

. * **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : July 16, 2014*

Judgment pronounced on: September 3, 2014

+ **O.M.P. No.651/2014 & CCP (O) No.90/2014**

CONSORTIUM OF DEEPAK CABLE INDIA LIMITED AND
ABIR INFRASTRUCTURE PVT LTD (DCIL-AIPL) Petitioner
Through Mr. Dushyant Dave and Mr. Rajiv
Nayar, Sr.Adv. with
Mr.Kartik Nayar, Mr. Nikhal
Rohtagi, Mr. Ayush Agarwal,
Mr.Vikrant Singh & Mr.Himanshu
Gupta, Advs.

versus

TEESTAVALLEY POWER TRANSMISSION LIMITED
..... Respondent
Through Dr.Abhishek Manu Singhvi, Sr.Adv.,
Mr.A.S.Chandhiok, Sr.Adv. &
Mr.Sandeep Sethi, Sr.Adv. with
Ms.Haripriya Padmanabhan,
Mr.Sanyam Saxena, Mr.Aman
Garg, Mr.Ritesh Kumar,
Ms.Mallika Ahluwalia, Mr.Mayank
Bamniyal & Ms.Aditi Tyagi, Advs.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. By the way of the present petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Act") the petitioner seeks to restrain the respondent purporting to

terminate and/or acting in pursuance of the purported termination of the Services and Supply Agreements for the 400KV D/C Teesta III – Kishanganj Transmission Line (Tower Package – A1 & A2) that were entered into between the petitioner and the respondent (hereinafter referred to as “the contracts”).

2. Brief facts for the purpose of adjudication of the present petition are that the Contract was entered into between Respondent (“TPTL”) and a Consortium between M/s Abir Infrastructure Private Ltd. (“Petitioner”) and M/s Deepak Cables (India) Ltd. (“DCIL”). The present petition has been filed by the petitioner on behalf of the said Consortium of Deepak Cables India Limited and Abir Infrastructure Private Limited (DCIL-AIPL).

3. The Contracts were entered into between the petitioner and the respondent for the construction of the 400 KV D/C Transmission Line from the 1200 MW TEESTA III Hydro Electric Project in the State of Sikkim to the Kishanganj Pooling Station in the State of Bihar covering a total length of approximately 212 KM (“Project”). The Contracts were executed on 22nd February, 2010. The respondent was required to complete its scope of works within 23 months i.e. until October, 2011 from the date of award of the contracts i.e. 18th November, 2009.

4. The Project was divided into two sections for geographical convenience, the section stretching from Teesta III HEP to Panighata, West Bengal (termed as “Package A1”) and the second section commencing from Panighata to Kishanganj, Bihar (termed as

“Package A2”). The scope of work of the petitioner in respect of each package was divided into two agreements being the Supply Agreement termed as A1/01 and A2/01 and Service Agreement termed as A1/02 and A2/02. The consideration payable to the petitioner by the respondent in respect of the Supply and Services Agreement of A1/01 and A1/02 was Rs.108,39,99,596/- (Rupees One Hundred and Eight Crores Thirty Nine Lakhs Ninety Nine Thousand Five Hundred Ninety Six only) and Rs.117,41,06,487/- (Rupees One Hundred Seventeen Crores Forty One lakhs Six Thousand Four Hundred Eighty Seven only) respectively. The consideration for Supply and Services Agreement for Package 2 i.e. A2/01 and A2/02 was Rs.54,97,41,980/- (Rupees Fifty Four Crores, Ninety Seven Lakhs Forty One Thousand Nine Hundred and Eighty only) and Rs.36,72,49,555/- (Rupees Thirty Six Crores Seventy Two Lakhs Forty Nine Thousand Five Hundred and Fifty Five only) respectively. The total value of the project was Rs.360,61,00610/-.

5. The contract in question was terminated by the respondent by letter dated 30th May, 2014 alleging that termination was forthwith. It was terminated under clause 36.2 of the contract. The present petition was filed on 31st May, 2014 seeking to pass interim orders restraining the respondent from terminating the contract or giving effect to third party rights being created. The case of the respondent is that termination itself was w.e.f. 30th May, 2014 and the work was already awarded to third party on the same day. The petition filed by the petitioner is therefore not maintainable.

6. Notice was issued for 6th June, 2014. On that date, parties were directed to maintain status quo as per order passed by the vacation Judge.

7. It has been stated in the petition that as per the contracts, it was the foremost obligation of respondent to provide/assist the petitioner in obtaining Right of Way (ROW) so as to enable the petitioner to carry out its obligations under the contracts, however respondent No.1 has failed to do so and as a result of the same, the completion date of the contract i.e. 16th October, 2011 has been consistently and continuously delayed and even till date performance under the contracts is not complete. The respondent has repeatedly been called upon by the petitioner to comply with its obligations however the respondent has miserably failed to perform its part of the obligation and is in material breach of its contractual obligations. The petitioner has been suffering heavy losses and cash flow crunch because of the idling equipments and manpower and non-payment of previous dues/claims of the petitioner against the respondents.

8. It is averred in the petition that the overall responsibility for making available of ROWs/way-leave clearances for the project remained with the respondent and the petitioner's responsibility was limited to facilitation of the said clearances etc. and in no event can the full responsibility of obtaining the clearances/ROW be shifted on the petitioner as ultimately the actual receipt of all such clearances would be in the name of the owner i.e. the respondent.

9. The petitioner admitted having entered into the Supplementary Agreement. In this regard, it is stated by the petitioner that since the

respondent had failed to effectively process the compensation of landowners etc, in order to aid in the faster execution of work and to minimize further delay, the petitioner entered into the Supplement Agreement on reimbursement basis. However, the obligation to obtain actual clearances/permissions remained with the respondent.

10. It is alleged that the petitioner has been unable to carry out works at certain sections only due to non-availability of the requisite permissions that are to be provided by the respondent. The petitioner at all times has been willing and ready to complete its obligations under the Contracts and has been ready even to cure the purported breaches etc. The petitioner continues to carry out the works despite the fact that bills in excess of Rs.70 crores remain pending. The respondent has failed to make requisite payments to the petitioner and also failed to comply with their contractual obligations and the date of completion of contract which was upto 16th October, 2011 has been continuously and consistently delayed. Various communications were addressed to the respondent by the petitioner providing the ROW status and the respondent acknowledged the responsibility of providing the same and in pursuance thereof granted extension of time for completion of the project. The petitioner on various occasions had also informed the respondent about the losses being suffered due to idling of equipment and certain other claims, payments whereof the respondent despite acknowledging chose to evade.

11. Due to various delays on part of the respondent, time was extended for completion of the project till October, 2014. Despite this, the respondent vide an alleged letter dated 9th May, 2014 (sent by e-

mail on 15th May, 2014) fraudulently sought to contend that the petitioner was in default of the contract and gave 14 days time to the petitioner for curing the defects. However, despite granting 14 days time, respondent No.1 vide letter dated 14th May, 2014 had written to State Bank of India to invoke the bank guarantee invoked furnished for separate works under the contracts.

12. On 31st May, 2014, petitioner received a purported Notice of Termination on the ground of delay in execution of work under the contracts and the respondent directed the petitioner to comply with all the obligations within 7 days from the date of issuance of the notice. It is the case of the petitioner that time was not the essence of the Contract and therefore no such stipulation was incorporated under the Contract. On the contrary, the petitioner was given time extensions starting from the year 2011 upto at least October, 2014 for completion of the transmission line and as such after the lapse of more than 3 years from the contractual completion date, it cannot be said that time was the essence. As such the respondent had no right to terminate the contract or act in pursuance of the said Termination Notice at this stage owing to the alleged delay in completion of the works particularly when it was the respondent who gave time extension till October, 2014.

13. It has been stated in the petition that the bank guarantees were invoked by the respondent 5 months prior to the completion date with fraudulent motive of encashing the bank guarantees and now termination of the contracts despite of the fact that the

encashment/disbursement of funds under the bank guarantees has been stayed by this Court in another connected petition.

