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IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
J.K. MAHESHWARI; J., ATUL S. CHANDURKAR; J.
SLP (C) Nos. 23846-47 OF 2025; March 11, 2026
MUNICIPAL CORPORATION OF GREATER MUMBAI *versus* **M/S R.V. ANDERSON ASSOCIATES LIMITED**

Arbitration and Conciliation Act, 1996 – Section 16, Section 4, and Section 34 – Appointment of Presiding Arbitrator – Improper Constitution of Tribunal – Waiver and Conduct – The Appellant challenged the arbitral award on the ground that the Presiding Arbitrator was appointed by the two nominee arbitrators beyond the 30-day period prescribed in Clause 8.3(b) of the Agreement - The Appellant contended that after 30 days, the power of the nominee arbitrators was extinguished, and only the Secretary General of ICSID could make the appointment - Held: Clause 8.3(b) is an enabling provision, not a restrictive one - It provides a "fail-safe" by permitting parties to approach ICSID if the nominee arbitrators reach an impasse, but it does not denude the nominee arbitrators of their power to appoint after the 30-day period unless a request is actually made to ICSID - Since neither party approached ICSID, the appointment by the nominee arbitrators was valid. *[Paras 30-34]*

Arbitration and Conciliation Act, 1996 – Section 4 and Section 16(2) – Timelines for Objection vs. Past Conduct – Held that while an objection under Section 16(2) raised before the statement of defence is technically "timely" to prevent statutory waiver under Section 4, the prior conduct and acquiescence of the party remain relevant in adjudicating the merits of the jurisdictional challenge - A party cannot participate in the process, allow multiple appointments of presiding arbitrators without protest, and then "keep a jurisdictional ace up their sleeve" to challenge the final constitution - Supreme Court must respect arbitral autonomy and ensure minimum judicial interference - If the arbitrator's interpretation of a contractual clause is a plausible view, the Court cannot substitute it with another view merely because it is possible – Appeal dismissed. *[Relied on Hindustan Construction Co. Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd. (2025 SCC OnLine SC 2578; Consolidated Construction Consortium Limited v. Software Technology Parks of India (2025 INSC 574); Paras 36, 40-45, 51-54, 61, 66, 67]*

For Petitioner(s): Mr. Siddharth Bhatnagar, Sr. Adv. Ms. Ananya Nair, Adv. Ms. Nivedita Nair, Adv. Ms. Asha Gopalan Nair, AOR

For Respondent(s): Mr. Shyam Divan, Sr. Adv. Ms. Riddhi Sancheti, AOR Ms. Tanjul Sharma, Adv. Mr. Mukul Kulhari, Adv. Mr. Raghav Bhatia, Adv.

J U D G M E N T

J.K. MAHESHWARI, J.

1. Leave granted.

2. The instant appeal(s) are directed against the judgment dated 04.07.2025 of the High Court of Bombay (hereinafter referred to as "**High Court**") in Arbitration Appeal (L) No. 4339 of 2024 with Interim Application (L) No. 7312 of 2024.

3. By the impugned judgement, the High Court dismissed the appeal of the Appellant – Municipal Corporation of Greater Mumbai (hereinafter referred to as "**MCGM**") under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "**1996 Act**") and confirmed the judgment and order dated 19th and 20th of October, 2022 of the learned Single Judge in Arbitration Petition No. 84 of 2012 dismissing the application filed

under Section 34 of the 1996 Act by MCGM for setting aside the award dated 05.06.2010 of a three-member Arbitral Tribunal.

4. The challenge made in the proceedings of Section 34 was threefold - improper constitution of the tribunal, limitation and interest. However, before us, the Appellant has confined their arguments only to the question of lack of jurisdiction due to improper constitution of the tribunal. As such, our examination of the facts of the case is confined to the question of validity of constitution of the tribunal.

FACTS

5. The facts shorn of unnecessary details are that the MCGM had floated a tender and invited proposals for '*Consultancy Services to Upgrade Sewerage Operations & Maintenance Services*'. The scope of work of the contract was for providing consultancy in upgrading the sewage and sewerage handling facilities, operations and routine maintenance protocols. This was a World Bank funded project and the Respondent turned out to be the successful bidder in association with PHE Consultants, Mumbai. Pursuant thereto, an agreement dated 18.09.1995 (hereinafter referred to as the "**Agreement**") was entered into between the MCGM and M/s R.V. Anderson Associates Ltd., which is an engineering firm based out of Canada.

6. The stipulated duration for completion of the work under the Agreement was 72 months and the contract was designed to be implemented in stages. The work under the contract was completed on 20.06.2001 and a final report was submitted by the Respondent to the MCGM. At that stage, a dispute arose in respect of payment of outstanding dues. A meeting was held on 24.10.2002 where the Respondent's claims were discussed and rejected by MCGM except to make partial payments on 17.02.2004.

7. When things stood as thus, on 09.08.2005, the Respondent invoked the arbitration clause as contained in the Agreement. *Vide* communication dated 09.08.2005, received by the MCGM on 14.09.2005, the Respondent invoked the arbitration clause, particularly clause 8.3(b) of the Agreement and appointed Hon'ble Mr. Justice S.M. Jhunjhunwala (Retd.) as their nominee arbitrator. On 07.10.2005, the MCGM appointed Mr. Sharad Upasani, former IAS officer as their nominee arbitrator.

8. On 04.11.2005, a meeting was held between the Appellant and the Respondent, where the parties discussed about exploring a possibility of conciliation or mediation. In reference to the said meeting, another letter dated 08.11.2005 was sent by the Respondent to MCGM, seeking to explore non-binding conciliation or mediation and in the meanwhile, on confirmation by the MCGM, the arbitration proceedings be put in abeyance. The said letter dated 08.11.2005 was also marked to Justice Jhunjhunwala (Retd.) and Mr. Upasani. The MCGM, by writing letter dated 07.01.2006 acknowledged the intention of the Respondent to keep arbitration proceedings in abeyance and to start conciliation proceedings.

9. After a while, the Respondent wrote letters dated 12.02.2006 and 27.02.2006 to the MCGM, requesting to participate in the conciliation. It appears from the record that steps were not taken by the parties to explore the possibility of settlement and nothing was materialized. On 15.12.2006, MCGM addressed a letter to Mr. Upasani, informing him that there was no conciliation pursuant to the letter dated 08.11.2005 and that Respondent was delaying the appointment of arbitrators.

10. On 08.01.2007, the Respondent wrote a letter to the MCGM stating that since MCGM no longer seems to be inclined to explore mediation and conciliation, the arbitration

proceedings may continue and the two arbitrators may proceed to appoint the third arbitrator in terms of the contract.

