

(2013) 205 DLT 64

Delhi High Court

Case No: OMP No. 21 of 2013

Transair and Others

APPELLANT

Vs

M/s. Kuwait Airways
and Others

RESPONDENT

Date of Decision: Oct. 21, 2013

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 12, 13, 14, 14(1), 14(2)

Citation: (2013) 205 DLT 64

Hon'ble Judges: Manmohan Singh, J

Bench: Single Bench

Advocate: Chetan Sharma, Mr. Vaibhav Gaggar, Ms. Garima Malhotra, Ms. Tushar Singh and Mr. Indresh Kumar, Ors. in OMP No. 21/2013, Mr. Rajiv Nayar, Mr. Abhijat, Mr. Aaditya Vijay Kumar, Mr. Harsh Hariharan and Mr. P. Kumar, in OMP No. 24/2013, for the Appellant; Jayant Bhushan Ms. Mamta Tiwari, Ms. Veronica Mohan, Arpit Shukla and Mr. Pallav Mongia for R-1, Mr. Abhijat, Mr. Aaditya Vijay Kumar, Harsh Hariharan, P. Kumar for R-3 and R-4 in OMP No. 21/2013, Mr. Chetan Sharma Mr. Vaibhav Gaggar, Ms. Garima Malhotra, Ms. Tushar Singh and Mr. Indresh Kumar for R-2 and R-3 in O.M.P. No. 24/2013, for the Respondent

Final Decision: Dismissed

Judgement

Manmohan Singh, J.

The petitioners by way of the present petitions seek to invoke Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") to declare that the mandate of the Arbitral Tribunal constituted for the arbitration proceedings between the petitioners and the respondent stands terminated de jure and de facto with effect from 17th December, 2012. M/s. Transair petitioner in OMP No. 21/2013 is a Partnership Firm having its registered office at 803, Ansal Bhavan 16, Kasturba Gandhi Marg, New Delhi-110001. The petitioner No. 2, respondent Nos. 3 and 4 are partners. Petitioner No. 2 Mr. Chetan Gupta is the husband of Ms. Vandana Gupta respondent No. 3 herein and son of Smt. Jagwanti, respondent No. 4.

2. Respondent No. 1 is a corporation incorporated in Kuwait which own and runs Kuwait Airlines. Respondent No. 2 is the Director General, IATA, which is a trade association of Airlines and under whose procedural rules, the Arbitral proceedings in question are being conducted.
3. Ms. Vandana Gupta and Smt. Jagwanti, the petitioners in OMP No. 24/2013 have also filed separate petition for similar relief against respondent No. 1 herein.
4. The question of law in both matters are same, therefore both are decided by common single order.
5. The petitioner No. 1 Transair and respondent No. 1 Kuwait Airways had entered into a General Sales Agency Agreement (hereinafter referred to as GSA) dated 30th July, 1987 by which the petitioner No. 1 was appointed as the General Sales Agent of respondent No. 1 for sale of passengers, cargo and mail transportation for various states and cities in India.
6. Disputes and differences accrued between the petitioners. The respondent No. 1 was left with no other option but to terminate the GSA vide letter dated 23rd September, 2008.
7. After the termination of GSA, the respondent No. 1 sought to raise issues regarding certain debit notes which related to transactions of the period 2005-2008. The respondent No. 1, by mail dated 11th March, 2011, informed the Director General, IATA of a dispute to be referred for an arbitration and copy of this request of arbitration made by the respondent No. 1 was received by the petitioners on 11th April, 2011.
8. As per Article XI of the GSA, the parties agreed to refer any dispute to arbitration which related to the scope, meaning or effect of the GSA agreement or its schedules. The said Clause stipulates the disputes and their reference for Arbitration in accordance with the provisions of IATA rules.
9. The case of the petitioners in both matters is that the Arbitral Tribunal had failed to conclude the arbitration proceedings between the parties within the stipulated time agreed between the parties, therefore, the mandate of the Tribunal terminated de jure, because as per Article 19 of IATA Rules, the award is to be passed within 6 months from the date when the Director General notifies that the parties have paid the advance of costs and thereafter, the period may at best be extended by another 3 months by the Director General, IATA.
10. Admittedly the Director General, IATA, constituted an Arbitral Tribunal of three members. The first hearing of said arbitration proceedings was held on 31st March, 2012.
11. The contention of the petitioners is that the procedural order by the Tribunal had decided upon the cost to be paid as the arbitrators fees and secretarial and other expenses. This order was brought to the notice of the Director General, IATA vide letter

dated. 13th April, 2012, notified the Tribunal confirming the advance of costs arranged by the parties. This letter was received by the Arbitral Tribunal on 17th April, 2012 and therefore, according of Article 19 r/w Article 29(4) of IATA rules, the Arbitral Tribunal was expected to decide the matter within 6 months from the date of notification by the Director General, i.e. on or before 17th October, 2012.