14. The petitioner stated that it ought to be allowed to continue the construction of the project which is a public interest project and termination of the contract and execution of the said termination notice shall lead to further delay of the project and cause substantial financial implication upon both the petitioner as well as the respondent.

15. In the reply to the said petition, the respondent has stated that the petition is infructuous inasmuch as termination and award of Contract has already been effected prior to filing of the instant petition. It has been stated that owing to the petitioner not being able to complete the contract within stipulated time, provisional extension of time was repeatedly given by the respondent in anticipation of completion of the project. However inspite of such cooperation being extended by the respondent to the extent of even assisting the petitioner in doing their part of contractual work, petitioner miserably failed to complete the project even by 50% of the total outstanding deliverables, owing to its own breaches of contract. It has been stated that the project needs to be commissioned by December 2014 and continuity of the petitioner as a contractor seriously jeopardized the stakes involved in the entire contract for laying of the transmission lines.

It has been stated that owing to severe delays in performance of the works by the petitioner, respondent was constrained to issued various letters 2014 informing the petitioner of its intention to carry

out the pending works under the contract itself/through contractors in continued absence of successful completion of works under the Contract by the petitioner.

16. As the petitioner was far from achieving and successfully completing the portions of Contract even as per its own schedule of completion shared with the respondent on 12th July, 2013, the respondent was constrained to issue a default notice dated 9th May, 2014, sent on 14th May, 2014 citing all previous correspondences. The petitioner however vide letter dated 23rd May, 2014 agreed to hiving off part of the project being fully aware of its limitation in completing the Contract in time and having defaulted thrice in meeting deadlines. It is stated in reply that as the petitioner failed to remedy the breaches within 14 days of receipt of notice of default dated 9th May, 2014, the respondent terminated the Contracts vide termination letter 30th May, 2014. On account of urgency involved in the completion of the work, the Contract was simultaneously awarded to M/s Tata Projects Limited on 30th May, 2014.

17. The pleadings were completed. Both parties made their submissions at great length. From the petitioner's side Mr. Dushyant Dave, Mr. Rajiv Nayar, learned Senior advocates and Mr. Kartik Nayar made their submissions. The respondent was represented by Mr. Abhishek Manu Singhvi, Mr. A.S.Chandiok and Mr. Sandeep Sethi, learned Senior advocates and Ms. Haripriya Padmanabhan who have argued the matter. Both the parties have also filed the written submissions. Numbers of judgments were referred by both sides. This Court is of the view that that the decision should not be rendered

on all contentions on merits as it would affect one of the parties if the findings are given on the aspect of disputed questions which are ultimately going to form subject matter of the arbitral dispute. I have been informed that both parties have taken requisite steps to invoke arbitration. Thus, the relevant aspects are being dealt with which are in aid for the purposes of disposing of the present petition.

Arguments of the petitioner

18. The main submission of the petitioner is that the purported termination of the Contract is wrong, illegal and against the terms of the Contract. The action of the respondent would cause the petitioner irreparable harm and injury in terms of financial losses and goodwill and reputation in its business. The petitioner may be likely to be even black listed from being an infrastructure contractor for the Government.

19. The first submission of Mr. Dave, learned Senior advocate is that the purported Termination Notice dated 30th May, 2014 is contrary to various clauses of the Contract between the parties. He has referred to Clause 34 of the of the Contract. The petitioner was granted time extension to complete the entire works by October, 2014 which was unconditional and without levying the liquidated damages by the respondent vide letter dated 4th July, 2013. Any purported defaults of the petitioner as alleged by the respondent, prior to that date stood waived. The effect of such termination notice issued under clause 36.2.2 is set out in clause 36.2.3 which mentions that the termination would take effect upon such date as specified in the notice of termination. By notice dated 30th May, 2014 issued by the

respondent, seven days time was given for the termination to take effect. The petitioner immediately filed the instant petition under Section 9 of the Act and by order dated 6th June, 2014 (i.e. prior to the expiry of the 7 days period as stipulated under the purported termination notice dated 30th May, 2014) the parties were directed to maintain *status quo*. Therefore, the present petition has been filed prior to the effect of purported termination of the Contract.

20. Secondly, it is argued by Mr. Dave that the Respondent {being a joint venture between POWERGRID and Teesta Urja Ltd. (which is partially owned and controlled by the State of Sikkim)} constitutes to be an instrumentality of the State under Article 12 of the Constitution and is supposed to act in a fair, reasonable and equitable manner in all matters including in matters of contract. It is submitted that an instrumentality of the State is liable to act in a fair manner on the touchstone of Article 14 of the Constitution of India. The respondent in the present case had already made up their mind to terminate the contract and was just looking for an excuse for the same.

21. The third submission is that the Contract between the parties provides for a specific mechanism for resolving the disputes between the parties. The respondent failed to follow the aforesaid procedure. He referred to clause 38 of the contract in this regard. As per him, the said terms and conditions of the contract are enforceable in law. The Arbitral Tribunal may pass the award for specific performance. In the meanwhile, this Court may continue the interim order of status quo already passed till award is passed by the Arbitral Tribunal as the petitioner in the present case is ready to perform its duty. It is the

respondent who is bent upon to terminate the contract without any reason. The respondent on one hand granted the third extension to complete the work by October, 2014 but later on limited the extension and illegally terminated the agreement. From the events happened after February, 2014, the respondent was mentally prepared to grant the work to entity of TATA which ultimately may face the same difficulties as faced by both parties for the last three years. As the contract is enforceable in law under the various provisions of Specific Relief Act, it would be appropriate to allow the petitioner to continue the work by staying the operation of termination letter and await for the Arbitral Tribunal to give an award.

22. Fourth submission of Mr. Dave is that it is the responsibilities of the respondent to get all the permissions and approvals, licenses from all local and state government as per clause 6 of the contract. As the primary obligation of the respondent under the Contracts, the supplementary agreements cannot be diluted in view of the clause 6.1 and 6.2 of the contract. The said supplementary Agreements referred by the respondent both dated 10th May, 2010 between the parties do not substitute or over-ride the aforesaid clauses 6.1 and 6.2 or in any way shift the responsibilities with the petitioner. The said supplementary agreements were executed for the limited purpose of adding additional responsibilities upon the petitioner but not to absolve the respondent's primary obligations under the main Contract.

It is argued that the scope of work entrusted upon the petitioner under the Supplementary Agreements was limited to the preparation

and proposals on behalf of respondent. The actual contractual as well as statutory responsibility of obtaining the necessary permits, approvals, permissions, ROW clearance, etc (anything to ensure access of the petitioner to the Site to work) has at all times been vested with the respondent and has at all been the responsibility of the respondent. The Supplementary Agreement stipulates that the time extensions can be provided to the petitioner only in the event that the respondent fails to fulfill its part of obligation. In fact three times extensions were granted to the petitioner which shows that whatsoever delay has happened is from the side of the respondent. After signing the Supplementary Agreements, the petitioner started “assisting”/“facilitating” the respondent in various works relating to clearance of ROW and obtaining approvals/ permits/ permissions etc. However, despite the said services provided by the petitioner, the respondent failed to fulfill its duty.

23. (i) Mr. Dave states that the petition filed is maintainable. This Court is empowered to pass the interim order during the arbitration proceedings while exercising its jurisdiction under Section 9 of the Act. Counsel referred to the following decisions in this regard:

- a) ***Sundaram Finance Ltd. v. NEPC India Ltd.***, (1999) 2 SCC 479.
- b) ***Firm Ashok Traders and Anr. v. Gurumukh Das Saluja and Ors*** (2004) 3 SCC 155.
- c) ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.***, (2007) 7 SCC 125.

d) ***Bhatia International v. Bulk Trading S.A.*** (2002) 4 SCC 105.

e) ***Transmission Corpn. Of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd.*** (2006) 1 SCC 540.