11. The two nominee arbitrators jointly appointed Justice D.R. Dhanuka (Retd.) as the Presiding Arbitrator by their letter dated 30.04.2007. The Presiding Arbitrator issued the notice for preliminary meeting *vide* communication dated 09.05.2007.

12. At this stage, Respondent by their letter dated 28.05.2007, objected to the appointment of Justice Dhanuka (Retd.) in reference to Clause 8.6 of the Agreement, *inter alia* stating that the presiding arbitrator must not be of Indian or Canadian nationality. As such, Justice Dhanuka (Retd.) tendered his resignation as the Presiding Arbitrator on 28.06.2007.

13. The two Co-Arbitrators, prior to appointing another presiding arbitrator, then addressed a letter dated 17.09.2007 to both the Respondent and the MCGM, seeking information as to whether the parties are "*still interested in the conduct of the pending arbitral proceedings*". The Respondent replied on 29.09.2007 conveying their intention to continue with the arbitration proceedings and requested both Co-Arbitrators to proceed with the appointment of the Presiding Arbitrator. However, the MCGM did not reply in response to the said letter. Thereafter, the Co-Arbitrators appointed Mr. John Savage as the Presiding Arbitrator on 24.04.2008, who also tendered his resignation on 11.08.2008.

14. On 21.10.2008, the Co-Arbitrators wrote to Mr. Anwarul Haque of Singapore for appointment as the Presiding Arbitrator, who conveyed his acceptance on 29.10.2008. Finally, on 12.11.2008, the learned Co-Arbitrators informed the parties that Mr. Anwarul Haque had been appointed as the Presiding Arbitrator and that a preliminary meeting was scheduled on 08.12.2008, which was first rescheduled to 09.12.2008 and again rescheduled to 09.01.2009.

15. The preliminary meeting of the Arbitral Tribunal was conducted on 09.01.2009 which was duly attended by both the parties as evinced from the Minutes of the Preliminary Meeting of the Arbitral Tribunal. After the said meeting, MCGM, addressing a letter on 20.02.2009 to the Presiding Arbitrator, alleged that the appointment of the Presiding Arbitrator was contrary to the terms of the Agreement, hence a 'nullity'. It was said that the learned CoArbitrators could not have made the appointment of the Presiding Arbitrator beyond 30 days from the date of nomination of the second arbitrator. It was stated that the Presiding Arbitrator, therefore, has 'no right' to be an Arbitrator and requested that the Presiding Arbitrator ought to withdraw himself from being an Arbitrator in the matter.

16. A written objection to the letter dated 20.02.2009 was addressed by Respondent through its letter dated 09.03.2009. Thereafter, the Respondent submitted its statement of claim before the Arbitral Tribunal on 20.03.2009. It was at this stage, the MCGM filed an application under Section 16 of the 1996 Act, challenging the appointment of the Presiding Arbitrator as a 'nullity' and seeking consequential reliefs.

17. The learned Arbitral Tribunal, by its order dated 17.07.2009, (hereinafter referred to as "**Section 16 order**") dismissed the application by a detailed order, holding that the appointment of the Presiding Arbitrator was valid.

18. On 05.06.2010, the Tribunal passed the final award, directing MCGM to pay specified amounts in United States Dollars (hereinafter referred to as "**USD**") and in Indian Rupees (hereinafter referred to as "**INR**"). The Tribunal, under the final award, directed the payment as follows:

I. USD 2,078,349.25 and INR 14,76,736 along with interest amount on USD 1,089,926.88 and INR 1,51,596 at the rate of 14% per annum calculated from 16th June, 2004 till payment or realization, whichever is earlier.

II. USD 55,217 and INR 15,57,500 along with USD 42,815 and INR 4,07,500 quantified as the cost of arbitration.

19. A corrigendum to the final award was passed on 29.06.2010, making some corrections to the amount payable by the MCGM to the Arbitrators. After the payments were made, the award was finally issued and released to the MCGM on 10.08.2011.

20. The application seeking setting aside of the arbitral award under Section 34 of the 1996 Act was filed before the High Court on 04.11.2011. The learned Single Judge of the High Court pronounced its judgement dismissing the said application on 19th and 20th of October, 2022. An appeal was preferred under Section 37 of the 1996 Act before the Division Bench of the High Court which has been dismissed *vide* the Impugned Order. Upon filing the present appeals by the Appellant, notice was issued *vide* order dated 29.08.2025 and the operation of the impugned order was stayed.

FINDINGS OF THE TRIBUNAL AND HIGH COURT

21. The main thrust of the jurisdictional challenge as raised by the Appellant is that the Presiding Arbitrator had been appointed after the expiration of 30 days from 07.10.2005, i.e., the day when the MCGM had appointed its nominee arbitrator. It has been contended by the Appellant throughout that as per Clause 8.3(b) of the Agreement, once period of 30 days had expired, the Arbitral Tribunal was rendered *coram non judice* and the Co-Arbitrators had no power to appoint the Presiding Arbitrator, who could have only been appointed by the Secretary General of the International Centre for Settlement of Investment Disputes, Washington D.C. (hereinafter referred to as "**ICSID**").

Tribunal's findings

22. The learned Arbitral Tribunal, while dismissing the challenge laid out to its jurisdiction in the application filed under Section 16 of the 1996 Act, found that the provision to approach the Secretary General of the ICSID for appointment of the Presiding Arbitrator was merely an enabling provision, which did not denude the power of the Co-Arbitrators to appoint the Presiding Arbitrator. It was found that in this case, admittedly, neither party has made a reference to the Secretary General of ICSID and as such, the power of the Co-Arbitrators to appoint the Presiding Arbitrator cannot be said to be ousted. The Tribunal observed that since arbitral proceedings were kept in abeyance on the request of the parties, hence, no fault can be found with the decision of the Co-Arbitrators to appoint the Presiding Arbitrator. It was held that the conduct of MCGM in participating in the arbitral process amounts to waiver under Section 4 of the 1996 Act and the decision to challenge the appointment of the Presiding Arbitrator was barred by limitation.

Findings of the High Court in the Section 34 order

23. Learned Single Judge dismissed the application *vide* order dated 19th and 20th October, 2022. On the question of jurisdiction, it was found that the interpretation of Clause 8.3(b) made by the Tribunal is not just a possible or plausible or reasonable view, but rather it is the only reasonable view, therefore, interference by 'setting aside' the award under Section 34 is not warranted. The Court observed that in case the clause is interpreted in a manner that once the 30-day period had expired, the Co-Arbitrators had no power to appoint the Presiding Arbitrator and had to wait indefinitely for the parties to approach the ICSID, it will lead to absurdity and incongruity since there was no time limit

for the parties to approach the ICSID. In such a situation, the Arbitrators could not be said to be completely powerless after their appointment.