The petitioners in both the matters stressed that as mandate of the Tribunal expired on 17th October, 2012, the respondent No. 2 i.e. IATA could have extended for a period of three months only on the request of the Tribunal upto 17th January, 2013 if the said request for extension was made on or before 17th October, 2012. As the Arbitral Tribunal did not seek extension before expiry of six months the mandate of the Tribunal stood terminated with effect from 17th October, 2012 due to the efflux of time, thereby invoking Section 14 of the Act is justifiable by the petitioners.

12. It is admitted by the petitioners that they did not raise any objection regarding the mandate of the Tribunal having been terminated w.e.f. 17th October, 2012 immediately and they joined the proceedings after the expiry of 17th October, 2012. The explanation given by them is that they were under an impression at that time that the period of 6 months was from 1st June, 2012 as recorded vide procedural order and the same was to expire on 30th November, 2012.

13. On 7th November, 2012, the Arbitral Tribunal fixed the next date of hearing as 4th December, 2012. However, the Arbitral Tribunal alongwith the parties and their counsels congregated on 4th December, 12, the Arbitral Tribunal cited inability to proceed as the period of six months had expired and also told the parties that since mandatory period stood expired, it has sought extension for six months for adjudication and disposal of the matter. However, the Director General, IATA sought consent of parties and directed the counsels of both the parties to seek and furnish necessary directions for extension by six months within 48 hours.

Pursuant of the order, the counsels of respondents No. 1 and 2 informed the Tribunal that the petitioners have categorically dissent from giving the consent for grant of extension of time.

14. On receipt of the letter dated 25th November, 2012 of the Arbitral Tribunal, the Director General asked the Tribunal to confirm with the parties whether they agreed with the extension proposal. Even after the parties dissented to give consent for extension of time, the Arbitral Tribunal once again addressed a letter to Director General IATA stating that for the time being the proceedings have been kept in abeyance due to expiry of the period of six months and because no order of extension has been passed till date and also in lights of the objections raised by the petitioners and the respondent No. 3 and 4 further stated that in case the Director General extends the period, the parties would be immediately informed, date would be fixed and the matter would be proceeded with. It was after this letter of the Arbitral Tribunal that the Director General on 13th December,

2012 addressed a letter to the Arbitral Tribunal wherein it was inadvertently recorded that since the parties have agreed to give consent to extension period, the extension is granted for six additional months. The inadvertent recording in the Director General's letter regarding the parties having consented to the extension of time was brought to the notice of the Director General by the Arbitral Tribunal and it was post this letter that the Director General vide its letter dated 18th December, 2012 granted extension of 3 months for conclusion of arbitration proceedings.

15. The Arbitral Tribunal, vide order dated 23rd December, 2012, informed the petitioner that the Director General IATA has extended the time period by three months with effect from 18th December, 2012 and the next date of hearing be fixed on 14th January, 2013.

16. The objection of the petitioners is that the said extension cannot under any circumstance revive the mandate of the Arbitral Tribunal or render any already functus officio Arbitral Tribunal with the powers and jurisdiction to try and adjudicate the arbitration. The extension of time by three months granted by Director General is otiose as the said extension is with effect from 18th December, 2012, i.e. after the expiry of the mandate and therefore, the Arbitral Tribunal has no jurisdiction to try and adjudicate the Arbitral proceedings as the Arbitral proceeding in question has germinated for clause XI of the GSA wherein the parties were ad-idem qua that the Arbitration proceedings would be concluded within 6 months and therefore, any extension of time beyond that six month period without the consent of the parties would ipso facto and de jure vitiate the mere basis of the consent to enter into GSA itself.

17. On 7th December, 2012, the Arbitral Tribunal heard the arguments advanced by respondents No. 3 and 4. Thereafter, the petitioners also pressed for arguing the application under Article 10 of Arbitration Rules challenging the arbitrability of the dispute referred by the respondent No. 1, of which the application was filed by the petitioners on 31st October, 2011 before the Director General, IATA. However, the Tribunal expressed its inability to hear the said application of the petitioners as the same was not placed before them by the Director General, IATA and in view of this fact, the petitioners were permitted to file a fresh application u/s 16 of the Act within 72 hours.

18. Thereafter, the petitioners vide mails dated 19th September, 2012 and 28th September, 2012 requested the Arbitral Tribunal to pass appropriate orders on the application under article 10 of IATA, however, no orders or directions as to the hearing was passed by the Arbitral Tribunal. The petitioners again pressed for argument in respect of the said application challenging the arbitrability of the dispute referred by the respondent No. 1. But the Arbitral Tribunal expressed inability to hear the said application as the same was not placed before the Director General, IATA and in view of this fact, the petitioners were allowed to file a fresh application u/s 16 of the Act within 3 days. The petitioners accordingly filed an application on 10th November, 2012.