(ii) His next argument is that the Arbitral Tribunal can direct specific performance of contract by rendering the award as per settled law and no prejudice would be caused if status-quo order be extended until Arbitral Tribunal may consider the interim arrangement and liberty be granted to either party to apply for modification and vacation of order. The petitioner is entitled for the interim order prayed for. Mr. Dave has referred to the following decisions:

a) ***Olympus Superstructures Pvt. Limited v. Meena Vijay Khetan and Ors.***, (1999) 5 SCC 651.

b) ***Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Ors.*** AIR 1964 SC 978.

(iii) Despite the termination of contract as alleged by the respondent, the present petition for reliefs sought in the petition is maintainable. The following decisions are referred by counsel:

a) ***Indian Railways Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd. & Anr***, 186 (2012) DLT 552.

b) ***Atlas Interactive India Pvt. Ltd. v. BSNL & Anr***, (2006) 126 DLT 504.

c) ***Pioneer Publicity Corporation v. Delhi Transport Corporation***, 2003 (103) DLT 442.

- d) ***Mayer Health Resorts v. Indian Tourism Development Corporation Ltd.***, O.M.P No. 260 of 2014.
- e) ***KSL & Industries v. National Textiles Corporation Ltd.***, 2012 (3) Arb LR 470.
- f) ***Softline Media Ltd. and Shalimar Advertisers v. Delhi Transport Corporation***, 2002 Supp ArbLR 632.

24. Mr. Nayar, argued that the power and authority under Section 164 of the Electricity Act read with Section 10 and 11 of the Telegraph Act was conferred upon the respondent and not upon the petitioner. It was the respondent who had the obligation to obtain the ROW and hand over the same to the petitioner enabling the petitioner to enter the site and carry out works. The Supplementary Agreements could not have enabled the petitioner to act as the authority under the Telegraph Act or to take steps necessary to lay the transmission line.

For instance, at certain location, the ROW clearance is not obtained as the villagers are not allowing the contractor to enter the site and carry out the works. The petitioner, despite the Supplementary Agreement, has no authority to take any steps to forcibly enter the site. Such steps can be taken only by the respondent who has been authorised under the Electricity Act/Telegraph Act and who is now attempting to wriggle out of its contractual as well as statutory obligations of

obtaining the ROW (a power which exclusively vests within the respondent).

25. Mr. Nayar, submits that during the entire course of the contract (before or after the Supplementary Agreement), the respondent has assumed its responsibility in view of series of correspondence exchanged between the parties which makes it clear that it was the respondent who had the obligation of securing the ROW as well as the necessary permissions. Reference is made to Minutes of Meeting (“MOM”) dated 20th June, 2012 which shows that a committee (comprising of 2 officers of TPTL and 1 officer of the Consortium) has been formulated to facilitate settlement of compensation issues. This MOM clearly records that Committee has been formulated after this ROW issue was deliberated in a meeting taken by Director (Projects) of Power Grid. Thereafter, in another MOM dated 21st June, 2012 whereby the task of resolving all ROW issues is conferred on the committee comprising of 2 member of the respondent and 1 member of the petitioner.

26. The learned Senior counsel has referred the letter dated 22nd June, 2012 wherein the petitioner requests the respondent in light of the new committee formulated, to expedite the obtaining of the ROW so that the work can be completed on time. Counsel has also referred the reminders/requests for providing the ROW clearance and necessary permissions were made by the petitioner on numerous occasions and the same were acknowledged by the respondent. A few instances which are referred by Mr. Nayar are tabulated below:

<u>S.No.</u>	<u>Date</u>	<u>Particulars</u>
1.	26.06.2012	Responsibility of the Respondent to pay compensation is pointed out
2.	08.08.2012	The various pending proposals are pointed out
3.	05.06.2013	The Respondent acknowledges ROW issue and seeks to resolve the it
4.	10.06.2013	The Respondent acknowledges ROW issue and seeks to resolve it
5.	02.08.2013	In the MOM all the responsibilities concerning ROW, forest clearances and other mandatory permissions have been entrusted upon the officers of the Respondent
6.	27.08.2013	the officer of the Respondent sets out the steps taken by him in pursuance of obtaining ROW, and other mandatory permissions

27. It is submitted that the respondent acknowledging its defaults in obtaining the ROW and permissions, continued to grant the petitioner time extension, the last extension being upto October, 2014 for completing the entire Project. The petitioner sought its first time extension vide its letter dated 5th October, 2011 citing non-availability of mandatory clearances (forest and others) and the ROW issues. The respondent granted the time extension to the petitioner vide its letter dated 11th November, 2011 without levying any liquidated damages. The extension of time was again sought by the petitioner

on 20th October, 2012 and extension upto 31st December, 2013 was granted to the petitioner vide the respondent's letter dated 30th November, 2012 also without levy of liquidated damages. It is submitted that the petitioner once again, on 10th June, 2013 wrote to the respondent seeking another time extension upto March, 2015. It was pointed out to the respondent that it would be impossible to complete the project within the stipulated timeframe since major permissions required to carry out the works have not been made available to the petitioner by the respondent. It is brought to the notice of the respondent that the petitioner's role is of a mere *facilitator*. The petitioner is not responsible for ROW acquisitions delays and its request for time extension were accepted by the respondent and the time extension was granted by the respondent on 4th July, 2013 to complete the *total* transmission line by October, 2014 which was again unconditional and without levy of liquidated damages.

Thereafter, on 12th July, 2013, the petitioner forwarded a proposal to the respondent stating that the petitioner would make best efforts to complete the transmission line by October, 2014 and depending upon the ROW issue getting sorted, the optimistic schedule would be met. The petitioner also suggested that the petitioner could attempt to complete transmission line from Teesta II HEP to LILO point towards Rangpo and from Panighata to Kishanganj by March, 2014 and balance portion i.e. from LILO point to Panighata by October, 2014 respectively and completion of project by March, 2015. The respondent in its letter dated 12th February,

2014 made an amendment to the extension granted vide letter dated 4th July, 2013 and directed the petitioner to complete the works related to the Teesta III HEP Rangpo Section and Panighats to Kishanganj Section by March, 2014 as per the letter dated 12th July, 2013. It was a mere proposal for completion of work till March 2015 in the event that ROW and all the necessary clearances and permissions are timely handed over to the petitioner. However, the respondent decided to treat the letter dated 12th July, 2013 as a request for amendment and reduced the completion time for certain sections of the project from October, 2014 to March, 2014 without extending the over-all completion date to March, 2015.

On 3rd April, 2014, the respondent wrote to the petitioner and alleged that the responsibility of preparation and obtaining approval of forest clearance and way leave clearance are under the scope of the petitioner who vide its letter dated 3rd April, 2014 agreed to partial off-loading of the works and subject to certain conditions proposes to allow partial off-loading of works on “as is where is” basis. The contention of the petitioner is that firstly, the respondent was estopped from retracting from the time extension granted to the petitioner. Secondly, without prejudice to the aforesaid, the petitioner had agreed to off-load only after the respondent repeatedly coerced the petitioner to off-load a part of the aforesaid work. It is admitted by the petitioner that it had acceded to the request only in the event that the off-loading is done at “no risk and cost” to the petitioner.

It has been submitted that the respondent thereafter vide its letter dated 9th May, 2014 sent the petitioner a purported notice of cure under Clause 36.2.2 of the GCC urging the petitioner to remedy the alleged breaches within 14 days of the receipt of the notice. In the aforesaid letter, the respondent rejected all conditions proposed by the petitioner vide its letter dated 3rd April, 2014 for off-loading of work and urged the Petitioner to remedy the defects. The Petitioner submits that the alleged cure notice sent by the respondent on 9th May, 2014 lacks in particulars and contrary to the required under Clause 36.2.2 of the GCC. The cure notice dated 9th May, 2014 was sent to the petitioner only on 15th May, 2014 (vide email) and the Bank Guarantees of the petitioner were deceptively invoked in between. It is submitted that the conduct of the respondent in invoking the Bank Guarantees prior to the expiry of the time extension granted to the petitioner (i.e. upto October, 2014) and prior to the expiry of the alleged cure notice dated 9th May, 2014 (received only on 15th May, 2014) is fraudulent and it shows the *mala fide* conduct of the respondent and terminating the Contracts.

