26 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 27 arbp.56-2013 Mr. Mehta placed reliance upon the judgment of Punjab & Hariyana High Court decided on 13.12.2011 in the case of Welspun Corporation Ltd. Vs. Micro, Small and Medium Enterprise Facilitation Council, Punjab in CWP 23016 of 2011, and particularly para-5 and 9 which read thus:

> "5 Learned counsel would contend that the reading of section 18 of the Act, 2006 makes it clear that insofar as it CWP No.23016 of 2011 (O &M) and connected cases [6] makes provision for conciliation, the provisions of sections 65 to 81 of the Act, 2006 as applicable, it should be so read that even the provision under section 80 of the Act, 1996 that bars a conciliator for acting as an Arbitrator must be applied. According to the learned counsel, section 18(2) itself allows for a full applicability of sections 65 to 81 and therefore, the non-obstante clause in section 18(1) ought not be used to eclipse section 80 itself. In my view this is not a correct reading of section 80. The Act, 2006 itself contains provisions, which are at once consistent with the Act, 1996. It must be remembered that the Act, 2006 is also an Act of Parliament and it is a special enactment meant for a particular class of persons only namely the Micro, Small and Medium Enterprises and for facilitating the promotion, development and enhancing their inter se competitiveness. The Act insofar as it contains a specific provision for conciliation and arbitration is alive to the issue that it could come into conflict with some of the provisions of the Act, 1996. There could also be certain other conflicts relating to recovery modes provided under other Central enactments. Consequently, there is an express provision under Section 24, which spells out an overriding effect of the Act. If there was no conflict or likely to be a conflict, it will be even failure to introduce such a provision. We must read into every section of an enactment of Parliament, a wisdom, which the CWP No.23016 of 2011 (O&M) and connected cases[7] courts are bound to apply as having been exercised by the Legislature.
>
> 9 There are at least 25 central enactments, which contain provisions for statutory arbitrations. The provisions that are frequently invoked are statutory arbitration provided under the Telegraph Act and amongst the State enactments, the State Cooperative Societies Act. The reference to statutory arbitration and the primacy that it obtains over contractual reference to independent modes of resolution of disputes had come before Hon'ble the Supreme court in several 27 / 65 ::: Downloaded on - 09/06/2013 19:48:30 ::: 28 arbp.56-2013 cases. In "Registrar, Cooperative Society Vs. Krishan Kumar Singhania, 1995(6) CWP No.23016 of 2011 (O&M) and connected cases[14] SCC 482" the Supreme Court dealt with a conflict between the statutory arbitration contained under the West Bengal Cooperative Societies Act and the Arbitration and Conciliation Act, 1996 and provided for a primacy of application of the State Act. In "Punjab State Electricity Board V. Guru Nanak Cold Storage, 1996(5) SCC 411", the Supreme court was considering the effect of some of the provisions of the Electricity Act and a provision for an arbitration outside the scope of the Act, 1996. These are merely to state that the issue is not res integra. The conflicts have existed and the Courts have never found it essential at all times to give the Act, 1996 a

primacy. In this case, the Act, 2006 which is an Act of the Parliament and will hold itself for determining the rights of parties for the disputes that they have arisen between a supplier and a buyer. The arbitral proceedings before the Council have not made much head way except that through the impugned order, it is clear that the Council has decided to accept the termination of conciliation proceedings and it has stated that the case was being adjourned and the parties will be informed the future date of hearing. The petitioner shall have his recourse only under the Act, 206 and with reference to the procedures for which the Act, 2006 does not make provision for conducting the arbitral process, he shall entitled to resort to the Act, 1996 to the extent to which it is applicable."

12. Mr. Tulzapurkar, learned Senior Counsel appearing on behalf of the 2nd respondent on the other hand submits that there was dispute between the LPG cylinders manufacturers who were more than 75 and the respondent no.2 which was referred to arbitration which disputes were similar in nature. It is submitted that some of the parties appointed common Advocate to represent them before the learned arbitrator. In more than 11 matters pleadings were completed by the parties and even evidence was recorded by the learned arbitrator. The parties had filed written submissions in those cases and thereafter matters were closed for 28 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 29 arbp.56-2013 passing award. In all those 11 matters, on 29.11.2005 the learned arbitrator made awards wherein the claim of the LPG Cylinders manufacturers were upheld and the arbitrator directed the respondent no.2 to pay the amounts as set out in the award to such LPG Cylinders manufacturers. This Court admitted the arbitration petitions filed by the respondent no.2 under section 34 of the Arbitration Act 1996 and finally heard the matters in the month of December 2009. This court was pleased to set aside the awards made by the learned arbitrator in 9 matters out of 11 matters and dismissed the arbitration petitions in two matters. The LPG Cylinders manufacturers have filed appeals in those 9 matters whereas the respondent no.2 had filed appeals in 2 matters. All such matters are pending for adjudication before the Division Bench of this court.

13. Mr. Tulzapurkar, learned senior counsel submits that in view of this background, the remaining LPG Cylinders manufacturers did not proceed further in the matters before the learned arbitrator, nor did they intimate their reservation against the arbitrator from continuing with the proceedings. It is submitted that Mr. A.M. Jagdale, the learned arbitrator made his award in eleven matters on 29.11.2005 and retired on 30.11.2005. The respondent no.2 thereafter appointed another arbitrator in terms of the arbitration agreement who proceeded with the matter and fixed a meeting on 28.1.2008 to decide further course of action. It is submitted that the Advocate for the petitioner attended the meeting on 28.1.2008. Advocates appearing for parties informed the learned arbitrator 29 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 30 arbp.56-2013 that pleadings in the matter on behalf of the claimants and the respondent no.2 would be completed and further requested that after filing of the pleadings date of hearing shall be fixed for deciding further course of action in the matter.

Accordingly, the learned arbitrator directed respective parties to complete the pleadings. Learned Senior counsel submits that no such objection that the respondent no.2 was alleged to have forfeited its right to appoint another arbitrator in terms of clause 22(g) of the agreement was raised by the

petitioner in the meeting held on 28.1.2008. Learned senior counsel submits that the petitioner had at no point of time protested or objected before the learned arbitrator that he was required to make an award within the period of three years.