19. One of the main grounds on which the petitioner challenged the arbitrability of the dispute on merit is that the entire claim of the respondent No. 1 is based on and replete with serious allegations against the petitioners of allegedly committing malpractices, fraud, forgery in the account books, manipulation of finances and cheating the respondent No. 1 of its dues in alleged conspiracy with one of the employees of the respondent. The allegations in the statement of claim, beside being false and frivolous are also beyond the scope of the arbitration clause of the GSA and there is no other standard arbitration agreement between the parties to make such kind of disputes amenable to arbitration.

20. The nature of dispute and the allegations as alleged by the respondent No. 1 in its claim neither impliedly nor explicitly fall within the scope or ambit of the arbitration clause to confer this Tribunal the jurisdiction to take cognizance of this claim.

21. Even assuming that the claim of the respondent falls within the ambit of the arbitration clause, the present proceedings would require a detailed and exhaustive trial since it relates to allegations wherein the entire claim is emanating out of alleged malpractices in the account books, manipulation of finances, raising of fictitious debit notes and fraud.

22. It is submitted by the petitioners that when the Arbitral Tribunal failed to act without undue delay, the petitioner was not bound to give consent as to the extension of time. The Petitioners were constrained to seek extension of time to file its reply and counter claim due to sudden demise of the mother of the learned Senior counsel of the petitioner in the matter.

23. Without having any sanction of extension of time, the Arbitral Tribunal held the proceeding on 20th October, 2012 and directed the respondents No. 2 and 3 to file reply to the Statement of Claim of the respondent No. 1 and further directed the respondent No. 1 to file rejoinder to the reply that would be filed by respondents No. 2 and fixed 7th November, 2012 as the next date of hearing for taking up the application u/s 14 and 16 of the Act filed by the respondents No. 3 and 4.

24. The case of the petitioners is that it is clear from the correspondences that no extension was sought and granted on or before 17th October, 2012 and therefore, the Arbitral Tribunal became functus officio and the proceedings held thereafter were ultra vires and non est in the eyes of law. It was only on 3rd January, 2013 and 5th January, 2013 when the Arbitral Tribunal forwarded the correspondences exchanged by it with Director General and it came to the knowledge of the Petitioners that Arbitral Tribunal vide letter dated 25th November, 2012, had acknowledged that the mandate expired on 17th October, 2012.

25. When the matter was listed before this Court, both parties agreed that time spent in this court would not be considered for the purpose of arbitration proceedings even if the orders are passed for continuation of arbitration proceedings.

26. As per the GSA, the parties had agreed to abide by the IATA Rules. Article 19 of the Rules lays down:

The Tribunal must render an award within six months from the date the Director General notifies the Tribunal that the advance on costs has been paid in full. The Director General, if necessary, extend this time limit for up to three months.

27. As per settled law normally legal position is that arbitration agreement is the fountain head of the Arbitral Tribunal's power and authority and parties and tribunal are controlled by the terms of the said agreement unless and otherwise parties agree to the contrary, the terms of agreement must operate in full. The petitioners in the present matters are unwilling to extend the period of making the Award after the expiry of prescribed period and are insisting that arbitration proceedings cannot continue. Their prayer in the petitions are that it be held that expiry of the period, the proceedings render Arbitral Tribunal "de jure" should not continue as the same are terminated within the meaning of Section 14 of the Act.

28. The case of the respondent No. 1 is that the demand of the petitioners for declaring the mandate of the Tribunal as terminated de jure and de facto is wrong and devoid of any logical and legal reasoning. Section 14 is perspicuous in laying down the parameters for declaring the mandate of Arbitral Tribunal as terminated de jure and de facto and the present matter does not fall within the said parameters by any stretch of imagination. The extension sought by the Tribunal would not prejudice the rights of the parties in any manner.

29. The matter came before this court for hearing when Mr. Rajiv Nayar, learned Senior counsel with Mr. Abhijat, Advocate appeared in OMP No. 24/2013 and Mr. Chetan Sharma, Senior counsel with Mr. Vaibhav Gaggar, Advocate appeared on behalf of the petitioner in OMP No. 21/2013 and Mr. Jayant Bhushan, learned Senior counsel with Ms. Swati Sinha appeared on behalf of the respondents who have made their respective submissions on behalf of the parties.