The detailed reply dated 28th May, 2014 was sent by the petitioner to the cure notice informing that the said notice was illegal and contrary to the terms of Clause 36.2.2 of the GCC. The petitioner continues to deploy its resources for the Project at all available sites is sufficient satisfaction of the requirement of Clause 36.2.2 of the GCC. Thus the termination of the entire Contracts by the respondent is *prima facie* unreasonable and inequitable. It is submitted that the cure notice dated 9th May, 2014 was for limited part of the site but the

termination notice was for the entire contract work. The said conduct of the respondent was contrary to the terms of the contract. The respondent being an instrumentality of the State is bound to act in a fair and equitable manner.

28. It is argued by Mr. Nayar that huge investments have been made by the petitioner in the Project and due to the failures of the respondent in acquiring the ROW/clearances the resources of the petitioner have been idling. The majority works under the Contracts i.e. approx. 70% have already been completed by the petitioner. The termination at this stage of Project or engagement of any third party contractor would result in further delay of the Project considering that petitioner is well experienced in the execution of the Project. The Contractor's machinery and manpower continues to be deployed at the site of the Project.

29. Even the invocation of Bank Guarantees by the respondent is *prima facie* fraudulent and the alleged termination of the Contracts by the respondent is *mala fide*. It is done by the respondent in arbitrary manner. It is unjust and inequitable and the respondent ought to be restrained from giving effect to the purported termination letter dated 30th May, 2014 pending arbitration between the parties.

30. The conduct of the parties is to be seen for the purpose of interpretation of the contract. The following judgments were referred in this regard:

- a) ***The Godhra Electricity Co. Ltd. & Anr. vs. The State of Gujarat and Anr.***, (1975) 1 SCC 199.

- b) ***Mc Dermott International Inc. vs. Burn Standard Co. Ltd. & Ors.***, (2006) 11 SCC 181.
- c) ***Life Insurance Corporation of India & Anr vs. Shri Dharam Vir Anand***, (1998)7 SCC 348.

31. Lastly, it was argued by Mr. Nayar that it is settled law that the party approaching the court for vacating injunction has to show that it was not at fault and that it acted fairly. He relies upon the following judgment and submits that in the present case, the respondent cannot deny the fact that the respondent is also at fault of not obtaining all the permissions and approvals as admitted in many letters written to the petitioner in this regard. Therefore, the interim order is not liable to be vacated. Supreme Court in the case of ***Gujarat Bottling Co. Ltd. v. Coca Cola Co.***, (1995) 5 SCC 545, held as under:

“47. In this context, it would be relevant to mention that in the instant case GBC had approached the High Court for the injunction order, granted earlier, to be vacated. Under Order 39 of the Code of civil procedure, jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction is purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in

respect of the person who seeks an order of injunction under Order 39 Rule 1 or Rule 2 of the CPC, but also in respect of the party approaching the Court for vacating the ad-interim or temporary injunction order already granted in the pending suit or proceedings.”

Argument of the respondent

32. Dr. Abhishek Manu Singhvi, learned Senior counsel appearing on behalf of respondent has argued the matter on legal issues and on facts. On legal side, his simple answer is that the contract in question has been terminated on 30th May, 2014. It is determinable nature of contract as per its terms. The same already stands terminated with effect from 30th May, 2014. The work has been awarded to a third party (TATA Projects Ltd.) on the same day. The petition subsequent to 30th May, 2014 is not maintainable. He has refuted the argument of the petitioner that termination shall be effective only after seven days and not from the date of termination. His submission is that the petitioner was not correct as the contractual provision entitles the respondent to terminate forthwith and also the respondent's letter of termination dated 30th May, 2014, mentions that the termination was effected forthwith in accordance with the Contract. The petitioner is unnecessarily trying to mislead this Court by raising the issue that termination takes effect in 7 days from issuance. The petitioner is ignoring Para 8 of the respondent's Notice of Termination. The said time was granted to the Petitioner to comply with its obligations under Clause 36.2.3 of the Contract which stipulates the Contractor's obligations upon receipt of notice of termination, i.e. delivery of executed works/termination of sub-contracts, etc.

It is stated that the valid reasons are given in termination notice i.e. the lack of any progress in the project execution and utter failure on part of the petitioner. Therefore, the argument of petitioner that the termination of contract lacks for details are without any force. He referred various letters issued by the respondent to the petitioner in order to show that many requests and reminders were issued to the respondent to complete the work. It is argued that in fact the respondent has provided full cooperation to the petitioner even when there were no obligations on its part. Still, the work was not completed by the petitioner. Therefore, the Contract is rightly terminated under GCC Clause No. 36.2.2 in view of urgency in the matter.

33. Dr. Singhvi has referred Sections 14, 16 and 41 of the Specific Relief Act and argues that as per the terms of Section 14 (a) there are cases where compensation is an adequate relief, Section 14 (b) are those cases where contracts run into minute details or is dependent on personal qualifications of parties, and Section 14 (d) are cases wherein performance of continuous duty is required.

It is argued by him that under the provisions of Section 16 of the Specific Relief Act, specific performance of a contract cannot be enforced in cases where the party is not ready and willing to perform essential terms of the contract as appeared from the letters issued by the petitioner itself. Reference is made to correspondence exchanged between parties. The same are read particularly letters on record dated 3rd April, 2014 and 23rd May, 2014 filed by the respondent wherein the petitioner has given its indication of offloading the original

Contract, subject to certain conditions who also indicates its unwillingness to proceed further on the basis of such original contractual understanding, and proposes alternatively that it would continue instead only on the basis of a significantly revised and re-worked contractual understanding. But in present nature of cases even an arbitrator cannot grant specific relief under a contract. Therefore, there cannot be any interim order under the provisions of Section 9 of the Act. In the present case, the petitioner has totally failed to establish its case either legally or on fact to the exception of Section 14 and 41 of Specific Relief Act. Thus the petitioner is not entitled to get any benefit to enforce the contract as per its own conduct.

34. Learned Senior counsel has referred the following judgments in support of his submissions:

- ***Rajasthan Breweries Ltd. vs. The Stroh Brewery Company***, AIR 2000 Delhi 450, Paras 1, 14, 19 (Division Bench).
- ***Raj Electricals (Regd.) v. BSES Rajdhani Power Ltd.***, 142 (2007) DLT 687, Paras 10, 11, 12 (Single Judge).
- ***MIC Electronics Ltd. and Anr. Vs. Municipal Corporation of Delhi and Anr.***, 2011 (1) Arb. LR 418.
- ***Kunj Bihari Construction Co. Pvt. Ltd. Vs. Nidhi Builders Pvt. Ltd.***, 158 (2009) DLT 331, Paras 1, 26, 27, 29, 30, 31, 32, 33, 34 (Single Judge).

- ***Sainath Enterprises Pvt. Ltd. Vs. Union of India and Ors.***, 2009 (Suppl. 1) Arb. LR 74 (Delhi), Paras 1, 2, 4, 6, 7, 9, 10 (Single Judge).
- ***Cox and Kings India Ltd. Vs. Indian Railway Catering and Tourism Corp. Ltd.***, 185 (2011) DLT 5, Paras 1, 2, 39, 40, 41, 61, 62 (Single Judge).
- ***Indian Railways Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd. and Anr.***, 2012 (1) Arb. LR 184 (Delhi) (DB), Paras 8, 15, 23 (Division Bench).
- ***Cox and Kings Ltd. v. Indian Rly. Catering and Tourism Corporation Ltd. and Anr.***, AIR 2012 SC 3391, Paras 22, 23, 24 (Supreme Court).
- ***VF Services (UK) Limited v. Union of India***, (2011) X AD Delhi 269, Para 7 (Single Judge).
- ***Thiess Minecs India Pvt. Ltd. Vs. NTPC Ltd.***, OMP No.630 of 2014, decided on 01.07.2014, Paras 67, 68 (Single Judge).