Learned senior counsel further submits that in view of the order passed by this court setting aside the awards made by the learned arbitrator, the learned arbitrator fixed a meeting in this matter on 4.4.2011 for deciding the further course of action in the matter. The said meeting was attended by the Advocate representing the petitioner. Learned senior counsel points out that the Advocate who was representing the petitioner in this matter was also representing other LPG cylinders manufacturers in similar matters before the learned arbitrator which were placed for hearing on the same date for the convenience of the said Advocate who was based in Delhi and had to travel to Mumbai for hearing. In the said meeting, the petitioner made a statement that interim application made by the petitioner would not be pressed at that stage and the same would be taken up alongwith the statement of claim as preliminary objection. It was pointed that 30 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 31 arbp.56-2013 during the course of hearing, Advocate for the parties were not aware of the exact status of the pleadings of the matters which were listed for hearing on 4.4.2011. The Advocate for the petitioner agreed to file statement of claim along with all documents within a period of 4 weeks or intimate status of claim if already filed and the Advocate for the respondents also agreed to file reply to the statement of claim along with documents in 4 weeks from the receipt of statement of claim as the case may be. Both parties agreed and undertook that in the cases in which pleadings were already completed, they would inform the exact status thereof within a period of 4 weeks. Parties further agreed in the said meeting to extend time to complete the arbitration proceedings and the same was accordingly recorded by the learned arbitrator in the minutes of meeting.

14. Learned senior counsel submits that the minutes of meeting dated 4.4.2011 was handed over to both the sides by the learned arbitrator and such minutes of meeting were also acknowledged by the Advocate for the petitioner.

Learned senior counsel therefore submits that by consent of both the parties time was extended by the the learned arbitrator. Learned senior counsel submits that in the rejoinder filed by the petitioner, receipt of the minutes of said meeting has been falsely disputed by the petitioner.

15. Learned senior counsel placed reliance upon the affidavit dated 31 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 32 arbp.56-2013 24.1.2013 filed by Mr. D.H. Shetye, Manager (Law) of the respondent no.2 in the present proceeding who has deposed that in the meeting held on 4.4.2011 before the learned arbitrator, Mr. Pravin Mahajan, Advocate of the petitioner was present who was also appearing in 24 other arbitration matters for various other LPG cylinders manufacturers in respect of similar disputes before the same arbitrator which matters were also kept for hearing on the same date at the request of the said Advocate as he was travelling from New Delhi for the purpose of attending the said matters. He has further stated in the said affidavit that he was present in the said meeting when the Advocate for the petitioner submitted that the interim application made by the petitioner was not being pressed at that stage and same would be taken up alongwith the statement of claim as preliminary objection. It is further stated that as the Advocate for the

parties were not aware of exact status of the pleadings in all the matters which were listed for hearing on 4.4.2011, the Advocate for the petitioner agreed to file statement of claim along with all documents within a period of 4 weeks or intimate status of claim if already filed and similarly Advocate for the respondents also agreed to file reply to the statement of claim with documents as the case may be. It is further stated that both the parties also agreed that in cases in which pleadings were already completed parties undertake to appraise the exact status thereof within a period of 4 weeks. It is further stated in the said affidavit that the parties further agreed to extend the time to complete arbitration proceedings and at the end of the meeting, discussion between the parties was 32 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 33 arbp.56-2013 duly recorded and the minutes of the meeting were prepared. After finalization of minutes of meeting, the secretary of the learned arbitrator took out a print of the said minutes which were given to the learned arbitrator. All persons present in the said meeting including Mr. D.H. Shetye have signed on the said minutes. The Advocate for the petitioner also signed on the said minutes. It is stated that thereafter photocopy of the said minutes were taken out and one copy each was handed over to the Advocate for the petitioner as well as the Advocate for the respondent no.2 by the learned arbitrator.

16. Mr. Tulzapurkar, learned senior counsel submits that in view of the dispute raised by the petitioner about the contents of the minutes of meeting recorded by the learned arbitrator held on 4.4.2011 or that same was not received by the petitioner or his Advocate, the learned arbitrator filed his personal affidavit on 19.1.2013. Learned senior counsel invited my attention to the said affidavit filed in the present proceedings. In the said affidavit filed by the learned arbitrator, it is pointed out that a meeting was called by the learned arbitrator on 26.3.2011 at 11.00 a.m. when Mr. Pravin Mahajan, Advocate appearing for the petitioner in the present proceedings was appearing for 15 such LPG cylinders manufacturers before the same arbitrator. The said Mr. Pravin Mahajan by his email dated 25.3.2011 had requested the learned arbitrator to defer the hearing in all the said 15 matters including the matter filed by the petitioner herein to 4.4.2011 at 11.00 a.m. since on 4.4.2011 other 10 matters were already scheduled 33 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 34 arbp.56-2013 before the learned arbitrator where the same Advocate was appearing for LPG cylinders manufacturers. The said Advocate informed the learned arbitrator that he had already spoken to the Advocate for the respondents who had given their no objection for hearing of the matter on 4.4.2011 in stead of 26.3.2011.

Accordingly, the date for arbitration meeting was rescheduled on 4.4.2011 along with other 10 matters wherein Mr. Pravin Mahajan, Advocate was appearing on behalf of LPG Cylinders manufacturers before the same arbitrator. It is further stated in the said affidavit that on 4.4.2011, Mr. Pravin Mahajan, Advocate for the petitioner and Ms. Jyoti Sinha i/b M/s Negandhi Shah & Himaytullah, Advocates for the respondents appeared when the officers of the respondent no.2 were also present. It is stated in the affidavit that during the course of the meeting on 4.4.2011, the parties informed the Tribunal that the issues in the said matters were dealt by another arbitrator in respect of similar LPG cylinders manufacturers who has made awards in some of the said disputes. The learned arbitrator was informed that the respondent no.2 had challenged the awards and one LPG cylinders manufacturer namely Pratima cylinders has also challenged the award and the parties were waiting for the outcome of the challenge to the said awards preferred before this court. The learned arbitrator stated that parties informed him that the said awards made by the learned

arbitrator was set aside by this court on 17.12.2009 and LPG cylinders manufacturers had preferred an appeal before this court challenging the order dated 17.12.2009. The arbitrator was also informed that the respondent no.2 had filed cross appeals in the said 34 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 35 arbp.56-2013 matters. It is further stated in the said affidavit that Advocates for the claimants and Advocate for the respondents submitted that the statement of claim and reply along with documents would be filed and both parties agreed in the meeting that the pleadings relevant to the issue involved will be completed at an early date and the parties have extended time for completion of the arbitration proceedings.

The learned arbitrator further deposed that after considering all the facts narrated in the said affidavit, minutes were drawn up by him and handed over to the parties immediately at the end of the meeting personally to the Advocates for the petitioner and the respondents. In the said affidavit, the learned arbitrator annexed copy of the minutes of meeting which shows signature of Mr. Pravin Mahajan on behalf of the claimants (petitioner herein) and Advocate for the respondent and their officers. The learned arbitrator also stated that neither the petitioner nor the LPG cylinders manufacturers or their Advocate complained him about the non receipt of the said minutes of meeting held on 4.4.2011. The learned arbitrator stated that the minutes were correctly drawn by him about what had transpired in the meeting held on 4.4.2011. The learned arbitrator denied that minutes were not duly recorded by him in the presence of parties and their Advocates. The learned arbitrator has recorded that minutes were duly handed over to the Advocates for the parties on the same day itself. He confirmed in the said affidavit that the said minutes were handed over to the Advocate for the claimants when the Advocate for the respondents and officers of the respondent no.2 were present as recorded in the said minutes of matters.