30. The submissions of Mr. Nayar and Mr. Chetan Sharma, learned Senior counsel for the petitioners are almost same which can be outlined in the following manner:

Mr. Nayar, learned Senior counsel for the petitioner has argued that the mandate of the Arbitral Tribunal appointed under IATA Rules has been terminated in view of the express provisions contained in Article 19 of the IATA arbitration rules. It is the contention of Mr. Nayar that the petitioner has expressly dissented to the grant of any further time period for conducting the arbitration beyond the period of 6 months prescribed in the rules. The arbitration proceedings commenced on 17th April, 2012 when the letter dated 13th April, 2012 issued by the Director General was received by the Arbitral Tribunal on 17th September, 2012 in accordance with Article 19 read with the Article 29 (4) of the IATA Arbitration Rules and the six months period prescribed under the rules expired on

17th October, 2012. Therefore, as per the submissions of Mr. Nayar, learned Senior counsel for the petitioner, the Arbitral Tribunal has become de jure incapable of performing their function as per the rules or in the alternative failed to act without any undue delay as prescribed under the provisions of section 14 of the Arbitration and Conciliation Act 1996 clearly attracting the jurisdiction of this court to terminate the mandate of the arbitrators under the said provision.

¶½ Learned Senior counsel further argued Arbitral Tribunal could have sought extension of 3 months only from the date of the expiry of the six months i.e. 17th October, 2012, however, they erroneously, sought extension of time from the Director General only on 25th November, 2012 and that too for a period of 5 months, which period is not contemplated u/s 19 of the IATA.

In view of the above it is apparent that according to Article 19 read with Article 29(4) of the IATA, Arbitration Rules, the mandate of the Arbitral Tribunal expired on 17th October, 2012 and could have been extended for another period of 3 months only by the Director General, IATA on the request of the Arbitral Tribunal which means that the mandate of the Arbitral Tribunal could not at all be extended beyond 17th January, 2013.

Hence the mandate of the Arbitral Tribunal stood terminated de jure and de facto with effect from 17th October, 2012 due to efflux of time within the meaning of Section 14 of the Arbitration and Conciliation Act, 1996.

It is denied that the presiding Arbitrator, vide his letter dated 7th December, 2012, brought to the notice of the parties that the matter is complicated and since good amount of documents have been filed, extension is required to complete the Arbitral proceedings. It is submitted that the presiding Arbitrator never addressed any such letter to the parties. The said letter dated 7th December, 2012 was addressed by the learned Arbitral Tribunal to the Director General, IATA, without having marked the copy of the same to the petitioners. It is only when the respondent No. 2 and 3, vide mail dated 3rd January, 2013 and 5th January, 2013, sought copy of the all the correspondences exchanged between the learned Arbitral Tribunal and the Director General, IATA, that the petitioners herein became aware of such a letter addressed by the learned Arbitral Tribunal to the Director General, IATA.

¶½ Mr. Nayar, argued that the petitioner never waived the objection qua the termination of the mandate and thus the defence raised by the respondent in order to resist the application is not tenable.

¶½ Mr. Nayar, argued that the provisions of Article 19 of the IATA rules are mandatory which is apparent from the express word "must" contained therein which means that the tribunal must render the award within 6 months from the date of notification by Director General. Thus, the time period prescribed by the said IATA rules which is in the form of agreed procedure cannot be departed by the Arbitral Tribunal or the Director General or

for that matter by this court. Thus, this court should not proceed to extend the time period which has been expressly agreed by the parties and has also provided in the rules of IATA.

¶ 1/2 Mr. Nayar argued that the petitioner could not be held solely responsible for the delay caused by the Arbitral Tribunal in making and rendering the award. It may be true that the petitioner has participated in the proceedings and has sought time to file the application as well as rejoinder, but that by itself does not absolve the Arbitral Tribunal from functioning as per the mandate provided to it as per the IATA rules. Therefore, the respondents case to say that the petitioner is guilty of any inequitable conduct does not really come in the way of this court in deciding the application u/s 14 of the Act of 1996 by terminating the mandate of the arbitrator.

¶ 1/2 Mr. Nayar, learned Senior counsel in order to support his submissions has cited the following judgments:

- a) [Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others](#), .
- b) [Rashtriya Ispat Nigam Limited and Another Vs. Verma Transport Company](#), .
- c) [Rambaksh Lachhandas Vs. The Bombay Cotton Company](#), .
- d) [Babubhai Tansukhlal Vs. Madhavji Govindji and Co.](#), .
- e) [Chetandas Daga Vs. Radhakisson Ramchandra](#), .
- f) [N. Radhakrishnan Vs. Maestro Engineers and Others](#), .
- g) [Krishan Chander Ramesh Chander and Brothers Vs. Sohan Lal](#), .
- h) [Krishna Chowdhury and others Vs. State of West Bengal and others](#), .
- i) [Shyam Telecom Ltd. Vs. Arm Ltd.](#), .