35. It is argued by Dr. Singhvi that the contracts in question indicate that the remedy of the Petitioner lies in seeking compensation for the allegedly wrongful termination and not a claim for specific performance of the Contract and in the light of the prayer made by the Petitioner itself for payment of security, the alleged non-performance of the Contracts can be compensated in terms of money. He argued at the best, the petitioner may claim compensation, damages and interest thereon, however the contract work cannot be stalled in case of hardship if any, suffered by the petitioner who admitted in its pleading and correspondence that the

work in question is pertaining to public interest involved in achieving a time bound and commissioning of the project is paramount.

36. Dr. Singhvi argues that even on factual position of the matter, once a party has taken a decision based upon the commercial wisdom and terminated the contract and entered into fresh contract, the Court under Section 9 of the Act proceedings cannot compel such party to continue with the work/project. This Contract too is to be governed by the commercial interest of the parties herein. The respondent has thoughtfully considered that the contractual arrangement with the petitioner and clearly outlived its utility/any chance of a successful accomplishment on time, and the respondent remains in a much better position now to serve the underlying objective of the Contract directly and through engagement of an alternate contractor after termination of the Contract, which he can always do so subject to the consequences of the same in arbitration proceedings. Thus, any order or interim relief in the form of status quo or injunction cannot be continued as it will further delay the completion of the project in question causing irreparable harm to the respondent as the Employer of the Contract.

37. It is submitted that the petitioner has, merely with a view to detract from the clear position of law as regards maintainability of the instant proceedings, sought to raise issues pertaining to the merits: such as raising arguments that obtaining Right of Way/Way Leave Clearances/Forest Clearances (despite such clearances being allegedly the respondent's responsibility) contributed to delay in the commissioning of the Project. The issue whether the ROWs and

other statutory clearances was the respondent's liability cannot be decided in the present proceedings finally and can only be adjudicated in the arbitration proceedings. As per the respondent, obtaining Right of Way/Way Leave Clearances/Forest Clearances was the duty of the Petitioner as per Supplementary Agreement and amendment of contracts dated 22nd February, 2010.

38. On factual position, it is argued that the termination of the contracts was in view of ground taken by the respondent i.e. contractor's failure to complete the works as per time schedule committed. It was alleged that the respondent was constrained to terminate on account of substantial delays (despite several extensions granted by respondent without prejudice). The following reasons are given:

- i. Vide communications dated 30th September, 2011, 27th December, 2011, 24th February, 2012, 31st August, 2012, and 26th February, 2014 filed by the respondents, the various breaches of the Petitioner were categorically highlighted by the Respondent. The Petitioner was already lagging behind the original completion schedule. The substantial delays already having arisen, the Petitioner introduced a revised schedule for the Respondent's consideration. As per Petitioner's own letter bearing reference No. TR/ 01/ 422 addressed from the Petitioner to the Respondent dated 12th July, 2013. The Petitioner assured that all outstanding works under the respective sections of the Contract would stand completed by October 2014 and March

2015. The said Schedule as committed by the petitioner was offered by it taking into account any inadequacies/ constraints / intermediate hurdles that may have been (allegedly) faced by it/ being faced by it – the Schedule constituted for all purposes and intents an unwavering commitment/ informed decision and assurance to the Respondent as regards timely and prompt completion of outstanding works. Pursuant to the Joint Measurement Certificates signed by the petitioner with the respondent. However, the petitioner has not executed the work as per Schedule proposed/committed by the petitioner as per its letter dated 12th July, 2013.

- ii. The respondent replied to the aforesaid letter dated 12th July, 2013 vide letter dated 22nd January, 2014 whereby it was informed to the petitioner to expedite the construction activities in the Project by March 2014 and October 2104 as committed by petitioner. Respondent issued other letters dated 26th February, 2014 and 3rd April, 2014 conveying concerns non-performance of any works as per Schedule committed by petitioner vide its earlier letter dated 12th July, 2013.
- iii. A reference to the respondent's Excel Sheet indicates the abject levels of performance of works by the petitioner in respect of Tower Package A1, Tower Package A2, and the cumulative deliverables for both Packages A1 & A2 over the periods running from July 2013-January 2014, July 2013-February 2014, July 2013 – March 2014, and July 2013 – April 2014 which shows

that during this period substantial work committed by the petitioner in its letter has not been completed.

39. The respondent has submitted that under Section 164 of Telegraph Act approval by the Government with respect to placing of telegraph lines and post were granted and it was also necessary for the respondent to obtain consents from other authorities and for obtaining the same, the respondent hired the services of the petitioner for contractual sum as mentioned in the Supplementary Agreement dated 10th May, 2010. It is not denied by the respondent that the consent was to be given by respondent for the purpose of local bodies. In the meeting held on 14th June, 2012, it is indicated that for obtaining ROW clearances, forest clearance was a duty and obligation of the petitioner as the same was reiterated and it was highlighted that the committee was being formed to facilitate payment of compensation.

40. In nutshell the case of the respondent is that as per supplementary agreement, it was the obligation on the part of the petitioner for obtaining the forest clearance as the petitioner obtained the requisite clearances. The respondent was merely helping, assisting and co-operating with the petitioner so that the work be completed at an early date through after supplementary agreements there was no obligation of any kind on the shoulders of the respondent who had already been paid for the said work done as per supplementary agreements. It is not now open for the petitioner after its failure to complete the work to put the burden on the respondent. Counsel has referred the letter dated 10th June, 2013 where it was

informed by the petitioner to respondent admitting that forest clearance for Sikkim had already been obtained on 7th September, 2011 and for West Bengal had not been obtained owing to the delay in various departments of the Government.

41. No doubt in view of the settled law, the court is empowered grant interim relief even before the commencement of Arbitral proceedings under the provision of Section 9 of the Act, if the prima facie case is made out and balance of convenience lies in favour of the party who has filed the petition although similar remedy of the kind is available with the Arbitral Tribunal. The courts can even apply the same principle as are applicable to the determination of an application under Order 39 Rule 1 and 2 CPC in the pending suit which is intended to preserve the status quo. Such order always is passed subject to main arbitration proceedings.

At the same time the said relief is equitable in nature, the party invoking the jurisdiction has to show that he was not at fault and is not responsible for bringing about the state of things complained of and was not unfair or inequitable in his dealing with the party against whom the party was seeking relief. The conduct should be fair and honest. It is also true that the State has to act in a fair and just manner and not arbitrarily as the principle may hold good between private parties. But the state cannot be said to be acted arbitrarily in cases where the private parties is responsible for breaches by merely terminating the contract after giving the ample opportunity to the party.

42. It is also settled law that the disputes relating to specific performance of a contract can be referred to arbitration in a case which falls within the preview of exceptions to the general rule and a party under Section 9 of the Act can ask for such relief as there is no prohibition in order to shorten the litigation in regular Courts to refer the issues relating to specific performance to arbitration and while passing such order, the Courts can also see the conduct of the parties for the purpose of interpretation of the contract.

43. The entire case of the respondent is that the contract in question is not enforceable contract because of the conduct of the petitioner which reflects that he is not ready and willing to perform the same as per communications issued by the petitioner. Thus, compensation is an adequate relief as per Section 41(e) and Section 14 of the Specific Relief Act, 1963.

If the respondent satisfies the conditions thereof and question of termination is challenged by the petitioner then the disputes between the parties relating to validity of the termination of the contract have to be decided by the Arbitrator, the Court has to refrain from expressing any opinion on merits, otherwise one of the parties would suffer but at the same time, it would be necessary to decide as to whether the petitioner has made out any case for granting interim order as prayed for in view of the principles laid down under Section 9 of the Act.

44. Now, the question before this Court in view of facts and circumstances of the present case is whether the petitioner is entitled

to a relief sought in the petition in view of fact and circumstances of the present case.

45. Before proceeding further in the matter, it is necessary to reproduce the relevant clauses of the contract:-

“5: Contractor’s Responsibility

5.3 The Contractor shall acquire in its name all permits, approvals and/or licenses from all local, state or national government authorities or public service undertakings in the country where the Site is located that are necessary for the performance of the Contract, including, without limitation, visas for the Contractor's and Subcontractor's personnel and entry permits for all imported Contractor's Equipment. The Contractor shall acquire all other permits, approvals and/or licenses that are not the responsibility "of the Employer under GCC Sub-Clause 6.3 hereof and that are necessary for the performance of the Contract.