Findings of the High Court in the Section 37 order

24. The High Court, while dismissing the appeal under Section 37 of the 1996 Act *vide* the Impugned Order has approved the interpretation of Clause 8.3(b) as made by the learned Single Judge and the Arbitral Tribunal. The Court observed that while exercising appellate power under Section 37, the Court cannot sit in appeal over interpretation of the contractual clauses by the Arbitrator merely because a different interpretation of the said clause is possible. Since the appointment of the arbitrator is in line with the provisions of Clause 8.3(b) of the Agreement, no interference is warranted.

ARGUMENTS ADVANCED

25. Learned Senior Counsel Mr. Siddharth Bhatnagar for the MCGM, argued with vehemence that the arbitral award deserves to be set aside due to improper constitution of the tribunal and the award lacks jurisdiction. It has been submitted that the Arbitral Tribunal, learned Single Judge and the Division Bench of the High Court have interpreted and substituted the contractual scheme as agreed by the parties, which militates against the principle of party autonomy. It has been urged that Clause 8.3(b) of the Agreement permits a period of 30 days from the date of appointment of the latter Arbitrator for the arbitrators to jointly appoint the Presiding Arbitrator, after which the Tribunal is rendered *coram non judice* and loses its power to appoint the Presiding Arbitrator. In such a case, he submits, the only way the Presiding Arbitrator could have been appointed, would have been by the parties approaching the Secretary General of the ICSID since use of the word 'shall' in Clause 8.3(b) of the Agreement makes this the only possible interpretation of the contractual terms. As such, entire arbitral process becomes '*non-est*' in law due to a foundational jurisdictional defect which is incurable.

26. The above said arguments have been met with equal vehemence by the learned Senior Counsel Mr. Shyam Divan appearing for the Respondent. He submitted that the Tribunal has passed a detailed award after interpreting the clauses of the Agreement and the question of jurisdiction has been aptly dealt with by the learned Arbitral Tribunal. He further contended that once the award has been passed by the Arbitral Tribunal, the scope of interference at the stage of a challenge under Section 34 of the 1996 Act is limited. Such scope of interference is even more limited in an appeal under Section 37 of the 1996 Act and more so in a special leave petition arising out of the said appeal. It is urged that once the learned Arbitral Tribunal has reached a conclusion with respect to interpretation of the contract, there is no scope for reinterpretation and the Courts must not sit in appeal in these proceedings merely because a different view may be possible. He has urged assiduously that Clause 8.3(b) is an enabling clause and not a restricting clause, it merely provides an additional avenue for the parties to seek appointment of the Presiding Arbitrator before the Secretary General of ICSID in case there is an impasse and the Co-Arbitrators fail to appoint the Presiding Arbitrator within the prescribed time period of 30 days. It is argued that neither party took recourse before the ICSID as specified under this clause and as such, MCGM has waived its right to challenge the appointment of arbitrator after having actively participated in the arbitration. It is therefore, submitted that the jurisdictional challenge is an afterthought, after the arbitral process was well underway and is hit by waiver.

ANALYSIS OF SUBMISSIONS

27. Having heard learned counsel for the parties at length and on perusal of the facts and material placed on record, the short question which falls for our consideration is *whether the arbitral award deserves to be set aside on the ground of lack of jurisdiction due to improper constitution of the arbitral tribunal or patent illegality?*

Interpretation of Clause 8.3(b) of the Agreement

28. The instant jurisdictional challenge hinges on Clause 8.3(b) of the Agreement and its interpretation by the learned Arbitral Tribunal. Clause 8 of the Agreement is of utmost relevance in this case, and is therefore reproduced as thus:

"8. SETTLEMENT OF DISPUTES

8.1 Amicable Settlement

The Parties shall use their best efforts to settle amicably all disputes arising out of or in connection with this contract or the interpretation thereof.

8.2 Right to Arbitration

Any dispute between the Parties as to matters arising pursuant to this Contract which cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party to arbitration in accordance with the provisions of Clauses 8.3 through 8.7 hereinafter.

8.3 Selection of Arbitrators

Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator or an arbitration panel composed of three arbitrators, in accordance with the following provisions:

(a) Where the Parties agree that the dispute to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty (30) days after receipt by the other Party of the proposal of a name for such appointment by the Party who initiated the proceedings, either Party may apply to the Federation Internationale des Ingenieurs-Conseil (FIDIC) of Lausanne, Switzerland for a list of not fewer than five nominees and on receipt of such list, the Parties shall alternately strike names therefrom, and the last remaining nominee on the list shall be the sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list. FIDIC shall appoint upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.

(b) Where the Parties do not agree that the dispute concerns a technical matter, the Client and Consultants shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either Party, be appointed by the Secretary General of the International Centre for Settlement of Investment Disputes, Washington D.C.

(c) If, in a dispute subject to Clause 8.3(b), one Party fails to appoint its arbitrator within thirty (30) days after the other Party has appointed its arbitrator, the Party which has named an arbitrator may apply to the Secretary General of the International Centre for Settlement of Investment Disputes, Washington D.C. to appoint a sole arbitrator for the matter in dispute, and the arbitrator appointed pursuant to such application shall be the sole arbitrator for that dispute.

8.4 Rules of Procedure

Except as stated herein, arbitration proceedings shall be conducted in accordance with the rules of procedure for arbitration of the United Nations Commission of International Trade Law (UNCITRAL) as in force on the date of this Contract.

8.5 Substitute Arbitrators

If for any reason an arbitrator is unable to perform his function, a substitute shall be appointed in the same manner as the original arbitrator.

8.6 Nationality and Qualifications of Arbitrations

The sole arbitrator or the third arbitrator appointed pursuant to paragraphs (a) through (c) of Clause 8.3 hereof shall be an internationally recognized legal or technical expert with experience in relation to the matter in dispute and shall not be a national of the Consultants' home country or of the Government. For the purpose of this clause, "home country" means any of:

(a) the country of incorporation of the Consultants or

(b) the country in which the Consultants' (or any of their Members') principal place of business is located; or

(c) the country of nationality of a majority of the Consultants' (or of any Members') shareholders; or

(d) the country of nationality of the Subconsultant concerned, where the dispute involves a subcontract.

8.7 Miscellaneous

In any arbitration proceeding hereunder:

(a) proceedings shall, unless otherwise agreed by the Parties, be held in Bombay;

(b) the English language shall be the official language for all purposes; and

(c) the decision of the sole arbitrator or of a majority of the arbitrators (or of the third arbitrator if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction, and the Parties hereby waive any objection to or claims of immunity in respect of such enforcement."