31. In view of the submissions advanced by the learned Senior counsel for the petitioners, in both matters stated that this court should declare that the mandate of the Arbitral Tribunal has been terminated and proceed to invoke its powers under the provisions of Section 14 of the Arbitration and Conciliation Act on the ground of de jure incapability of the Arbitral Tribunal to function or the arbitrators inability to function without undue delay.

32. Per contra, Mr. Jayant Bhushan, learned Senior counsel for the respondent has made his submission in resistance to the application filed by the petitioner and the said submissions can be outlined in the following manner:

a) Mr. Bhushan, learned Senior counsel for the respondent firstly argued that the present application seeking termination of the mandate of the Arbitral Tribunal under the provisions of Section 14 of the Act is not maintainable in as much as the same is premature. Mr. Bhushan argued that the conjoint reading of Article 19 and Article 29 of the IATA rules would reveal that the 6 months time period shall commence from the date of the notification full cost is paid in advance by Director General. As per Mr. Bhushan, the full cost includes the cost of Arbitral Tribunal and what has been contained in Article 29. Thus, till the time the cost of the Arbitral Tribunal is paid in advance in full by the parties, it cannot be said that the six months period to render the award shall start running or has been elapsed. Thus, As per Mr. Bhushan, the petition preferred by the petitioner is misconceived and ought to be rejected by this court.

b) Mr. Bhushan, learned Senior counsel for the respondent has further argued it is the petitioner who is guilty of seeking time from the Arbitral Tribunal on one pretext or the other. It has been argued that the petitioners have even filed the application u/s 16 of the Arbitration and Conciliation Act whereby the petitioner has challenged the jurisdiction of the tribunal to entertain the dispute. The petitioners have systematically tried hard to make all types of excuses before the learned Arbitral Tribunal so that the proceedings should not be completed within the frame work of the prescribed period. Thus, it is the petitioners who is guilty of the delay in the process and thus, the Arbitral Tribunal could not be said to have failed to act without undue delay as it is the petitioner who is responsible for the delay and the provisions of Section 14 of the Act does not get attracted.

c) Mr. Bhushan, learned Senior counsel for the respondent argued that the time limit which has been agreed by the parties under IATA rules is merely procedural in nature and thus, the said time limit to render the award can be extended by the consent of the parties or by the court. It has been argued that the time limit to render award is thus directory in nature and not a mandatory one. Mr. Bhushan in this context relied upon Article 19 and submitted that the word "must" does not always reflect mandatory nature in the clause and sometimes also can be read in the directory sense. In order to support his submission, Mr. Bhushan also placed reliance upon the Black's Law dictionary where the meaning of the word "must" has been provided. Mr. Bhushan, learned Senior counsel for the respondent contended that the present case is thus an exceptional one where the delay is directly not attributable to the Arbitral Tribunal and thus the rigid time period should not obstruct the functioning of the Arbitral proceedings and this court can conveniently proceed to hold that the time limit under the IATA rules is directory in nature. He argues that it is a matter of fact that even after expiry of alleged period on 17th October, 2012 the petitioners conduct reveal that they were proceeding with the matter. Thus, now they can not take any advantage of their wrong doing. It has been argued that the petitioner has thus participated in the proceedings even after the expiry of the time. In fact, they have waived their right to object on the ground of the termination of the mandate of the Arbitral Tribunal by participating in the Arbitral proceedings.

d) Mr. Bhushan, learned Senior counsel for the respondent has argued that the petitioners have informed the learned Arbitral Tribunal about the termination of mandate even prior to the passing of the three months time period to be extended by the Director General under IATA rules. As per respondent, six months period and extension were supposed to expire on 17th January, 2013 even if the contention of the petitioners are taken as correct. Thus, the present petition which is filed on 8th January, 2013 is otherwise not maintainable being premature in nature and thus is liable to be dismissed.

33. In view of the aforementioned submissions, Mr. Bhushan prayed that this court should dismiss the petition filed by the petitioner and direct for the continuation of the Arbitral proceedings.

34. I have gone through the petition filed by the petitioner, response filed by the respondent and also the records of the Arbitral proceedings. I have given my careful consideration to the submissions advanced by the learned counsel for the parties at the bar. I shall now proceed to discuss the various aspects which arise for consideration in the present case.

35. First and foremost thing which is required to be mentioned for the purpose of deciding the present application is that the petitioner and respondent had entered into the General Service Agency Agreement dated 30th July, 1987 which contained the arbitration referring that the arbitration shall be conducted as per the clause contained in IATA. The said arbitration clause/Article XI of GSA reads as under:

Any dispute concerning the scope, meaning, construction or effect of this Agreement or its schedules shall be referred to and finally settled by arbitration in accordance with the provisions of the IATA arbitration.