5.4 The Contractor shall comply with all laws in force in India. The laws will include all local, state, national or other laws that affect the performance of the Contract and bind upon the Contractor. The Contractor shall indemnify and hold harmless the Employer from and against any and all liabilities, damages, claims, fines, penalties and expense's of whatever nature arising or resulting from the violation of such laws by the Contractor or its personnel, including the Subcontractors, and their personnel, but without prejudice to GCC Sub-Clause 6.1 hereof.”

“6. Employer’s Responsibilities

6.1 The Employer shall ensure the accuracy of ail information and/or data to be supplied by the Employer as described in the corresponding Appendix - 6 (Scope

of Works and Supply by the Employer) to the Contract, except when otherwise expressly stated in the Contract.

- 6.2 The Employer shall be responsible for acquiring and providing legal and physical possession of the Site and access thereto, and for providing possession of and access to all other areas reasonably required for the proper execution of the Contract, including all requisite rights of way specified in the corresponding Appendix - 6 (Scope of Works and Supply by Employer) to the Contract Agreement. The Employer shall give full possession of and accord all rights of access thereto on or before the date(s) specified in that Appendix.
- 6.3 The Employer shall acquire and pay for all permits, approvals and/or licenses from all local, state or national government authorities or public service undertakings in the country where the Site is located which such authorities or undertakings require the Employer to obtain them in the Employer's name, are necessary for the execution of the Contract (they include those required for the performance by both the Contractor and the Employer of their respective obligations under the Contract), including those specified in Appendix 6 (Scope of Works and Supply by the Employer) to the Contract Agreement.”

“34. Extension of Time for Completion

- 34.1 The time(s) for Completion specified in the SCC shall be extended if the Contractor is delayed or impeded in the performance of any its obligations under the Contract by reason of any of the following:
- (a) Any change in the Facilities as provided in GCC Clause 33.
 - (b) Any occurrence of Force Majeure as provided in GCC Clause 32.

- (c) Any suspension order given by the Employer under GCC Clause 35 hereof or reduction in the rate of progress pursuant to GCC Sub-Clause 35.2 or
- (d) Any changes in laws and regulations as provided in GCC Clause 31 or
- (e) Any other matter specifically mentioned in the Contract by such period as shall be fair and reasonable in all the circumstances and shall fairly reflect the delay or the impediment sustained by the Contractor.....”

“36. Termination

36.1 Termination for Employer's Convenience

- 36.1.1 The Employer may at any time terminate the Contract for any reason by giving the Contractor a notice of termination that refers to this GCC Sub-Clause 36.1.
- 36.1.2 Upon receipt of the notice of termination under GCC Sub-Clause 36.1.1, the Contractor shall either immediately or upon the date specified in the notice of termination :
 - (a) cease all further work, except for such work as the Employer may specify in the notice of termination for the sole purpose of protecting that part of the Facilities already executed, or any work required to leave the Site in a clean and safe condition .
 - (b) terminate all subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) (ii) below
 - (c) remove all Contractor's Equipment from the Site, repatriate the Contractor's and its Subcontractors' personnel from the Site, remove from the Site any

wreckage, rubbish and debris of any kind, and leave the whole of the Site in a clean and safe condition

- (d) In addition, the Contractor, subject to the payment specified in GCC Sub-Clause 36.1.3, shall
 - (i) deliver to the Employer the parts of the Facilities executed by the Contractor up to the date of termination
 - (ii) to the extent legally possible, assign to the Employer all right, title and benefit of the Contractor to the Facilities and to the Plant and Equipment as of the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors
 - (iii) deliver to the Employer all non-proprietary drawings, specifications and other documents prepared by the Contractor or its Subcontractors as at the date of termination in connection with the Facilities.

36.1.3 In the event of termination of the Contract under GCC Sub-Clause 36.1.1, the Employer shall pay to the Contractor the following amounts :

- (a) the Contract Price, properly attributable to the parts of the Facilities executed by the Contractor as of the date of termination -
- (b) the: costs reasonably incurred by the Contractor in the removal of the Contractor's Equipment from the Site and in the repatriation of the Contractor's and its Subcontractors' personnel
- (c) any amounts to be paid by the Contractor to its Subcontractors in connection with the termination of any subcontracts, including any cancellation charges

- (d) costs incurred by the Contractor in protecting the Facilities and leaving the Site in a clean and safe condition pursuant to paragraph (a) of GCC Sub-Clause 36.1.2
- (e) the cost of satisfying all other obligations, commitments and claims that the Contractor may in good faith have undertaken with third parties in connection with the Contract and that are not covered by paragraphs (a) through (d) above.

36.2 Termination for Contractor's Default

36.2.1 The Employer, without prejudice to any other rights or remedies it may possess, may terminate the Contract forthwith in the following circumstances by giving a notice of termination and its reasons therefor to the Contractor, referring to this GCC Sub- Clause 36.2:

- (a) if the Contractor becomes bankrupt or insolvent, has a receiving order issued against it, compounds with its creditors, or, if the Contractor is a corporation, a resolution is passed or order is made for its winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), a receiver is appointed over any part of its undertaking or assets, or if the Contractor takes or suffers any other analogous action in consequence of debt
- (b) if the Contractor assigns or transfers the Contract, or any right or interest therein in violation of the provision of GCC Clause 37.
- (c) if the Contractor, in the judgment of the Employer has engaged in corrupt or fraudulent practices in competing for or in executing the Contract.
- (d) For the purpose" of this Sub-Clause; -

"corrupt practice" is the offering, giving, receiving or soliciting, directly or indirectly, of anything of value to influence improperly the actions of another party;

"fraudulent practice" is any act or omission, including a misrepresentation, that knowingly or recklessly misleads or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation;

"collusive practice" is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party;

"coercive practice" is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

"obstructive practice" is

(aa) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Employer's investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation;

or

(bb) acts intended to materially impede the exercise of the Employer's inspection and audit rights.

In persuasions of its policy, the Employer will sanction a firm or individual, including declaring ineligible, either indefinitely or for a stated period of

time, to be awarded a contract if it at any time determines that the firm has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for, or in executing, a contract.

36.2.2 If the Contractor

- (a) has abandoned or repudiated the Contract
- (b) has without valid reason failed to commence work on the Facilities promptly or has suspended (other than pursuant to GCC Sub-Clause 35.2) the progress of Contract performance for more than twenty-eight (28) days after receiving a written instruction from the Employer to proceed
- (c) persistently fails to execute the Contract in accordance with the Contract or persistently neglects to carry out its obligations under the Contract without just cause.
- (d) refuses or is unable to provide sufficient materials, services or labor to execute and complete the Facilities in the manner specified in the program furnished., under GCC Sub-Clause 14.2 at rates of progress that give reasonable assurance to the Employer that the Contractor can attain Completion of the Facilities by the Time for Completion as extended,

then the Employer may, without prejudice to any other rights it may possess under the Contract, give a notice to the Contractor stating the nature of the default and requiring the Contractor to remedy the same. If the Contractor fails to remedy or to take steps to remedy, the same within fourteen (14) days of its receipt of such notice, then the Employer may terminate the Contract forthwith by giving a notice of

termination to the Contractor that refers to this GCC Sub-Clause 36.2.

36.2.3 Upon receipt of the notice of termination under GCC Sub-Clauses 36.2.1 or 36.2.2, the Contractor shall, either immediately or Upon such date as is specified in the notice of termination,

- (a) cease all further work, except for such work as the Employer may specify in the notice of termination for the sole purpose of protecting that part of the Facilities already executed, or any work required to leave the Site in a clean and safe condition
- (b) terminate all subcontracts, except those to be assigned to the Employer pursuant to paragraph (d) below
- (c) deliver to the Employer the parts of the Facilities executed by the Contractor up to the date, of termination
- (d) to the extent legally possible, assign to the Employer all right, title and benefit of the Contractor to the Facilities and to the Plant and Equipment as of the date of termination, and, as may be required by the Employer, in any subcontracts concluded between the Contractor and its Subcontractors
- (e) deliver to the Employer all drawings, specifications and other documents prepared by the Contractor or its Subcontractors as of the date of termination in connection with the Facilities.