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17. Relying on the said two affidavits one filed by the Manager (Law) of the respondent no.2 and affidavit filed by the learned arbitrator, Mr. Tulzapurkar, learned senior counsel submits that it is thus clear that the minutes recorded by the learned arbitrator was properly recorded and copies thereof were duly served upon all the parties including petitioner through their Advocate.

Learned senior counsel submits that at no point of time any complaint was received from the petitioner about the contents of the minutes or non receipt of the minutes. It is submitted that the minutes of meeting cannot be challenged now as the petitioner had consented to extend the time to make an award.

Learned senior counsel distinguished the judgment of the Supreme Court in the case of N.B.C.C.Ltd. (supra) and relied upon paragraph 16, 22 and 27 of the said judgment. Learned senior counsel submits that the Supreme Court has held that the arbitrator was bound to make and complete his award within time mutually agreed by the parties unless the parties consented to further enlargement of time.

It is submitted that in the facts of this case as the petitioner had consented for enlargement of time which is recorded by the learned arbitrator in the meeting held on 4.4.2011, receipt whereof was duly acknowledged by the petitioner through its Advocate, the judgment of the Supreme court in the case of N.B.C.C.Ltd. (supra) relied upon by the petitioner is clearly distinguishable in the facts of the present case.

18. Mr. Tulzapurkar, learned senior counsel placed reliance upon the judgment of this court in the case of Jayesh H. Pandya vs. Subhtex India Ltd. & Ors. [2008 (5) Mh. L.J. 749, and more particularly para-13 and 14 of the said judgment in support of his plea that in view of the petitioner having extended time by giving consent to the learned arbitrator, it has waived its right to object the continuation of the arbitration proceedings. Para 13 and 14 of the said judgment read thus:

> "13 In the present case, the appointment of Mr.Justice V.D. Tulzapurkar was by an order dated 14th November 2003.

The sole Arbitrator held a meeting on 23rd December 2003. Ordinarily, the period of four months for the conclusion of the arbitral proceedings would have commenced from this date where the order of the High Court and the arbitration agreement dated 28th April 2000 were brought to the notice of the Learned Arbitrator. After the dismissal of the Writ Petition filed by the Petitioner on 20th January 2004, the Petitioners moved a Special Leave Petition before the Supreme Court in which further proceedings were stayed on 8th March 2004. But for the order of stay, the period of four months for Mr.Justice V.D. Tulazapurkar to conclude the proceedings would have expired on 23rd April 2004. The Supreme Court dismissed the Special Leave Petition on 24th April 2007. The contention of the Petitioners is that the Learned Arbitrator is in error in holding that the period of four months had already commenced to run and if the Petitioners herein had any objection to the proceeding continuing beyond the period of four months, they ought to have apprised the Supreme Court of the fact that the appointment of an Arbitrator would serve no purpose as the period of four months was shortly to expire. The contention of the Petitioners is that upon the appointment of Mr.Justice S.N. Variava, there was a fresh mandate and the period of four months would, therefore,

have to be reckoned from the time when a copy of the agreement was sent to the new Arbitrator. But, even on the hypothesis which the Petitioners seek to assert before the Court, it is impossible to accept their submission that the mandate of Mr.Justice S.N. Variava expired 37 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 38 arbp.56-2013 upon the completion of four months from the date on which a copy of the agreement was served upon the new Arbitrator. The first meeting before the new Arbitrator was held on 4th May 2007. At the first meeting before the Learned Arbitrator the Petitioners chose not to assert that they would seek strict compliance with the condition that the arbitral proceedings would have to be completed no later than within a period of four months from the date of the service of the agreement. On the contrary, the record of the proceedings indicates that on 4th May 2007, parties stated before the Arbitrator that the Statement of claim had been filed before the earlier Arbitrator, but since those papers were not available, the claimant was to file a Statement of claim before 1st June 2007. The Respondents to the arbitral proceedings were granted time until 6th July 2007 to file the Written igStatement. On 22nd May 2007, the Petitioners'Advocate forwarded a copy of the Statement of claim which had been filed before the earlier Arbitrator. On 4th June 2007, the Advocate for the claimant forwarded a copy of the fresh Statement of claim. On 6th June 2007, the Learned Arbitrator addressed a communication to the Advocate for the Petitioners enquiring as to whether the Petitioners had any objection to the fresh Statement of claim being filed. The Petitioners had objections. On 11th June 2007, the Petitioners sought an extension of time to file their reply. The Learned Arbitrator correctly came to the conclusion in his communication dated 18th June 2007 that there was no justification for not filing the Written Statement under the pretext that the claimants had not filed a compilation of documents. Be that as it may, the Learned Arbitrator granted a further extension till 20th July 2007 for filing the Written Statement since there was a delay on the part of the claimant. Right from 4th May 2007, when the first meeting took place before Mr.Justice S.N. Variava, until 27th August 2007, there was no indication on the part of the Petitioners that they were going to punctiliously hold the parties to the proceedings down to the stipulation of four months contained in the arbitration agreement dated 28th April 2000. On the contrary as the facts which have been disclosed before the Court would show that on 4th May 2007 the Petitioners were initially granted time until 6th July 2007 to file their Written Statement since the claimant was to file the Statement of claim on 20th June 2007. Parties to an arbitration agreement are entitled to stipulate the time within 38 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 39 arbp.56-2013 which an arbitral award is to be rendered. In the present case, the time which was prescribed was four months. In such a case, however, where a party intends to assert a rigid adherence to the time prescribed by the arbitration agreement, it must at the earliest opportunity make its intention known to ensure compliance with a rigid standard as to time. To hold otherwise would be to encourage a lack of candour on the part of parties in their dealings before the Arbitrator. Interpretation of law by the Court must be such as to promote honesty, fairness and transparency on the part of parties and not such as would defeat the salutary object in the enactment of the Arbitration and Conciliation Act, 1996. Section 4 of the Act deals with a waiver of the right to object and inter alia stipulates that a party who knows that any requirement under the agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such noncompliance without undue delay, shall be deemed to have waived his right to object. Section 4 is indicative of the policy of the legislature. The Petitioners stood by and allowed the Arbitrator to fix a time schedule for the filing of pleadings. If they had a serious intent of not allowing the proceedings to continue beyond the period

of four months, it was the duty of the Petitioners to inform the Arbitrator at the earliest when the time schedule was fixed by the Arbitral Tribunal. Counsel appearing on behalf of the Petitioners, in fact, fairly stated before the Learned Arbitrator on 27th August 2007 that the contention which was sought to be taken up ought to have been urged on 4th May 2007, but at that stage he had not read his papers. The Petitioners' Advocate unfortunately sought to controvert the correctness of what was recorded by the Learned Arbitrator in his order dated 27th August 2007. The Arbitrator, as the record would show, was constrained to set the record straight by a communication dated 27th September 2007. The Learned Arbitrator is justified in coming to the conclusion that the Petitioners have by their conduct waived their objection to enforce a punctilious observance of the time schedule of four months. To adopt any other construction would frustrate the object and purpose of arbitral proceedings and bring the whole machinery provided by the Act to facilitate an efficacious recourse to arbitration into grave peril. Speaking for myself, I would decline to accept a construction which would lead to that result. The Court is duty bound to effectuate the object and intent of Parliament in enacting the law and the 39 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 40 arbp.56-2013 view which I have taken is one which will protect the object which Parliament had in view.