36. Pursuant to the invocation of the aforementioned arbitration clause contained the agreement, the respondent wrote to the IATA to launch the arbitration proceedings by filing a request for the arbitrator. Thereafter, the Arbitral Tribunal was appointed as per the IATA rules and the petitioner has filed the application under the provisions of Article X of IATA rules before the Director General, IATA that the dispute in the instant case does not fall within the realm of the arbitration clause. Thereafter, the Director General, IATA constituted an Arbitral Tribunal of three Hon"ble members. The first hearing was held on 31st March, 2012. Thereafter, the petitioner herein filed a similar application under the provisions of section 16 of the Arbitration and Conciliation Act 1996 before the Arbitral Tribunal constituted under the IATA Rules. The petitioner herein also filed the statement of the defence along with the counter claim before the Arbitral Tribunal.

37. All this background became essential in the instant case in order to make it clear that both the parties agreed under the arbitration clause contained in the agreement dated 30th July, 1987 that arbitration is required to be conducted as per the rules of IATA which is a kind of institutional arbitration though the parties have chosen the substantial law as

the Indian law for the purposes of arbitration. Even during the course of the submissions of both the parties as well as in the petition and the reply, it is no one's case that the arbitration clause nowhere provides for the conducting of arbitration as per the rules of IATA. Rather, the petitioner by filing the present application seeking termination of the mandate of the arbitrator u/s 14 of the Act also believes that the Arbitral Tribunal was rightly constituted under the IATA rules but its mandate is over due to the efflux of the time although petitioner is also of the belief that the dispute does not fall within the ambit of the arbitration clause.

38. The necessary consequence of the discussion which has been held in the preceding two paragraphs is that the parties agreed under the agreement as well as thereafter to arbitrate their dispute as per IATA rules and the substantial law for the purposes of the arbitration was law of India as mentioned in the form by the respondent by preferring to launch the arbitration and the claim.

39. In this backdrop, if one closely examines the conception of the institutional arbitration, then it can be realized that the rules of the institution providing for the mode of the conducting the arbitration shall govern the arbitration to the extent the said rules provide for the appointment, replacement and all other processes and steps which are required to be taken during the course of conducting the arbitration and the applicability of the substantive law shall thus vary accordingly. The said rules of institutions for the conducting of reference shall be treated as the agreement between the parties or agreed procedure for the purposes of the derogable or non mandatory provisions of the Act.

40. Russel on Arbitration by David St. John Sutton, Judith Gill and Mathew Gearing, 23rd Edition, Thomson, Sweet & Maxwell, discusses extensively on the subject of Institutional arbitration and arbitration rules. The learned author proceeds to observe that the reference in the arbitration clause to such rules of arbitration constitutes an agreement in writing for the purposes of the Section 5 of the Arbitration Act in UK which is similar to the Indian Act and for that purpose it is an agreement between the parties for the purposes of the non-mandatory provisions of the Act of 1996. The learned Author observes thus:

5-101 Institutional arbitration and arbitration rules. Various institutions promulgate rules for use in arbitrations which set out, in varying degrees of detail, the procedure to be adopted in an arbitration conducted under those rules. These institutions include both commercial associations (such as GAFTA and FOSFA) and institutions whose very existence is designed to facilitate arbitration (such as the Chartered Institution of Arbitrations and, in the international context, the ICC and LCIA). A reference in the arbitration clause to such rules of arbitration constitutes an agreement in writing for the purposes of s. 5 of the Arbitration Act 1996 and may therefore be an agreement between the parties for the purposes of the non-mandatory provisions of the 1996 Act.

(Emphasis Supplied)

41. It is further noteworthy to mention that institutional arbitration is a device by way of which the parties agree to resolve their disputes by way of arbitration by subjecting themselves to the rules of the institution for the purposes of conducting the reference and the rules of such institution normally provide for all the necessary processes and challenges which are preferred during the course of conducting of the arbitration including the matters of appointment, replacements etc. The said rules are made in the form of comprehensive codes so that the matters relating to appointment and replacement could be decided by the parties through institution without approaching the court. The learned Author of Russel on Arbitration has succinctly put forth the advantages of the institutional arbitration wherein one of the significant advantage is that the mode of appointment and replacement can be decided by parties without interference of the court. The learned author observes thus:

5-101 Advantages of institutional arbitration. The institution concerned may perform a number of different roles in connection with arbitration proceedings. However, its principal function will usually be to deal with the administration of the reference in accordance with its rules. The main advantages of having the arbitration administered by an institution in this way are that:

• it provides a procedural framework for the case;

• it may be able to provide specialist services or arbitrators with particular expertise;

• it may serve to relieve the parties and the tribunal of some of the administrative burden of conducting the reference;

• The institution can deal with challenges to and replacement of arbitrators without the need to involve the courts

(Emphasis Supplied)