29. On a plain reading, Clause 8.3(b) provides that the parties shall each appoint one arbitrator and if the two arbitrators do not succeed in appointing the third arbitrator who shall preside the arbitration panel, within 30 days, then, on the request of either party, the ICSID shall appoint the third arbitrator. Such is the requirement in respect of appointment of the three arbitrators who shall constitute the Arbitral Tribunal.

30. On an objective perusal of the arbitration clause, it appears to be enabling in nature. It does not provide that in case the two arbitrators do not succeed in appointing the third arbitrator within the period so prescribed, the two arbitrators will lose their power of appointment of the third arbitrator. Rather, the power of appointment of the third arbitrator acts in an independent sphere when juxtaposed with the second part of the clause which is enabling in nature, permitting the parties to approach the ICSID after 30 days, in case the two arbitrators appointed by the parties reach an impasse and do not succeed in making such appointment.

31. The consequence of non-appointment of the Presiding Arbitrator within the prescribed period has not been specified in the Agreement. In fact, the clause merely grants liberty to the parties to seek the appointment of the Presiding Arbitrator, after a period of 30 days, before the ICSID. The intent of the parties while drafting the arbitration clause could not have been to withdraw the power to appoint the Presiding Arbitrator from the Co-Arbitrators appointed by the parties upon expiry of 30 days from the date of appointment of the second arbitrator, otherwise, it would have certainly found mention in the Agreement. The intent of the clause appears to be that in case both Arbitrators cause a delay in appointment of the third arbitrator, the parties retain the authority to remedy the delay and after 30 days of such non-appointment, they have liberty to apply before the

ICSID to address the delay and upon making such a request, the ICSID shall appoint the third Arbitrator. Hence, in absence of such a stipulation in the said clause and looking to the intent of the language used, the Court while exercising its jurisdiction in proceedings arising out of Section 34 of the 1996 Act, cannot read something into the contract which it does not explicitly provide.

32. The manner in which a contract is understood and acted upon by the parties is the best aid to interpreting the contract and understanding the intent of the parties while drafting the contract. The Arbitral Tribunal has interpreted the arbitration clause in a manner which is certainly plausible, holding that it is enabling in nature, on the contingency that an application is made by either party before the ICSID. We are in complete agreement with the said view, however, addressing the contentions made before us, it is seen that the initial part of Clause 8.3(b), "*Where the Parties do not agree that the dispute concerns a technical matter, the Client and Consultants shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel."* lays down the composition of the arbitral tribunal and their method of appointment, it vests the power of appointment of the third arbitrator with the Co-Arbitrators appointed by the parties. The subsequent part of Clause 8.3(b) reads *"If the arbitrators named by the Parties do not succeed in appointing a third arbitrator within thirty (30) days after the latter of the two arbitrators named by the Parties has been appointed, the third arbitrator shall, at the request of either Party, be appointed by the Secretary General of the International Centre for Settlement of Investment Disputes, Washington D.C."*. This deals with a contingency which breaks into three critical components, firstly, the contingency is triggered upon the expiration of the thirty-day period from the date of appointment of the second arbitrator without the appointment of the third arbitrator; secondly, the condition precedent is that a request must be made by either party, meaning thereby that the Secretary General of ICSID does not have the power to act *sua sponte* (on its own accord); and thirdly, by using the word 'shall', the mandate is that once such a request is made by either party, the Secretary General of ICSID is required to make such appointment.

33. The parties have, in their commercial wisdom, drafted a 'failsafe' into the arbitration clause to deal with a contingency where the Co-Arbitrators fail to appoint the third arbitrator, so as not to leave the dispute resolution process in the balance. They have retained with themselves the power to approach the ICSID and make a request for appointment of the third arbitrator in case of such a contingency. At the very first instance, when the CoArbitrators did not succeed in appointing the third arbitrator within thirty days of the appointment of Mr. Upasani, neither party exercised the option to approach the ICSID. If the parties had exercised such an option upon the contingency being triggered, certainly an argument could have been made that despite a request being made before the ICSID, the Co-Arbitrators have proceeded to appoint the third arbitrator and therefore the arbitral tribunal is improperly constituted. In the present case, however, the parties have not exercised the option to approach the ICSID and non-exercise of the contingency cannot make the initial part of the arbitration clause *otiose*. It certainly cannot be said that after the period of thirty days, the power of the Co-Arbitrators to appoint the third arbitrator was completely extinguished.

34. Much emphasis has been placed by the learned Senior Counsel Mr. Bhatnagar on the use of the word 'shall' in Clause 8.3(b) to argue that once the 30-day period from the date of appointment of the second arbitrator elapses, the only way to appoint the Presiding Arbitrator is through the Secretary General of ICSID. We are unable to agree with this submission since the word 'shall' has been used to enable the parties and the ICSID to

proceed in the matter, upon a request being made by either party, upon the non-appointment of third, i.e. Presiding arbitrator, otherwise it will lead to procedural and commercial absurdity. By using 'shall' in the clause, the responsibility has been cast on the Secretary General of the ICSID to appoint the third Arbitrator only upon a request made by either of the parties. It provides a mandate that the President of the ICSID shall mandatorily appoint the third arbitrator and this mandate is based on the condition precedent, i.e., a request being made by either of the parties. It is nobody's case that a request has been made by either party before the ICSID after 30 days and prior to appointment of the Presiding Arbitrator by the Co-Arbitrators. The enabling clause is permissive and only attracts when the condition precedent of making a request before the ICSID is satisfied. The parties have, in their wisdom and in a specific circumstance, retained the power and liberty, to make a request before the ICSID, which shall appoint the third arbitrator. The clause cannot, therefore, be read to be restrictive in nature as contended by the Appellant, however, this Court is inclined to reject this argument in line of the decision of the Arbitral Tribunal.

35. Another important factor is that once the arbitrators were appointed by the respective parties, which initiated the arbitration by sending a notice, it cannot be said that the arbitrators have to indefinitely wait for the parties to apply before the ICSID in order to appoint the Presiding Arbitrator and for the arbitration to proceed. If such an interpretation is made, it will lead to commercial irrationality, since until the parties approach the ICSID, the two arbitrators would be left in a state of limbo. This could not have been the intent of the parties within the framework of party autonomy and from the conduct of the parties, which will be discussed in the subsequent part of this judgement, the parties never interpreted the contract in such a manner. In view of the aforesaid discussion, it cannot be said that the parties would want their contract to become unworkable and for the dispute resolution clause to work in such a manner that the arbitrators appointed by the parties after invocation of arbitration would wait indefinitely for either of the parties to approach the ICSID seeking appointment of the third arbitrator.