14 There is no merit in the petition. The Petition shall accordingly stand dismissed.

19. Mr. Tulzapurkar, learned senior counsel placed reliance upon the judgment of this court in the case of M/s Snehdeep Auto Centre Vs. Hindustan Petroleum Corporation Ltd. (supra) in which the Division Bench of this court dealt wity the judgment of the Supreme court in case of N.B.C.C. Ltd (supra).

Reliance is placed on para-6 to 8 and 12 of the said judgment, which read thus:

> "6 It is an admitted position that award was passed after the period provided for in the agreement was over. The award was passed on April 10, 2008 after the period specified in the agreement both initial and extendable for making the award was over. However, to our mind the Judgment of the Apex Court in the case of N.B.C.C Ltd., (supra) relied upon by the learned single Judge does not lay down an absolute proposition that moment the award is made after the stipulated period then it must be set aside. In that case the six months period was provided by the High Court by its order and not by agreement between the parties. The respondent in that case had moved an application before the High Court for a declaration that the mandate of the arbitrator stood terminated. The party in that case had taken a clear stand that the mandate of the arbitrator was terminated and his application itself was a clear and unequivocal act to enforce such a time limit. The Apex Court in the said Judgment in the case of N.B.C.C Ltd., (supra) observed that - "The arbitrator was bound to make and publish his award within the time mutually agreed to by the parties, unless the parties consented to further enlargement of time". The learned Counsel for the appellant is right in contending that this observation of the Apex Court does not rule out a contingency where conduct of the parties can be implied with certainly to mean that they have consented not to insist on mandatory time limit.

> 7. The learned single Judge of this Court in the case of Mascon Multiservices (supra) came to the conclusion that the inquiry on facts to find out whether the parties have waived the condition of termination of arbitration by efflux of time is permissible. The learned Judge has held that if a party attends number of meetings after the award has expired it would be a strong indication of the waiver. The learned Judge however, cautioned that the strength of indication of waiver is not necessarily directly proportional to the number of meetings attended and it is the nature of meeting and nature of conduct which is important. The learned Judge has held that the conduct should be such that the waiver can be clearly inferred.

8. In the case at hand after the period stipulated of six months was over on November 3, 2006, the respondent made further submission in the arbitration proceedings on December 14, 2006.

The respondent made further submissions on December 21, 2006. On March 3, 2007 the period of four months thereafter expired. Thereafter on March 12, 2007 both the parties therein submitted their Written Statement. In the written submission, the respondent did not contend that the mandate of arbitrator had come to an end. Thus, the respondent did not take a clear and unambiguous stand that, the arbitrator cannot proceed to declare the award as his mandate has come to an end. This conduct of the respondent amounts to clear waiver to the objection of time limit being mandatory requirement for pronouncement of the award. Making submissions and filing written submissions cannot be termed as formal steps but were integral part of the proceedings before the arbitrator. The respondents had opportunity, both at the time of making oral submissions on December 14, 2006 and December 21, 2006 to raise the contention that the mandate of the arbitrator has come to an end by efflux of time. Respondent also had an opportunity to put on record this contention in the written submissions filed on March 12, 2007. This conduct of the respondent amounts to clear waiver on their part to the condition of time limit stipulated in the agreement.

12. Thus, in conclusion we are not in agreement with the learned single Judge that the present arbitration Petition needs to be automatically allowed because the award of the arbitrator was passed after the period stipulated in the agreement had come to an end without looking into any other aspect. Having considered the facts narrated above, we find that the conduct of the respondent is 41 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 42 arbp.56-2013 such that a clear inference can be drawn that it had waived the time limit stipulated in the agreement and the objection regarding the jurisdiction of the arbitrator. "

20. Mr. Tulzapurkar, learned senior counsel placed reliance on the judgment of this court in the case of Mascon Multi services & Consultants Pvt.

Ltd. V. Bharat Oman Refineries Ltd. & anr. [2008(6) Bom. C.R. 611], and more particularly para-20, 35 and 37 of the said judgment in support of his plea that when the parties raised question as to jurisdiction, it would be legitimate to draw inference that they themselves have given a go-bye to the stipulation as to the time within which the award is to be made. Learned senior counsel placed reliance in support of the plea that parties can always by consent agree to extend time within which award to be made and published which was extended in this case by consent of both parties as recorded by the learned arbitrator. Para 20, 35 and 37 of the judgment in the case of Mascon Multiservices and Consultants Pvt.

Ltd. read thus:

> "20. When parties raise questions as to jurisdiction it would be legitimate to draw an inference that they themselves have given a go by to the stipulation as to the time within which the award is to be made. When parties stipulate a time for making an award commencing from the date on which the arbitrator enters upon reference it would be legitimate to presume that they contemplated that the stipulation as to time would operate only where disputes other than those regarding jurisdiction including the authority of the arbitrator are raised. For when parties enter into an arbitration agreement it would be reasonable to presume that they do so on the basis that the arbitrator would have jurisdiction and be competent to adjudicate upon the merits of the disputes between themselves.

> Parties do not enter into arbitration agreements on the basis that the arbitrators may not have jurisdiction to decide the disputes which may arise and which they agree must be arbitrated upon. Thus, it would be safe and proper to assume that parties that raise questions as to jurisdiction have given a go by to the stipulation as to time within which an award is to be made in the agreement.

35. In Shyam Telecom Ltd Versus ARM 2004 (3) Arbitration Law Reporter 146 it was found that the Petitioner had waived its right to object to the continuance of the arbitration proceedings by having participated therein and not having raised the objection even after the time for making the award had expired. A learned single judge of the Delhi High Court held :-

"19. Mr. Rajiv Nayar in support of his contention that the petitioner will be deemed to have waived its right to object within the meaning of Section 4 of the Act, has sought support from the Supreme Court decision in the case of Narayan Prasad Lohia v. Nikunj Kumar Lohia and Ors., MANU/SC/0114/2002 (SO ; Inder Sain Mittal v.