42. The Learned author further observes in his book that in the cases where the rules provide comprehensive code containing the challenges, the said rules become the agreement to the contrary by the parties for the purposes of derogable or mandatory provisions of the Act of 1996 in UK which is akin to Indian Act. The learned Author observes thus:

5-101 Rules providing procedural framework. Whether administered or not, arbitration under the different rules is intended to provide a procedural framework for the conduct of the reference. The rules do not provide an exhaustive code designed to cover all points that might arise in the course of the arbitration, but rather set out the powers, duties and obligations of the tribunal and the parties so that they know what can and cannot be done, and by whom, in determining the procedure to be adopted in the particular reference. Similar guidance is given by the Arbitration Act, 1996, but the arbitration rules will normally provide a more complete code than the framework provided by the Act for

example by specifying time limits for the services of written submissions and appointment of the tribunal. They will often also constitute an agreement between the parties for the purposes of many of the non-mandatory provisions of the 1996 Act.

(Emphasis Supplied)

43. On the fair reading of the aforementioned excerpts quoted from Russel on Arbitration, it is clear that the rules of arbitration of an institution in the cases relating to institutional arbitration may provide for several challenges as a framework to conduct the reference including the appointment process, replacement process etc which may be departed from the provisions of the Act and in such cases, the rules would act as an agreement to contrary for the purposes of the provisions of the Act based on model law where such provisions are permitted by the law to be deviated from subject to the contract to the contrary.

44. Applying the said proposition of law to the instant case, if one reads the Section 2(6) of the Act of 1996, it is clear that the provisions of part 1 are derogable to the extent provided by the Act and in such case the parties are at liberty to authorize the institution to decide the said issue. Section 2(6) reads as under:

(6) Where this Part, except section 28, leaves the parties free to determine a certain issue, that freedom shall include the right of the parties to authorise any person including an institution, to determine that issue.

45. Accordingly, the parties in the instant case by the written agreement have stated that the arbitration shall be conducted as per the IATA clause and thereafter proceeded to invoke the arbitration as the IATA rules and also referred to the said rules at the time of conducting of the proceedings as well as before this court to their advantage. The parties have thus clearly agreed to conduct the arbitration as per the rules of IATA as an institution.

46. IATA rules have been adopted in the year 1999. The careful reading of the said IATA rules would reveal that the rules provide not merely for the procedure for an appointment, conducting reference and rendering of award but also provide for the procedure for replacement of arbitrator and the remedies available to the parties relating to mandate of the arbitrator or Arbitral Tribunal in the form of Article 12 of IATA rules. The said Article 12 of IATA rules reads as under:

Article 12-Replacement of arbitrators

1. An arbitrator shall be replaced in the event of death or disability, the acceptance by the Director General of the arbitrator's resignation, the agreement of all parties that the said arbitrator be replaced, or the acceptance of a challenge under Article 11.

2. An arbitrator shall also be replaced when the Director General decides that such person is prevented de jure or de facto from acting as arbitrator, or is not fulfilling such functions in accordance with these Rules. In any such case, the Director General shall give the arbitrator concerned, the parties and other members of the tribunal, an opportunity to comment before making his decision final.

3. The Director General shall appoint any replacement arbitrator. Once reconstituted, and after having invited the parties to comment, the tribunal shall determine if and to what extent the tribunal's proceeding shall be recommenced. In discharging his functions under this Article, the Director General may seek the assistance of any expert(s), as he deems fit. The Director General's decision shall be final.

47. On mere reading of Article 12 of IATA rules would reveal that sub Rule 2 and 3 of the Article 12 is akin and analogous to that Section 14 and Section 15 of the Arbitration and Conciliation Act. The said provisions in the form of Article 12 (2) and (3) are though similar in their language with that of Section 14 and 15 of the Act but provide a different remedy which is before the Director General after giving necessary hearing to the parties, Arbitral Tribunal and members of the tribunal unlike the remedy before the court under the provisions of Section 14 and 15 of the Act. Furthermore, the decision of the Director General under Article 12 of the IATA arbitration rules is final. The said provisions under Article 12 of the IATA rules are clear departure from the provisions of Section 14 and 15 of the Act of 1996 in India.

48. On the other hand, the careful reading of Section 14 of the Act would reveal that the said provision relating to the termination of the mandate of the arbitrator and the consequences relating to appointment of the replacement/substitute arbitrator u/s 15 are clearly subject to the agreement between the parties. Section 14 and 15 of the Act reads as under:

14. 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 13, 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.

15. Termination of mandate and substitution of arbitrator.- (1) In addition to the circumstances referred to in section 13 or section 14, the mandate of an arbitrator shall terminate----

(a) where he withdraws from office for any reason; or

(b) by or pursuant to agreement of the parties.

(2) 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 being replaced.