36. Of course, while saying so we are cognizant of the sacrosanct principle of party autonomy and the fact that Courts cannot substitute the commercial wisdom of parties as is borne out from the plain meaning of the words used in the contract. However, Clause 8.3(b) has been rightly interpreted by the learned Arbitral Tribunal in the Section 16 order and the matter has been dealt with in the right perspective by the learned Single Judge in Section 34 and the learned Division Bench in the Section 37 appeal. The law in respect of the scope of interference permissible in proceedings arising out of a challenge to the arbitral award under Section 34 of the 1996 Act, is well settled. Generally, the scope of interference is quite narrow. The arbitrator is the master of evidence and so also of interpretation of the terms of contract. If the arbitrator has reached at a certain view with respect to interpretation which is plausible, interference is not warranted merely because some other view may also be possible. This is a settled principle of law which has been recently reiterated in the decisions of this Court in ***Consolidated Construction Consortium Limited v. Software Technology Parks of India***[1] and ***SEPCO Electric Power Construction Corporation v. GMR Kamalanga Energy Ltd.***[2] The role of the Court, in the proceedings arising out of Section 34 of the 1996 Act, is clearly demarcated. The approach of the Court must be to respect arbitral autonomy and ensure minimum judicial interference.

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[1] 2025 INSC 574
[2] 2025 INSC 1171

37. As rightly observed by the learned Arbitral Tribunal in the Section 16 order as well as the High Court, this is not a case where the Arbitral Tribunal has been composed completely outside the scope of the agreement and a procedure alien to the agreement has been adopted to appoint the arbitrators. The difference in interpretation is merely as to whether the third arbitrator could only have been appointed by the Secretary General of ICSID or by the two arbitrators nominated by the parties. In any case, in the facts of this case, it cannot be said that the Arbitral Tribunal has been improperly constituted in derogation of the arbitration agreement, or that the interpretation of the arbitration clause as made by the Arbitral Tribunal has resulted in any patent illegality, which would warrant setting aside of the award. As such, the High Court has rightly decided not to interfere with the arbitral award under Section 34(2)(a)(v) or Section 34(2A) while rejecting the application to set aside the award.

Conduct, Acquiescence and Waiver

38. Even though we have found that the Arbitral Tribunal has reached the right conclusion with respect to interpretation of the arbitration clause as contained in the Agreement and that the appointment of the third arbitrator is in line with the arbitration clause, there is yet another aspect of the instant matter which we must address, since it forms a part of the reasoning of the Section 16 order. Even assuming that there is non-compliance of the arbitration agreement in appointing the third arbitrator, whether the MCGM has waived its right to object to the same due to its conduct?

39. Section 16 of the 1996 Act permits the arbitral tribunal to rule on its own jurisdiction. It is relevant and is therefore quoted as under:

*"**16. Competence of arbitral tribunal to rule on its jurisdiction.***

(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, —

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party shall not be precluded from raising such a plea merely because that he has appointed, or participated in the appointment of, an arbitrator.

(3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(4) The arbitral tribunal may, in either of the cases referred to in sub-section (2) or sub-section (3), admit a later plea if it considers the delay justified.

(5) The arbitral tribunal shall decide on a plea referred to in sub-section (2) or sub-section (3) and, where the arbitral tribunal takes a decision rejecting the plea, continue with the arbitral proceedings and make an arbitral award.

(6) A party aggrieved by such an arbitral award may make an application for setting aside such an arbitral award in accordance with section 34."

40. On the other hand, Section 4 of the 1996 Act deals with waiver of right to object. It provides as follows:

*"**4. Waiver of right to object. –***

A party who knows that –

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

(b) any requirement under the arbitration agreement,

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

41. It has been argued by the Respondent that even though a challenge to arbitrability was raised by the MCGM under Section 16 of the 1996 Act, at its core, it is a challenge to non-compliance of the requirements under the arbitration agreement with regard to the procedure for appointment. In fact, the learned Arbitral Tribunal in its order has observed that the challenge by the MCGM is that the appointment of the Presiding Arbitrator is a 'nullity' and as such, the Arbitral Tribunal lacks jurisdiction. In this context, it is to be examined whether MCGM has waived its right to object to the appointment of the Presiding Arbitrator by the Co-Arbitrators appointed by the parties.

42. MCGM has claimed before us and also before the Tribunal and the High Court that once the period of thirty days had elapsed from the date of appointment of the second arbitrator, Mr. Upasani, the Co-Arbitrators were denuded of their power to appoint the Presiding Arbitrator and it was only the Secretary General of ICSID who could make such appointment. As discussed, such an interpretation of the arbitral agreement cannot be countenanced. In any case, it is pertinent to refer to the conduct of MCGM to understand the aspect of waiver and acquiescence and its understanding of the arbitration clause.

43. On a perusal of the communication between the parties and the history of the present dispute, the authenticity whereof is not disputed by either party, it appears that Mr. Upasani was appointed by MCGM on 07.10.2005. Thereafter, in the meeting dated 04.11.2005, there was some discussion between the parties about pursuing conciliation/mediation which has been referenced in the letter dated 08.11.2005 by the Respondent to the MCGM, a copy whereof has been forwarded to the Co-Arbitrators, Justice Jhunjhunwala (Retd.) and Mr. Upasani. The relevant portion of the said letter was as follows:

"…

During the meeting we had with yourself on 04.11.2005 in your office the possibility of amicably settling the issue under dispute through a process of 'non-binding conciliation' or 'mediation' was discussed and positively received by yourself.

As we are keen to avoid litigation and we consider it appropriate to attempt to amicably resolve issues to the fullest extent possible. We, therefore, request you to confirm MCGM's agreement to participate actively in such 'nonbinding conciliation' or 'mediation' with us, having regard to a time limit of six months for (sic) resolution of the issues.

Upon receipt of MCGM's confirmation of the above, we will request the arbitrators to keep the proceedings in abeyance while such conciliation proceedings are continuing between us and MCGM.

In case the parties are unable to arrive at a mutual settlement on all the issues, those issues not amicably settled may be taken up by the Arbitrators in the arbitration proceedings. We, therefore, await your confirmation within 15 days of receipt of this letter, so that the Arbitrators could be appropriately informed. You are also requested to kindly initiate the conciliation proceedings.

…"

44. This letter was not replied to by the MCGM until 07.01.2006 when the MCGM wrote a letter addressed to the Respondent, relevant part whereof has been reproduced:

"…

Dear Sir,

Prejudice to our right, we have noted your intention to keep arbitration proceedings in abeyance & start conciliation proceedings. It is to inform further that contractors have initiated arbitration process in this case without taking efforts for resolving the issues of dispute, if any. Please note that MCGM's doors were always open and are open for reconciliation, if any.