36.2.4 The Employer may enter upon the Site, expel the Contractor, and complete the Facilities itself or by employing any third party. The Employer may, to the exclusion of any right of the Contractor over the same, take over and use with the payment of a fair rental rate to the Contractor, with all the maintenance

costs to the account of the Employer and with an indemnification by the Employer for all liability including damage or injury to persons arising out of the Employer's use of such equipment, any Contractor's Equipment owned by the Contractor and on the Site in connection with the Facilities for such reasonable period as the Employer considers expedient for the supply and installation of the Facilities.

Upon completion of the Facilities or at such earlier date as the Employer thinks appropriate, the Employer shall give notice to the Contractor that such Contractor's Equipment will be returned to the Contractor at or near the Site and shall return such Contractor's Equipment to the Contractor in accordance with such notice. The Contractor shall thereafter without delay and at its cost remove or arrange removal of the same from the Site.

36.2.5 Subject to GCC Sub-Clause 36.2.6, the Contractor shall be entitled to be paid the Contract Price attributable to the Facilities executed as of the date of termination, the value of any unused or partially used Plant and Equipment on the Site, and the costs, if any, incurred in protecting the Facilities and in leaving the Site in a clean-and safe condition pursuant to paragraph (a) of GCC Sub-Clause 36.2.3. Any sums due to the Employer from the Contractor accruing prior to the date of termination shall be deducted from the amount to be paid to the Contractor under this Contract.

36.2.6 If the Employer completes the Facilities, the cost of completing the Facilities by the Employer shall be determined.

If the sum that the contractor is entitled to be paid, pursuant to GCC sub-clause 36.2.5, plus the

reasonable cost incurred by the employer in completing the facilities, exceeds the Contract Price or the entire facilities of entire Facilities have been completed or the price for part of the Facilities if part of the Facilities have been completed, the Contractor shall be liable for such excess.

If such excess is greater than the sums due the Contractor under GCC Sub-Clause 36.2.5, the Contractor shall, pay the balance to the Employer, and if such excess is less than the sums due the Contractor under GCC Sub-Clause 36.2.5, the Employer shall pay the balance to the Contractor. For facilitating such payment the Employer shall encash the Bank Guarantees of the Contractor available with the Employer and retain such other payments due to the Contractor under the Contract in question or any other Contract that the Employer may have with the Contractor.

The Employer and the Contractor shall agree, in writing, on the computation described above and the manner in which any sums shall be paid.

- 36.3 In this GCC Clause 36, the expression "Facilities executed", shall include all work executed, Installation Services provided, and all Plant and Equipment acquired (or subject to a legally binding obligation to purchase) by the Contractor and used or intended to be used for the purpose of the Facilities, up to and including the date of termination.
- 36.4 In this GCC Clause 36, in calculating any monies due from the Employer to the Contractor, account shall be taken of any sum previously paid by the Employer to the Contractor under the Contract, including any advance payment paid pursuant to the corresponding Appendix (Terms and Procedures of Payment) to the Contract Agreement."

“38. Settlement of Disputes.

- 38.1 If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination or the execution of the Facilities, whether, during the progress of the Facilities or after their completion and whether before or after the termination, abandonment or breach of the Contract, the parties shall seek to resolve any such dispute or difference, to the extent possible, amicably by mutual consultation.
- 38.2 If the parties fail to resolve such a dispute or difference by mutual consultation at the execution site level, then the dispute shall be referred by the Contractor to the Project Manager, who, within a period of thirty (30) days after being requested by Contractor to do so, shall give written notice of his decision.
- 38.2.1 The decision/instruction of the Project Manager shall be deemed to have been accepted by the Contractor unless notified by the contractor of his intension to refer the matter for arbitration within 30 of such decision/instruction
- 38.2.2 In the event the Project Manager fails to notify his decision as aforesaid within thirty (30) days, the Contractor, if he intends to go for Arbitration, shall notify his intention to the Project Manager within 30 days of expiry of the first mentioned period of thirty days failing which it shall be deemed that there are no dispute or difference between the Employer and the Contractor.

- 38.3 In case of dispute or difference between the Employer and the Contractor, if the Employer intends to go for Arbitration, he shall notify such intention to the Contractor.”

“39. Arbitration

- 39.1 All disputes or differences in respect of which the decision, if any, of the Project Manager and/or the Head of the Implementing Authority has not become, final or binding as aforesaid shall be settled by arbitration in the manner provided herein, below :
- 39.2 The arbitration shall be conducted by three arbitrators, one each to be nominated by the Contractor and the Employer and the third to be appointed by both the arbitrators in accordance with the Indian Arbitration Act. If either of the parties fails to appoint its arbitrator within sixty (60) days after receipt of a notice from the other party invoking the Arbitration clause, the arbitrator appointed by the party invoking the arbitration clause shall become the sole arbitrator to conduct the arbitration.
- 39.3 The language of the arbitration proceedings and that of the documents and communications between the parties shall be English. The arbitration shall be conducted in accordance with the provisions of the Indian Arbitration and Conciliation Act, 1996 or any statutory modification thereof. The venue of arbitration shall be New Delhi.
- 39.4 The decision of the majority of the arbitrators shall be final and binding upon the parties. In the event of any of the aforesaid arbitrators dying, neglecting, resigning or being unable to act for any reason, it will be lawful for the party concerned to nominate another arbitrator in place of the outgoing arbitrator.

- 39.5 During settlement of disputes and arbitration proceedings, both parties shall be obliged to carry out their respective obligations under the Contract.”
46. The relevant extract of supplementary agreements dated 15th September, 2010 is reproduced hereunder:-

“Supplementary Agreement for Tower Package A1

Supplementary Agreement to the Services Contract No. TPTL/TOWER-A1/02 dated 22.02.2010 for Tower Package - A1 - 400 kV D/C Teesta-III HEP - Panighata section of Teesta-III- Kishanganj Transmission Line associated with 1200 MW Teesta-III HEP at North Sikkim.

Whereas the subject Contract was entered between the Parties for providing all services required for completion, testing and commissioning of 400 KV D/C (Quad) Teesta III HEP - Panighata section of Teesta III HEP - Kishanganj Transmission Line associated with 1200 MW TEESTA III HE Project as detailed in the Contract Document.

And whereas for successful execution of the Contract, the Employer is desirous to include certain additional services in the scope of works/services under the Contract and the Contractor has agreed to perform the same at the terms and conditions hereinafter appearing.

NOW IT IS HEREBY AGREED as follows:

1. Scope of Works/ Facilities (GCC Clause 3)

Following additional services are agreed to be added under the Scope of Facilities:

- (i) survey (Fresh Detailed Survey) and Contouring.

- (ii) Preparation of proposals for Forest Clearance for the entire route of Transmission Line and follow up with concerned Govt. and other agencies culminating with accord of Forest Clearance approval by MoEF.
- (iii) Preparation of proposals for and arranging way leave clearances from owners of land coming under towers/ compensation of damage to crops etc as well as cutting of trees in consultation with and consent of the Revenue and Forest authorities of respective district/states.

IV Time Schedule (Appendix -4-Contract Agreement)

The Contractor shall complete the services including the additional items of works/ services within the Time for Completion given under the Contract unless an extension of time is authorized by the Employer keeping in view the additional scope of services, if any.

The Contractor shall be responsible for getting the statutory clearances including Right of Way (ROW) and way leave clearances required for completion of the Facilities within stipulated Time of Completion.

Except for the reasons stipulated under the Contract such as Force Majeure etc. and/or non-fulfillment of obligations under the Contract by TPTL leading to any delay in completion of Facilities, no extension of time for completion of the Facilities under the Contract shall be allowed to the Contractor.