(3) Unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section (2), any hearings previously held may be repeated at the discretion of the arbitral tribunal. (4) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

49. On careful reading of Section 14 and 15 of the Act, it can be said that the mandate of arbitrator can be terminated as per the eventualities prescribed u/s 14(1) and Section 15(1) of the Act either by the mutual agreement between the parties or by way of parties agreeing to the otherwise by way of any other mode of termination or by way of the court if the controversy still remains. This is evident from the clear wordings of Section 14(2) which curtails the right of the parties to approach the court only in cases where the controversy remains concerning the grounds mentioned under the provisions of Section 14(1) of the Act and seek termination of the mandate of the arbitrator. The said right to approach the court if the controversy remains is further subject to the agreement which the parties may otherwise enter prescribing any other mode of termination of the mandate than by approaching the court. This is evident from the words "unless otherwise agreed by the parties" contained in Section 14(2) of the Act. Therefore, the party's right to apply to the court for seeking the termination of the mandate of the arbitrator or Arbitral Tribunal is clearly subjected to contract which the parties otherwise agree and is thus a derogable provision by way of the agreement between the parties. Similarly, the provision of Section 15 is also subjected to the agreement otherwise between the parties and is a provision which can be agreed to be departed with by the parties as per the scheme of the Act.

50. In the instant case, it is already seen that the parties have agreed to conduct the arbitration as per IATA rules, the parties by agreeing to conduct the arbitration as per IATA rules have submitted themselves to the rules of IATA as an institution including Article 12. The said rules are comprehensive code in themselves providing for several challenges which come in the way of conducting of the arbitration by the Arbitral Tribunal. The said Article 12 is in the nature of appointment of the replacement arbitrator or termination of the mandate in case the arbitrator has de facto or de jure become

incapable of performing the function or are not performing their functions as per the rules by providing the remedy to the Director General who shall decide the matter after hearing the parties and whose decision shall be final. Consequently, the parties by agreeing for the applicability of rules IATA in the arbitration proceedings clearly departed from the provisions of the Arbitration and Conciliation Act to the extent that they are provided under the IATA rules to the contrary.

51. Thus, the existence of the provisions relating to the defacto or dejure incapability or inability to perform functions as per the rules in the rules of IATA is clearly an agreed procedure to the contrary as provided under the provisions of Section 14 and 15 of the Act. The provisions of Section 14 and 15 of the Act would have no applicability in the instant case and the parties would not have right to approach the court under the provisions of Section 14 of the Act as they already have agreed to conduct the arbitration as per the rules of IATA which contained the mechanism and agreed procedure to deal with such eventuality.

52. It cannot also be argued that the termination of the mandate of the arbitration is different from appointment of the replacement arbitrator. This is due to the reason that the termination of the mandate of the arbitrator does not result in the termination of the arbitration proceedings. A party by seeking the termination of the mandate of the arbitrator cannot plead that the arbitration proceedings axiomatically come to end. The necessary consequence in law for the termination of the mandate of the arbitrator under the provision of Section 14 of the Act is the appointment of the substitute arbitrator u/s 15 of the Act wherein again the appointment procedure is followed. Thus, the provisions of Article 12 of IATA rules are the clear departure of the provisions of Section 14 and 15 of the Act. Thus, the remedy of seeking replacement arbitrator on the ground of the termination of the mandate of the arbitrator in the instant case would lie to the Director General as per the mechanism and framework agreed and provided under the IATA rules of 1999. Thus, the present petition u/s 14 of the Act is not maintainable.

53. The parties also cannot dispute the applicability of IATA rules in the instant case as both the petitioner and respondent cited several rules of IATA while canvassing submissions where petitioner reliance was mainly on Article 19 of IATA rules whereas the respondent mainly relied upon article 19 read with Article 29 of the rules. Once both the parties are relying upon IATA rules to their advantage, the parties are also estopped from pleading to the contrary that the rules are not applicable for any other purpose when the rules are themselves self contained code and as per the authorities on the subject are mechanism to deal with challenges for conducting the arbitration through institutional arbitration. The agreement entered into by the parties also nowhere make any such distinction on the applicability of the rules. Thus, the rules are clearly applicable in so far as it relates to the process of appointment and replacement of the arbitrator which is akin to Section 14 and 15 of the Act though the rules provide for the departure.

54. I need not go into deciding the rival contentions raised by the parties as I am of the considered view that the present petition u/s 14 of the Act is not maintainable in view of clear applicability of Article 12 of IATA rules. Therefore, the said contentions are left open to be decided by the competent forum before which the challenge shall be raised as prescribed under the rules. The present petitions are thus dismissed. Both petitioners are burdened with costs of Rs. 50,000/- which shall be deposited by them in equal share with the Prime Minister Relief Fund within four weeks from today.