…"

45. It is relevant to note that at this stage, there was no objection raised by MCGM that the Co-Arbitrators, due to the operation of Clause 8.3(b), after the elapsing of 30 days period from the date of appointment of Mr. Upasani, had lost the power to appoint the Presiding Arbitrator and to proceed with the arbitration. It has also not been indicated that they had applied or that are intending to apply before the ICSID for appointment of the Presiding Arbitrator. The intent of the parties was clearly to pursue other alternative methods of dispute resolution such as mediation or conciliation and to amicably settle the disputes, prior to pursuing arbitration with respect to issues which remained unsettled.

46. It appears from the record that thereafter the parties did not, in fact, pursue mediation/conciliation and on 15.12.2006, the MCGM informed their nominee arbitrator, Mr. Upasani that there was no conciliation and that it was in fact the Respondent which was delaying the appointment of Arbitrator in order to 'get a contract from MCGM'. In this letter, the MCGM has also alleged that the appointment of Arbitral Tribunal by the Respondent is of no effect, which was under examination by the MCGM. It is not explained why the appointment made by Respondent was of no effect. It is, however, acknowledged by the MCGM that the appointment of arbitrators had been delayed. Relevant portion of the letter dated 15.12.2006 has been quoted herein for reference:

"…

There was no conciliation as alleged under the letter dated 8th November 2005. It appears that the Claimant was delaying appointment of Arbitrators to get a contract from MCGM.

From the records, we feel that appointment of Arbitral Tribunal by Claimant is of no effect. However, MCGM will examine the case and report soon."

47. On 08.01.2007, a letter was written by the Respondent to MCGM which was received by MCGM on 14.02.2007. The relevant portion of the said letter is reproduced below for reference:

"…

However, it now appears, based on MCGM's above referred letter that MCGM does not intend to attempt non-binding mediation & conciliation efforts to resolve the dispute amicably.

We are therefore left with no option but to continue with the arbitration proceedings and request the two arbitrators to proceed with the appointment of the third arbitrator in accordance with the contract."

48. A copy of this letter was also marked to Justice Jhunjhunwala (Retd.) and Mr. Upasani. By means of the letter dated 08.01.2007, the Respondent made it clear to MCGM as well as the two learned Arbitrators that it is fully intent to proceed with arbitration and in fact, explicitly requested them to appoint the third arbitrator. This letter was also not replied to by the MCGM. The MCGM did not, at this stage, take a plea that due to elapse of 30 days, the Co-Arbitrators had lost discretion or competence to appoint the Presiding Arbitrator and therefore the Respondent could not have requested the Co-Arbitrators to

appoint the third arbitrator. No objection with respect to non-compliance of the terms of the agreement was raised by the MCGM.

49. It was on 30.04.2007 that the Co-Arbitrators appointed Justice D.R. Dhanuka (Retd.) as the Presiding Arbitrator. If MCGM's argument is to be accepted, this would be the first instance of non-compliance of the agreement. If in fact it was under the impression that the Co-Arbitrators had no power to appoint the Presiding Arbitrator, at first instance itself, it should have objected to the appointment of Justice D. R. Dhanuka (Retd.), which it admittedly did not do. Justice D.R. Dhanuka (Retd.), acting in the capacity of the Presiding Arbitrator then issued a notice dated 09.05.2007 to both parties for a preliminary meeting. At this stage, it was actually the Respondent which raised an objection to his appointment by means of their letter dated 28.05.2007, alleging non-compliance of Clause 8.6 of the Agreement, since the Presiding Arbitrator could not be of Indian origin.

50. Justice D.R. Dhanuka (Retd.) withdrew his acceptance to act as the Presiding Arbitrator on 28.06.2007 and thereafter, the CoArbitrators addressed the letter dated 17.09.2007 to both parties, posing a question as to whether the parties were still interested in the conduct of arbitral proceedings and to continue with the proceedings. Even though MCGM did not reply to this letter of the Co-Arbitrators, the Respondent replied to the Co-Arbitrators with a copy marked to the MCGM *vide* letter dated 29.09.2007, mentioning that they intend to continue the arbitration proceedings. The Respondent also mentioned that the CoArbitrators should proceed with the appointment of the third arbitrator and inform the parties. No reply was made by the MCGM to this letter either, it did not inform the Co-Arbitrators or the Respondent that since more than 30 days had elapsed, the appointment necessarily had to be made by the Secretary General, ICSID and could not be made by the Co-Arbitrators as its case now is. Relevant portion of the letter dated 29.09.2007 has been reproduced below for reference:

"…

In reference to your above letter, we confirm our intent to continue with the arbitration proceedings. We request your goodselves to proceed with the appointment of the third arbitrator.

We await your subsequent communication confirming the appointment of the third arbitrator and commencement date for the proceedings.

…"

51. On 24.04.2008, the Co-Arbitrators appointed Mr. John Savage as the Presiding Arbitrator, who tendered his resignation on 11.08.2008. Yet again, even to the appointment of Mr. John Savage, MCGM did not raise an objection or point out that the CoArbitrators had no power to appoint the third arbitrator.

52. After Mr. John Savage's resignation, the letter dated 21.10.2008 was addressed by the Co-Arbitrators to Mr. Anwarul Haque for appointment as the Presiding Arbitrator, who communicated his acceptance *vide* letter dated 29.10.2008. Mr. Justice Jhunjhunwala (Retd.) on behalf of the arbitral tribunal, addressed the letter dated 12.11.2008 to both parties, scheduling the preliminary meeting of the Arbitral Tribunal on 08.12.2008, which was further rescheduled to 09.12.2008 and then 09.01.2009. Even at that stage, there was no objection raised by MCGM to the appointment of the Presiding Arbitrator by the CoArbitrators.

53. The preliminary meeting of the Arbitral Tribunal was conducted on 09.01.2009. The minutes of the meeting reflect that the meeting was attended by representatives of both parties. The MCGM was represented through Mr. S.B. Sardar, AE (SO) P & C along with Mr. A.B. Mengole, AE (SO) P & C and Mr. R.H. Murya, SE (SO) P & C. The minutes of the

preliminary meeting do not reflect any objection being raised by the MCGM to the constitution of the tribunal.

54. When things stood thus, as explained above, the MCGM raised their objection for the first time, addressing the letter dated 20.02.2009 to the Presiding Arbitrator, alleging that his appointment is a 'nullity' since the Co-Arbitrators had not succeeded in appointing the third arbitrator within 30 days and therefore had no power to appoint. Relevant portion of the letter dated 20.02.2009 has been reproduced below for reference:

"As per facts, the appointed Arbitrators Mr. S.P. Upasani and Mr. Justice S. M. Jhunjhunwala (Retd.) have not succeeded in appointing within 30 days after their appointment, i.e. they have ought to have appointed the third arbitrator on or about 07.11.2005. Since they have not appointed the third Arbitrator within 30 days, as per law, they have forfeited their right to appoint the third Arbitrator within 30 days.