Housing Board, MANU/SC/0117/2002; and a Karnataka decision in the case of K.S.R.T.C. v. M. Keshava Raju, MANU/KA/0732/2003. In Narayan Prasad Lohia's case (supra), the Court considered the question of waiver of a right to object by a party in relation to the constitution of an arbitral tribunal and held that a conjoint reading of Sections 10 and 16 shows that an objection to the composition of the Arbitral Tribunal is a matter which is derogable. The Court further ruled that it is derogable because a party is free not to object within time prescribed in Section 16(2) of the Act and if a party chooses not to so object, there will be a deemed waiver under Section 4. The Court repelled the submission that Section 10 is a non-derogable provision.

20. Inder Sain Mittal's case (supra), was considered under the provisions of the 1940 Act and, therefore, is not of much help in deciding the question. In the case of K.S.R.T.C's case (supra), the Karnataka High Court considered the question of waiver more fully in relation to the 43 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 44 arbp.56-2013 right to object the jurisdiction of the Arbitrator and has held as under :

"Thirdly, the appellant should be deemed to have waived his right to object to the jurisdiction of the Arbitrator to pass the impugned Award in terms of the provisions of Section 4 of the Act. Section 4 is based on general principles such as "estoppel" or "venire contra factum proprium". It is intended to help the arbitral process function efficiently and in good faith. If there is non-compliance of any non- mandatory provision of Part I or of any requirement of the Arbitration agreement by a party to an Arbitration agreement of which the other party to the agreement though has the knowledge of such non-compliance but does not object without undue delay, or if a time limit is provided for stating that objection and no objection is taken within that period of time, such a party later on can neither raise objection about that non-compliance of any provision of Part I nor any requirement of the Arbitration agreement since such party shall be deemed to have waived its objection. Though, in order to apply the doctrine of waiver by invoking Section 4, the first condition is that the non-compliance must be of non-mandatory provision of Part I or of any requirement under the Arbitration agreement, certain mandatory provisions of the Act also provide for a grant of waiver in the event of failure to object. For example, Sub-sections (2) and (3) of Section 16 are one of such mandatory provisions. Section 16(2) of the Act provides that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. Section 16(3) of the Act provides that a plea that the Arbitral Tribunal shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the Arbitral proceedings."

"22. In the opinion of this Court, these arguments of the learned counsel for the petitioner cannot be accepted ; firstly, because 44 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 45 arbp.56-2013 having regard to the totality of the facts by no stretch it can be said that the Article IV(3) of the

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

Besides, in the opinion of the Court the right to object the continuance of the proceedings on the ground of expiry of the stipulated period is one which falls in Part-I of the Act and which is derogable. The object of providing time limit for rendering an Award by the Arbitrator is aimed at expeditious resolution of the disputes rather than to leave the disputes unsettled or inconclusive on the expiry of the stipulated period. -Thus, looking at the matter from any angle, this Court is of the opinion that having regard to the entirety of the facts and circumstances, the petitioner will be deemed to have waived its right to object about the continuation of the proceedings or alleging the termination of the mandate of the Arbitrator simply on the ground that the time prescribed under Article IV(3) of the Divestment agreement for making the Award had expired." (emphasis supplied) I am in respectful agreement with the judgment. It is applicable to 45 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 46 arbp.56-2013 the present case.

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

21. Learned senior counsel distibgushed the judgment of the Division Bench of this court relied upon by Mr. Mehta, learned Counsel for the petitioner in case of Bharat Omen Refineries dated 2.5.2012. Mr. Tulzapurkar pointed out that the judgment of the Division Bench of this court in case of Snehadeep Auto Centre (supra) has been distinguished by the Division Bench of this court in the case of Bharat Omen Refineries in the facts of that case by taking a view that there was no conflict of law. In the judgment of Snehadeep Auto Centre (supra) as well as Division Bench in judgment of Bharat Oman Refineries (supra) has held that doctrine of waiver or deemed waiver or estoppal 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. Mr. Tulzapurkar learned senior counsel thus submits that the judgment of this court in the case of Snehadeep Auto Centre (supra) has interpreted law laid down by the Supreme Court in case of N.B.C.C. Ltd (supra). It is submitted that the Division Bench in case of Bharat Oman Refineries (supra) does not take a different view on 46 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 47 arbp.56-2013 question of law but has only

distinguished the facts of that case and thus reliance placed by the petitioner on the judgment of the Division Bench in the case of Bharat Oman Refineries is of no assistance to the petitioner.

22. On the issue raised by Mr. Mehta that the provisions of Micro, Small and Medium Development Act would have overriding effect and thus from the date of the said Act having come into effect even pending proceedings before the learned arbitrator appointed under the provisions of the Arbitration and Conciliation Act 1996 can be referred to the Council appointed under the provisions of the said Act of 2006 is concerned, Mr. Tulzapurkar placed reliance upon the judgment of the Division Bench of this court in the case of M/s Steel Authority of India Ltd. and Anr. Vs Micro, small Enterprises Facilitation Council through Joint Director of Industries [AIR 2012 Bombay 178) in support of his plea that it cannot be said that Section 18 of the said Act provides for forum of arbitration and independent agreement entered into between the parties still cease to have effect. It is thus submitted that all pending arbitrations based on arbitration agreement would continue to be governed by the provisions of the Arbitration Act, 1996. Learned senior counsel placed reliance on the para 11 and 12 of the said judgment which read thus:

> "11. Having considered the matter, we find that Section 18(1) of the Act, in terms allows any party to a dispute relating to the amount due under Section 17 i.e. an amount due and payable by buyer to seller; to approach the facilitation Council. It is rightly contended by Mrs. Dangre, the learned Additional Government 47 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 48 arbp.56-2013 Pleader, that there can be variety of disputes between the parties such as about the date of acceptance of the goods or the deemed day of acceptance, about schedule of supplies etc. because of which a buyer may have a strong objection to the bills raised by the supplier in which case a buyer must be considered eligible to approach the Council. We find that Section 18(1) clearly allowed any party to a dispute namely a buyer and a supplier to make reference to the Council. However, the question is; what would be the next step after such a reference is made, when an arbitration agreement exists between the parties or not. We find that there is no provision in the Act, which negates or renders an arbitration agreement entered into between the parties ineffective. Moreover, Section 24 of the Act, which is enacted to give an overriding effect to the provisions of Sections 15 to 23 including section 18, which provides for forum for resolution of the dispute under the Act would not have the effect of negating an arbitration agreement since that section overrides only such things that are inconsistent with Sections 15 to 23 including Section 18 notwithstanding anything contained in any other law for the time being in force.

Section 18(3) of the Act in terms provides that where conciliation before before the Council is not successful, the Council may itself take the dispute for arbitration or refer it to any institution or centre providing alternate dispute resolution and that the provisions of the Arbitration and Conciliation Act, 1996 shall thus apply to the disputes as an arbitration in pursuance of arbitration agreement referred to in Section 7(1) of the Arbitration and Conciliation Act, 1996. This procedure for arbitration and conciliation is precisely the procedure under which all arbitration agreements are dealt with. We, thus find that it cannot be said that because Section 18 provides for a forum of

arbitration an independent arbitration agreement entered into between the parties will cease to have effect. There is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996.