Thus, as per clause 8(b), the third Arbitrator is required to be appointed by the Secretary General of International Center of Settlement of Investment Disputes Washington D.C.

The claimant Mr. R.V. Anderson Associates + PHE Consultants had not (illegible) under clause 8.3(b) to the Secretary General of International Center for Settlement of Investment (illegible) though after Arbitrator Mr. S.P. Upasani was appointed on 07.10.2005 and add 30 days period is over as 07.10.2005 i.e. as on 07.11.2005.

Thus you have no right to be an Arbitrator under the Arbitration Agreement under the Contract.

The MCGM request you to withdraw your self as Arbitrator since your appointment is not in consonance with Arbitration Agreement under this contract."

55. Application under Section 16 of the 1996 Act was then filed by MCGM on 07.07.2009 prior to filing the Statement of Defence. The Respondent, in its reply to the letter dated 20.02.2009 as well as the application *inter alia* contended that the MCGM has not approached the Secretary General of the ICSID seeking appointment of the third arbitrator, and has not raised this objection at the earliest, therefore it may not raise this objection at this stage.

56. It is clear from the above factual conspectus that the MCGM did not raise any objection to the appointment of the third arbitrator by the Co-Arbitrators until after the preliminary meeting of the Arbitral Tribunal was conducted by Mr. Anwarul Haque, who happened to be the third person appointed as the Presiding Arbitrator by the Co-Arbitrators. It is nobody's case that the third arbitrator appointed by the parties was ineligible to be appointed as an arbitrator under Section 12 of the 1996 Act. In fact, it has been recorded in the Section 16 order that MCGM itself conceded that Section 12 and 13 have no applicability to the present case. Its challenge was limited to the aspect of improper constitution of tribunal due to non-compliance of terms of the arbitration agreement. What needs to be considered, therefore, is whether there was undue delay on the part of the MCGM in objecting to what it alleges to be non-compliance of the arbitration agreement, resulting in waiver of rights.

57. In this context, it has been submitted by the learned Senior Counsel appearing for the MCGM that as per Section 4, waiver may not attract in case an objection is made to non-compliance of terms of the agreement 'within the time limit provided' for raising such objection. He contends that under Section 16(2) a plea that the arbitral tribunal does not have jurisdiction may be raised at any time prior to submission of statement of defence, which the MCGM has done in the present case. Also, as per the said provision, a party shall not be precluded from raising such a plea, merely because he has appointed, or participated in the appointment of, an arbitrator.

58. The facts of this case do not reveal a situation where the MCGM has, under protest, participated in the appointment of the third arbitrator. In fact, the third arbitrator was appointed by the Co-Arbitrators appointed by the parties. Be that as it may, it cannot be said that the challenge to jurisdiction of the Arbitral Tribunal under Section 16 was belated; it was rather filed at the appropriate stage, i.e., prior to filing of the statement of defence, which is as per the timeline as prescribed in Section 16(2) of the 1996 Act.

59. A co-ordinate bench of this Court, in the context of ineligibility of the arbitrator under Section 12 of the 1996 Act, in ***Hindustan Construction Co. Ltd. v. Bihar Rajya Pul Nirman Nigam Ltd.,***[3] discussed the concept of waiver, acquiescence and estoppel under the 1996 Act. The relevant portion of the said judgement is quoted herein for reference:

"***13.1.*** *Waiver is a foundational principle of arbitration, rooted in party autonomy and fairness in conduct. Arbitration, being adversarial in nature, inevitably results in a winning and a losing side. The legislative rationale in codifying waiver is to ensure that parties do not secure a second bite at the cherry after an unfavourable outcome. Parties are not permitted to sleep over their rights. This statutory policy is in harmony with the scheme of minimal judicial intervention, where the grounds for interference with an arbitral award are narrow, and waiver operates as a significant bar to belated objections.*

13.2. *Though waiver, acquiescence, and estoppel are often discussed together in arbitral jurisprudence, they occupy distinct conceptual spaces. Waiver is the intentional relinquishment of a known right; acquiescence arises from passive acceptance or delay; and estoppel precludes a party from resiling from a representation on which the other has relied. The Act, however, incorporates only the doctrine of waiver - presuming parties to be conscious of their conduct and its consequences. The Act elevates silence to waiver by importing an element of intent, thereby preventing parties from approbating and reprobating. A party who has actively participated or consented to continuation of the proceedings cannot later challenge the same process merely because the result is adverse. The legislative design thus discourages tactical objections and multiplicity of proceedings.*"

60. Additionally, this Court in ***Quippo Construction Equipment Ltd. v. Janardan Nirman (P) Ltd.***,[4] has relied upon the judgement of this Court in ***Narayan Prasad Lohia v. Nikunj Kumar Lohia***,[5] where the Court held that in case a party is making a challenge to the composition of the arbitral tribunal, the challenge must be made within the timeline as prescribed under Section 16 of the 1996 Act, i.e., prior to filing of the statement of defence, otherwise the waiver under Section 4 shall attract. Relevant portion of the judgement in ***Narayan Prasad Lohia*** (Supra) is quoted herein for reference:

"***16.*** *It has been held by a Constitution Bench of this Court, in the case of Konkan Rly. Corpn. Ltd. v. Rani Construction (P) Ltd. [(2002) 2 SCC 388] that Section 16 enables the Arbitral Tribunal to rule on its own jurisdiction. It has been held that under Section 16 the Arbitral Tribunal can rule on any objection with respect to existence or validity of the arbitration agreement. It is held that the Arbitral Tribunal's authority under Section 16, is not confined to the width of its jurisdiction but goes also to the root of its jurisdiction. Not only this decision is binding on this Court, but we are in respectful agreement with the same. Thus it is no longer open to contend that, under Section 16, a party cannot challenge the composition of the Arbitral Tribunal before the Arbitral Tribunal itself. Such a challenge must be taken, under Section 16(2), not later than the submission of the statement of defence. Section 16(2) makes it clear that such a challenge can be taken even though the party may have participated in the appointment of the arbitrator and/or may have himself appointed the arbitrator. Needless to state a party would be free, if it so chooses, not to*

[3] 2025 SCC OnLine SC 2578
[4] (2020) 18 SCC 277 [5]
(2002) 3 SCC 572.

raise such a challenge. Thus 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. It is derogable because a party is free not to object within the time prescribed in Section 16(2). If a party chooses not to so object there will be a deemed waiver under Section 4. Thus, we are unable to accept the submission that Section 10 is a non-derogable provision. In our view Section 10 has to be read along with Section 16 and is, therefore, a derogable provision."