12. At this stage, it is necessary to deal with another contention raised on behalf of the Council by Mrs. Dangre, the learned Addl. Government Pleader. According to the learned Addl. Government Pleader, the procedure of conciliation contemplated by Section 18 (2) of the Act is a procedure, which has been specially enacted for 48 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 49 arbp.56-2013 the purposes providing a Forum for conciliation which itself is capable of setting a dispute between the micro, small and medium enterprises and any other party. We find that the arbitration agreement in question, like most arbitration agreements, does not contain a specific provision for conciliation and, therefore, it would be necessary for the parties to submit to the conciliation process under Section 18(2) of the Act notwithstanding the existence of an arbitration agreement. Undoubtedly, the Council may either itself conduct the conciliation in accordance with the provisions of Sections 65 to 81 of the Arbitration and Conciliation Act, 1996 or as provided by Section 18(2) of the Act refer it to any institute or centre provided for alternate dispute resolution."

23. Mr. Tulzapurkar, learned senior counsel submits that large number of matters were filed by LPG cylinders manufacturers before the same arbitrator and represented by a common Advocate were pending. Advocate represented by such parties wanted convenient dates from time to time. Parties were waiting for the outcome of the proceedings pending in the High court and the learned arbitrator was asked to wait till the matters in High Court between those parties were disposed of. It is submitted that in view of the disputes though falsely raised by the petitioner about the contents of the minutes of meeting held on 4.4.2011, the learned arbitrator who has filed his personal affidavit placing true and correct facts on record shall be considered by this court and not the disputes falsely raised by the petitioner belatedly.

24. In rejoinder, Mr. Mehta, learned counsel for the petitioner submits that the Division Bench of this court in case of Bharat Oman Refineries (supra) 49 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 50 arbp.56-2013 has considered the judgment of the Supreme Court in case of N.B.C.C. Ltd and also the judgment of Divison Bench of this court in the case of Snehadeep Auto Centre (supra) and after considering the same held that if time to make an award has expired and parties have not consented to enlargement of time, mandate of the arbitrator stands terminated under section 14 of the Arbitration Act 1996 and the law laid down by this court following the judgment in case of N.B.C.C. Ltd is binding . It is submitted that in any event one year has expired even after last meeting held before the arbitrator on 4.4.2011 and therefore the arbitrator has become de jure or defacto in terms of section 14 of the Arbitration Act 1996 and thus petitioner deserves to be granted reliefs as prayed. It is submitted that the arbitration proceedings are pending for last nine years before various arbitrators and also at least for a period more than 3 years before the respondent no. herein and the entire purpose that the arbitration proceedings shall be disposed of expeditiously has been frustrated in this case and thus the mandate of the learned arbitrator shall be declared as

termimnated.

25 Mr. Tulzapurkar, learned senior counsel for the respondent no.1 points out from the order passed by the Supreme Court in the case of Bharat Oman Refineries that the Supreme Court has issued notice and in the meantime has stayed the proceedings filed by the parties having succeeded in the said matter under section 11 of the Arbitration Act 1996. He thus submits that the proceedings under section 11 of the Arbitration Act 1996 having been stayed by 50 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 51 arbp.56-2013 the Supreme court, the judgment of the Division bench in the case of Bharat Oman Refineries is subjudice before the Supreme Court and thus no reliance can be placed by the petitioner on the said judgment of Division Bench of this Court.

26. On perusal of the records in the present proceedings, it is clear that on acceptance of appointment by the first arbitrator Mr. A.M. Jagdale was on 22.6.2003. The petitioner had filed an application under Section 12 of the Arbitration Act 1996 challenging his appointment. The respondent no.2 filed their reply to the said application on 2.3.2004. By an order dated 18.6.2004, the learned arbitrator rejected the said application filed by the petitioner on 9.1.2004.

On 25.2.2005, the petitioner filed application under section 18 and 24 of the Arbitration 1996 for discovery and inspection, which application was rejected by the learned arbitrator on 26.8.2005. Mr. A.M. Jagdale, the learned arbitrator made and declared his awards in other eleven matters on 29.11.2005 and retired on 30.11.2005. Mr. Jagdale retired after two years from the date of his appointment as arbitrator. However, no objection was raised by the petitioner that the said Mr. A.M. Jagdale ceased to be arbitrator or that his mandate came to be terminated on expiry of two years. When Mr. A.C. Das appointed as arbitrator by the 2nd respondent, the petitioner filed an application on 8.2.2008 under sections 13,14 and 16 of the Arbitration Act 1996 before him. On his retirement, the 2nd respondent by letter dated 12.3.2008, appointed the respondent no.1 herein as the arbitrator. The respondent no.1 accepted his appointment as 51 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 52 arbp.56-2013 arbitrator on 14.5.2008. On 31.5.2008, the petitioner filed an application under section 13 and 14 read with section 16 of the Arbitration Act 1996 before the learned arbitrator contending that the respondent no.1 could not be appointed as arbitrator as time period of appointment had already expired. When the 1 st respondent fixed hearing on 26.3.1011, the petitioner again requested to dispose of the application filed under section 13 and 14 read with section 16 of the Arbitration Act 1996.

27. From the pleadings filed by the respondent no.2, it is revealed that there was dispute between the LPG cylinders manufacturers who were more than 75 and the respondent no.2 which was referred to arbitration. Some of the parties were represented by a common Advocate before the learned arbitrator. The erstwhile arbitrator made awards in respect of 11 matters which awards were challenged before this court by the respondent no.2. This court admitted those petitions and finally heard those matters in the month of December 2009 and set aside the awards made by the learned arbitrator in 9 matters out of 11 matters and dismissed remaining two matters. LPG cylinders manufacturers filed appeals in those 9 matters whereas respondent no.2 filed appeals in 2 matters. All such matters are pending for adjudication before Division Bench of this court.

28. The learned arbitrator fixed a meeting on 28.1.2008 to decide further course of action when the Advocate for the petitioner and the Advocate 52 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 53 arbp.56-2013 for the 2nd respondent informed the learned arbitrator that pleadings in the matter on behalf of the parties would be completed and requested to fix date of hearing after pleadings were filed for deciding further course of action in the matter. The learned arbitrator accordingly directed respective parties to complete the pleadings. No objection was raised by the petitioner that the respondent no.2 had forfeited its right to appoint another arbitrator in terms of clause 22(g) of the agreement prior to 28.1.2008.

29. It appears that after setting aside of the awards in 9 matters by this court and in view of the appeals filed by both parties being pending in this court, the learned arbitrator fixed a meeting on 4.4.2011 for deciding the further course of action in the matter. It is not in dispute that the said meeting was attended by the petitioner through his Advocate Mr. Pravin Mahajan. Records of the proceedings reveals that the said Mr. Pravin Mahajan who was representing the petitioner in this matter was also representing other LPG cylinders manufacturers in similar matters before the learned arbitrator which were placed for hearing on the same date for the convenience of the Advocate for the petitioner who was based in Delhi. In the said meeting, the petitioner through his Advocate made a statement that interim application made by the petitioner would not be pressed at that stage and the same would be taken up alongwith the statement of claim as preliminary objection. The record also indicates that in view of large number of matters in which the same Advocate was appearing for 53 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 54 arbp.56-2013 various parties including petitioner herein and the respondents, whether pleadings in various matters were filed or not was not clear and thus both parties agreed to file their respective pleadings within a period of 4 weeks if such pleadings were not already filed and agreed to appraise the exact status thereof within a period of 4 weeks to the learned arbitrator.

30. The learned arbitrator prepared a minutes of meeting dated 4.4.2011 and handed over copies thereof to both the parties through their Advocates. The minutes of meeting dated 4.4.2011 indicates that both the parties further agreed in the said meeting to extend time to complete the arbitration proceedings and same was accordingly recorded by the learned arbitrator in the said minutes of meeting.

31. The 2nd respondent has strongly placed reliance upon the affidavit dated 24.1.2013 filed by Mr. D.H. Shetye, Manager (Law) of the 2 nd respondent who had attended the said meeting held on 4.4.2011 and was aware of what had transpired therein. The said officer deposed in the said affidavit that parties were not aware as to whether pleadings were already complete and agreed to appraise the arbitrator about the exact status thereof within 4 weeks. He deposed that after finalization of the minutes of meeting, the secretary of the learned arbitrator took out the print and after signature on the minutes, all persons present in the meeting signed the said minutes including the Advocate representing the 54 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 55 arbp.56-2013 petitioner. Photocopy thereof was taken out and was handed over to both the Advocates including the Advocate for the petitioner. The reliance also placed on the affidavit filed by the learned arbitrator himself in the present proceedings on 19.1.2013 who deposed what transpired in the said meeting held on 4.4.2011.

The learned arbitrator in his affidavit deposed that Mr. Pravin Mahajan, Advocate had by his email dated 25.3.2011 had requested the learned arbitrator to defer the hearing in all the 15 matters in which he was appearing including this matter to 4.4.2011 as other 10 matters were already scheduled before the learned arbitrator on 4.4.2011 where the same Advocate was appearing for LPG cylinders manufacturers. The learned arbitrator accordingly rescheduled the meeting on 4.4.2011 along with other 10 matters wherein Mr. Pravin Mahajan, Advocate was appearing. In the said affidavit, the learned arbitrator also deposed about agreement about filing of pleadings and to appraise learned arbitrator of exact status of the arbitration proceedings. The learned arbitrator also deposed that the parties had agreed to extend time for completion of arbitration proceedings. It was also stated in the said affidavit that minutes of meeting was drawn up and handed over to the parties immediately at the end of the meeting personally through the Advocates of the petitioner and the respondents. The learned arbitrator also annexed copy of the minutes of meeting to the said affidavit held on 4.4.2011 showing acknowledgement of the parties including their Advocates. The learned arbitrator confirmed that the said minutes were handed over to the Advocates for the petitioner and the respondents and the 55 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 56 arbp.56-2013 officers of the 2nd respondent who were present. There is no affidavit filed by the petitioner controverting these statements made by the learned arbitrator or by the Manager (Law) of the 2nd respondent. In my view, the petitioner has wrongly denied the contents of the minutes held on 4.4.2011. The minutes of meeting dated 4.4.2011 indicates that parties had agreed to file pleadings if not filed and agreed to appraise the learned arbitrator about the status of the pleadings. No objection was raised by the petitioner about the jurisdiction of the learned arbitrator to proceed or that he had become becomes functus officio and/or that his mandate was terminated. On the contrary, the minutes of the meeting indicates that both parties had agreed to extend time to complete the arbitration proceedings.

32. In my view, in view of disputes about the contents of minutes of meeting recorded in rejoinder filed by the petitioner and the affidavits of the Manager (Law) of the respondent no.2 and the personal affidavit of the learned arbitrator deposing what had transpired in the said meeting held on 4.4.2011 and annexing copy of the minutes of meeting showing acknowledgement thereof by the petitioner through his Advocate, the personal affidavit filed by the learned arbitrator will have to be believed. At no point of time the petitioner disputed contents of the minutes of meeting dated 4.4.2011 or that the same was not received by the petitioner. The minutes of the meeting shows acknowledgement thereof by the petitioner as well respondents. If the petitioner wanted to dispute 56 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 57 arbp.56-2013 the contents of the said minutes, the petitioner could have raised objection in writing immediately or within a reasonable period of time which they failed to do so. In my view, there is no reason to disbelieve the affidavit filed by the learned arbitrator deposing about what transpired in the meeting held on 4.4.2011 and which indicates that both the parties had agreed to extend time to dispose of arbitration proceedings.

33. So far as the judgment delivered by the Supreme Court in the case of NBCC Ltd. (Supra) relied upon by the petitioner is concerned, in the said matter before the Supreme Court though the parties had extended time to make an award, the learned arbitrator failed to conclude the proceedings within extended time. One of the party therefore filed proceedings in the High court for termination

of mandate of the arbitrator on account of his failure to publish the award within time fixed by the parties. In the facts of that case the Supreme Court held that that the arbitrator was bound to make and publish his award within time mutually agreed by the parties unless the parties consented to further enlargement of time. It is held that the condition precedent for enlargement of time would depend only on the consent of the parties i.e. to say, that if the parties agree for enlargement of time. If consent is not given by the parties, then the authority of the arbitrator would automatically cease to exist after the expiry of the time limit fixed. It is thus clear that if both parties have enlarged time to make an award, the arbitrator does not cease to have jurisdiction to proceed with 57 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 58 arbp.56-2013 the matter and to make an award.

34. The question that arises for consideration of this court is whether any parties have consented for enlargement of time before the arbitrator. In my view, though time to make an award had expired, the petitioner participated in the matter without raising any objection about the expiry of the period or that the arbitrator ceased to have jurisdiction. In view of the pendency of various matters in High court in identical matters, it appears that both parties did not want to proceed with the pending arbitration before the learned arbitrator which led to postponement of the proceedings before the learned arbitrator. No sooner the awards were set aside by the High court and appeals were filed by the parties in the said proceedings which are pending, the present proceeding before the learned arbitrator proposed to be commenced. In view of the consent of both the parties for enlargement of time to complete the arbitration proceedings and to make an award mandate of the arbitrator has not come to an end and the learned arbitrator does not cease to have jurisdiction to proceed with the matter and to make an award. Even by conduct of both parties, time to complete arbitration proceedings and to make an award is extended.