61. From the above judgements, it is clear that statutory waiver under Section 4 of the 1996 Act would attract in case an objection under Section 16 challenging the composition of tribunal and lack of jurisdiction is not filed prior to the time-limit as prescribed under Section 16(2). In the present case, the application under Section 16 has been filed within the said time-limit. Therefore, it cannot be said that the MCGM is completely precluded from raising a challenge of this nature. As such, statutory waiver under Section 4 does not attract in the present case since a timely challenge to the jurisdiction of the Arbitral Tribunal has been made by the MCGM.

62. However, upon making such a challenge by a party, while adjudicating the application under Section 16 on merits by the Arbitral Tribunal, or examining its rejection at the stage of Section 34 followed by Section 37, the prior conduct of the party certainly becomes a relevant consideration to decipher its understanding of the contractual scheme. This is especially so, when the jurisdictional challenge due to improper composition of the Arbitral Tribunal is made on the ground of non-compliance of the arbitration clause. In such a case, the conduct of the party right from the stage of invocation of arbitration becomes a relevant consideration. While examining the alleged departure from the contractual scheme, acquiescence by the party in its conduct, its actions pursuant to the contractual terms and how it has understood and acted as per the terms of the contract, are all crucial aid in comprehending the contractual scheme.

63. In the facts of this case, beyond 30 days from the date of appointment of the second Arbitrator, i.e. 07.10.2005, the MCGM agreed to attempt mediation / conciliation by its letter dated 07.01.2006 and then informed the Co-Arbitrators about there being no mediation / conciliation by its letter dated 15.12.2006. MCGM passively sat idle while three different persons were appointed as the Presiding Arbitrator under Clause 8.3(b) of the Agreement by the Co-Arbitrators, without any demur. Even when the Co-Arbitrators in their communication marked to parties discussed about appointing the third arbitrator and the Respondent requested them to appoint the third arbitrator, there was no objection or demur from MCGM about the alleged noncompliance of the terms of the arbitration agreement. The MCGM, until they raised their objection after the first preliminary meeting of the Arbitral Tribunal, had never come up with a plea that after expiry of thirty days from the date of appointment of Mr. Upasani, the Co-Arbitrators had become *forum non conveniens* and therefore they had absolutely no power to appoint the third arbitrator. Even though we have found above that the interpretation by the Tribunal and High Court that the appointment of the third arbitrator by Secretary General, ICSID was not a requirement under the arbitration agreement, but rather an enabling clause triggered upon a request being made by either party before the ICSID, we find that if the conduct of the Appellant is examined, it is clear that the Appellant never interpreted the contract in the manner which they are suggesting now.

64. We have reached this conclusion in the peculiar facts and circumstances of this case, where it is apparent that merely filing the application under Section 16 could not regularize the conduct of the Respondent and its acquiescence to the power of appointment of the third arbitrator being exercised by the CoArbitrators not only once, but thrice. We are constrained to reach this conclusion, primarily because, Justice Dhanuka

(Retd.) was appointed as the Presiding Arbitrator by the Co-Arbitrators on 30.04.2007; even if MCGM's argument that the Co-Arbitrators had become *forum non conveniens*, is assumed to be corrected, this was the first time an objection to non-compliance of terms of the arbitration agreement should have been raised. Yet, it was only after the subsequent appointment of Mr. John Savage, his resignation and the later appointment of Mr. Anwarul Haque and the preliminary meeting of the Tribunal in the year 2009 that the objection to composition of the Arbitral Tribunal was made for the first time.

65. Neither party has approached the ICSID and triggered the enabling clause by fulfilling the condition precedent of making a request for appointment. Although there was extensive communication between the parties and the Co-Arbitrators, the MCGM did not point out from the very beginning that the Respondent must approach the ICSID. In such circumstances, the Appellant cannot now turn around and say, that was the only method for appointment.

66. In the present case, the MCGM was completely aware about the non-compliance of a contractual requirement under the arbitration agreement which it alleges. It proceeded with the arbitration process without any demur, agreed to keep the arbitration proceedings in abeyance to pursue other methods of dispute resolution (mediation / conciliation), and did not object to such non-compliance on three different occasions when such alleged non-compliance took place. In such a case, filing of an application under Section 16 of the 1996 Act cannot regularize or condone its conduct and such conduct is a relevant consideration to decipher its understanding of the contractual terms while deciding the Section 16 application on merits by the Tribunal even in the absence of statutory waiver under Section 4 being attracted.

67. We say so because the subsequent conduct of the parties serves as a powerful practical tool to understand their contractual intent. Reliance on a party's original understanding of obligations under a contract as well as their actions prevents a party from later on adopting a legalistic interpretation which supports their case in stark contradiction of how they actually operated on the ground. In the present case, even though the MCGM argues with vehemence that the Co-Arbitrators had no power to appoint the third arbitrator, the admitted case is that neither party triggered the contingency by approaching the ICSID. Additionally, the MCGM was put to notice by the Co-Arbitrators and the Respondent about the appointment of the third arbitrator, not only once, but on three different occasions. In response to communication where the Respondent has requested the Co-Arbitrators to appoint the third arbitrator, the MCGM has not taken a view that the Secretary General, ICSID is the only authority who could appoint the third arbitrator. The MCGM seems to have conveniently turned a blind eye to the communication which was marked to it and then at the stage prior to filing of the statement of defence, for the first time, raised this issue which relates to alleged non-compliance of terms of the agreement in respect of appointment of arbitrators. In such a fact situation, no party can be permitted to take the dispute resolution process, the nominee arbitrators or the opposite party for a ride. A party cannot keep a 'jurisdictional ace' up their sleeve and then claim that filing of the jurisdictional challenge under Section 16 would go back in time and wipe out the past conduct and acquiescence of the party which would clearly evince how the contractual terms were viewed by the parties. If the same is permitted, it will erode the basic principles of alternative dispute resolution and ethos of arbitration.

68. In view of the above findings, the learned Single Judge in the Section 34 application and the Division Bench in the Section 37 appeal were completely justified to reject interference and refuse to set aside the arbitral award. In light of the evidence which goes

to show the manner in which the contract was understood and acted upon by the parties, the view taken by the Arbitral Tribunal is certainly a plausible view and no reasonable ground is made out for setting aside the arbitral award under Section 34 of the 1996 Act. As such, we do not find any merit in these appeals, they are accordingly dismissed. In the facts, there shall be no order as to cost. All pending applications shall be treated as disposed of.