35. So far as the judgment of the Division bench of this court in the case of Bharat Oman Refineries (supra) is concerned, it is held that there is no conflict of law in the law laid down by the Division bench of this court in case of 58 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 59 arbp.56-2013 Snehadeep Auto Centre (supra) in which the Division bench had dealt with judgment of Supreme Court in the case of NBCC Ltd (supra). The said judgment was however distinguished on facts. The Division bench of this court has held that the Division bench in case of Snehadeep Auto Centre (supra) has interpreted the judgment of the Supreme Court in a particular manner after taking into account the said judgment and there is no question of the said judgment of the division bench be per incuriam. The division bench however held that in the case of Bharat Oman Refineries (supra), it could not be said that the parties were in active participation after the arguments were completed before the learned arbitrator and thus it could not be said that the respondents had waived its right of proceeding further with the arbitration proceedings after conclusion of arguments before the learned arbitrator and after inordinate delay of two years in making the award. In para 27 of the judgment of the Division bench it is held that the clause of the contract which was subject matter in case of Snehadeep Auto Centre (supra) was totally different and distinguished in the case before the division bench in case of Bharat Oman Refineries. Special leave petition against the order passed in the case of Bharat Oman Refineries is pending. By order dated 31.8.2012, notice is directed to be issued by the Supreme Court and the Supreme Court has stayed the proceeding filed under section of 11 of Arbitration and Conciliation Act 1996 in this court.

36. In case of Snehadeep Auto (supra), the Division bench of this court 59 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 60 arbp.56-2013 after considering the judgment of the Supreme Court in the case of NBCC Ltd has held that parties having not taking clear and unambiguous stand before the learned arbitrator that he could not proceed to declare the award as his mandate has come to an end, such conduct amounts to clear waiver to the objection of time limit being mandatory requirement for pronouncement of the award. The Division bench also held that in view of the conduct of the respondent showing clear waiver on their part in the time limit in the agreement, a clear inference can be drawn that it had waived the time limit stipulated in the agreement and the objection regarding the jurisdiction of the arbitrator. The Division bench of this court in case of Bharat Oman Refineries Ltd has not disputed the proposition of law laid down by the division bench of this court in case of Snehadeep Auto (supra), but distinguishes the judgment in the fact of that case. In my view, considering the records of this matter, it is clear that by conduct of the petitioner in not objecting to proceed with the matter before the learned arbitrator, by agreeing to file pleadings and obtaining convenient time for hearing of the matter, by agreeing to extend time to complete the proceeding, the petitioner has waived their right to object that the learned arbitrator became functus officio and/or ceased to have jurisdiction or that his mandate has come to an end by eflux of time.

37. The Single Judge of this court in case of Jayesh H. Pandya (supra) which judgment was delivered prior to judgment of the Supreme Court in case of 60 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 61 arbp.56-2013 NBCC Ltd. had taken a view that where a party intends to assert a rigid adherence to the time prescribed by the arbitration agreement, it must at the earliest opportunity make its intention known to ensure compliance with a rigid standard as to time. It is held that to hold otherwise would be to encourage a lack of candour on the part of parties in their dealings before the Arbitrator. The court held that interpretation of law by the Court must be such as to promote honesty, fairness and transparency on the part of parties and not such as would defeat the salutary object in the enactment of the Arbitration and Conciliation Act, 1996. I am in respectful agreement with this view of the learned Single Judge of this court.

38. In my view, parties have enlarged time by consent to complete the proceedings by the learned arbitrator and to make an award.

39. This court in the case of Mascon Multiservices & Consultants Pvt.

Ltd.(supra) held that when parties raise questions as to jurisdiction it would be legitimate to draw an inference that they themselves have given a go-bye to the stipulation as to the time within which the award is to be made. It is held that it would be safe and proper to assume that parties that raise questions as to jurisdiction have given a go-bye to the stipulation as to time within which an award is to be made in the agreement. I am in respecful agreement with this view of the learned Single Judge of this Court.

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40. Perusal of the records indicates that the petitioner had raised objection of jurisdiction from beginning by filing application under section 12 and 13 even before expiry of the two years period. Petitioners had also filed application for discovery and inspection. In view of such applications filed by the petitioner raising issue of jurisdiction of the arbitrator, in my view the petitioner cannot be allowed to raise a plea that the arbitrator became functus officio on expiry of two years period or that his mandate stood terminated due to delay on the part of arbitrator.

41. Perusal of the record also indicates that the learned arbitrator had fixed convenient date to accommodate the Advocate representing the petitioner who was also appearing in large number of other matters before the same arbitrator. It is clear that parties did not want to proceed with this arbitration in view of the pendency of various matters on similar issue in this court. The petitioner therefore could not have raised such plea of delay on the part of the learned arbitrator in completing the proceedings within time.

42. As far as reliance placed by Mr. Mehta, learned Counsel on the provisions of Micro, Small, Medium Enterprises Development Act, 2006 and on the judgment of Punjab & Haryana High court in the case of Welspun Corporation Ltd.(supra) in support of the plea that the petitioner having 62 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 63 arbp.56-2013 registered under the provisions of the said Act and thus dispute, if any, between the parties is required to be resolved by the Council appointed under the provisions of the said Act is concerned, reference to the judgment of the Division bench of this court in case of M/s Steel Authority of India Ltd. (supra) would be useful. The division bench of this court in that matter has held that it cannot be said that because Section 18 which provides for a forum of arbitration, an independent arbitration agreement entered into between the parties will cease to have effect. It is held that there is no question of an independent arbitration agreement ceasing to have any effect because the overriding clause only overrides things inconsistent therewith and there is no inconsistency between an arbitration conducted by the Council under Section 18 and arbitration conducted under an individual clause since both are governed by the provision of the Arbitration Act, 1996. It is held that there is no provision in that Act which negates or renders an arbitration agreement entered into between the parties ineffective. In my view, there is no substance in the submissions made by Mr. Mehta, learned Counsel appearing on behalf of the petitioner that after petitioner having registered itself under the provisions of the said Act of 2006, the present proceedings could not be proceeded with under the arbitration agreement entered into between the parties or that dispute could be resolved only by Council appointed under the provisions of the said Act of 2006. In my view, the proceedings under the existing arbitration agreement between the parties would not be affected by enactment of the said Act and would continued to be governed 63 / 65 ::: Downloaded on - 09/06/2013 19:48:31 ::: 64 arbp.56-2013 by the provisions of the existing agreement between the parties and would be

governed by the provisions of the Arbitration and Conciliation Act, 1996. In my view, there is no merit in the submissions made by Mr. Mehta, learned Counsel appearing for the petitioner.

43. Accordingly, I pass the following order:

The arbitration petition is dismissed with no order as to costs.

ig R.D. DHANUKA, J.