This Supplementary agreement will form an integral part of the said Contract Agreement.”

“Supplementary Agreement for Tower Package A2

Supplementary Agreement to the Services Contract No. TPTL/TOWER-A2/02 dated 22.02.2010 for Tower Package A-2 - 400 kV D/C Panighata - Kishanganj section of Teesta-III -

Kishanganj Transmission Line associated with 1200 MW Teesta-III HEP at North Sikkim.

Whereas the subject Contract was entered between the Parties for providing all services required for completion, testing and commissioning of 400 KV D/C (Quad) Panighata-Kishanganj section of Teesta III HEP – Kishanganj Transmission Line associated with 1200 MW TEESTA III HE Project as detailed in the Contract Document.

And whereas for successful execution of the Contract, the Employer is desirous to include certain additional services in the scope of works/services under the Contract and the Contractor has agreed to perform the same at the terms and conditions hereinafter appearing.

NOW IT IS HEREBY AGREED as follows:

1. Scope of Works/ Facilities (GCC Clause 3)

Following additional services are agreed to be added under the Scope of Facilities:

- (i) Survey (Fresh Detailed Survey) and Contouring.
- (ii) Preparation of proposal for obtaining clearances from Civil Aviation and owners/administrative offices of EHV Power lines, Railways, Road, Rivers & Highways, Communication lines.
- (iii) Preparation of proposals for and arranging way leave clearances from owners of land coming under towers/compensation of damage to crops etc as well as cutting of trees in consultation with and consent of the Revenue and Forest authorities of respective district/states.

IV Time Schedule (Appendix -4-Contract Agreement)

The Contractor shall complete the services including the additional items of works/ services within the Time for Completion given under the Contract unless an extension of time is authorized by the Employer keeping in view the additional scope of services, if any.

The Contractor shall be responsible for getting the statutory clearances including Right of Way (ROW) and way leave clearances required for completion of the Facilities within stipulated Time of Completion.

Except for the reasons stipulated under the Contract such as Force Majeure etc. and/or non-fulfillment of obligations under the Contract by TPTL leading to any delay in completion of Facilities, no extension of time for completion of the Facilities under the Contract shall be allowed to the Contractor.

This Supplementary agreement will form an integral part of the said Contract Agreement”

47. The total amount of Rs.16.87 crores was agreed to be paid to the petitioner, out of which Rs.12 crores approx. admittedly received by the petitioner who has admitted in various minutes of meeting that to obtain all clearances, right of way as being its duty. The petitioner has carried out construction work in various regions however work in many regions were not completed due to various reasons for non-obtaining approvals including the forest clearances except it was obtained in Sikkim.

48. In case the main contract and two supplementary agreements are read together holistically, it can be seen that as per clause 6.1 and 6.2, it was the responsibility and obligation which was earlier

upon the respondent to take all the permissions including way, right of way, forest clearance etc was ultimately added to the scope of the work of the petitioner by way of the two supplementary agreements dated 15th September, 2010, it is stipulated and agreed by the parties in the supplementary agreement that the petitioner shall prepare the proposal for obtaining clearances from various places who shall complete the services and shall be responsible for getting the statutory clearances including right of way in order to complete the work in time. It is stipulated that the supplementary agreements will form integral part of the said contract. The said obligation of the petitioner is not confined to the preparation of the proposals in the manner contended by the petitioner, the reading of the clauses of the supplementary agreements indicate that the responsibility of the petitioner extended upto successfully obtaining the permissions.

49. It is not disputed by the petitioner that the contract in question is a terminable contract under GCC Clause No.36. The same is terminated on 30th May, 2014 under Clause 36.2.2. Clause 36.2.3 of the Contract, there is a requirement of completion of the obligation upon receipt of notice of termination.

50. It is also to be noted that as per the Clauses 6.1 and 6.2 of the original Contract prior to the entering of the supplementary agreement, the primary obligations and responsibilities of the respondent to get all the permissions and approvals, licenses from all local and State Governments. As per the case of the petitioner that they have been unable to carry out works at certain sections due to

non-availability of the requisite permissions that are to be provided by the respondent. Various communications were sent to the respondent in this regard who failed to perform his obligation to get the same and kept granting extension of time knowing the difficulties of the petitioner. The petitioner, therefore, was given time extensions started from the year 2011 until October, 2014 for completion of transmission line. Therefore, it cannot be said that the time was the essence of the contract. The petitioner is not denying having entered into the Supplementary Agreement in order to aid in the faster execution of works and to minimize delay but it appears that in the year 2010, after entering into the supplementary agreements, it became the responsibility of the petitioner to obtain the permissions, forest clearances, right of way etc. This is atleast plain from the collective reading of the agreements.

51. The fact of the matter is that both parties are blaming each other for the said clearances. The petitioners' case is that they are only the service provider i.e. pursuing the approvals of various governments and they themselves could not obtain the approval without the efforts of the respondent who are the actual party to obtain approval and without them, no government department would grant the approvals to third party. The respondent says that it was the duty and obligation of the petitioner as per supplementary agreements, the respondent has never denied to the petitioner to cooperate to get such approvals. There are two different versions of the parties who are relying upon correspondence exchanged

between them and various minutes of meeting and committee formed, which have to be determined before the Arbitral Tribunal. One thing is clear that the work is not complete despite of supplementary agreements executed between the parties and despite of three extensions granted by the respondent. It is yet to be determined as to who is responsible for obtaining the approvals, delay caused and consequences of termination. These are disputed questions which have to be considered and to be decided by the Arbitral Tribunal in view of the responsibility mentioned in the main contract and supplementary agreements. One thing is clear that while deciding the said dispute between the parties, both i.e. main contract and supplementary agreements are to be read together by the Arbitral Tribunal. At this stage, it is not proper to decide the said issues on merit. Thus, the contention of the petitioner that the respondent is taking advantage of its own breaches by remaining on the fault side by not obtaining the clearances, permissions which was obligatory upon them in view of the terms of the supplementary agreements is prima facie doubtful.

52. The following cases are cited by Dr. A.M. Singhvi, learned Senior counsel appearing on behalf of respondent:

(i) In ***Thiess Minecs India Pvt. Ltd. vs. NTPC Ltd.*** (supra), it was observed as under:

“67. I also find force in the submission of Mr. Vasisht that clause 24.7 and 24.3(c) show that the contract is a terminable contract. Being a terminable contract, no

injunction can be granted by the Court to prevent its breach as such a contract is not specifically enforceable. Prima-facie, it appears that the petitioner was well-aware of the existing ground situation and the difficulty being faced in the process of acquisition of land and re-location of the encroachers/ occupants of land at the site. The petitioner, however, prima facie, proceeded to throw its hat in the ring by taking a calculated risk. The petitioner cannot now find fault with the respondent, and seek to cover its defaults on the ground that the entire land has not been made available to the petitioner.”

(ii) In ***VF Services (UK) Limited Vs. Union of India & Anr.*** (supra), it was observed as under:

“7. The VOC is a contract which by its very nature is determinable. Although in exceptional facts of individual cases involving agencies of the State, this Court has granted interim relief even against the termination of a contract (for e.g., Pioneer Publicity Corporation v. Delhi Transport Corporation), the settled law is that even where a contract has been illegally terminated the aggrieved party would be able to only claim damages and no interim relief against termination of the contract.”

(iii) In ***Cox and Kings Ltd. vs. Indian Rly. Catering and Tourism Corporation Ltd. & Anr.***, (supra), it was observed as under :

“23. It is no doubt true that the Petitioner has invested large sums of money in the project, but that cannot entitle it to pray for and obtain a mandatory order of injunction to operate the train once the lease agreement/arrangement had been terminated. We are also unable to accept Mr. Rohatgi's submission that the Joint Venture Agreement was akin to a partnership. Such submission had been rightly rejected by the Division Bench. As rightly pointed out by the Division Bench of the High Court, the Petitioner's remedy, if any, would lie in an action for damages against

IRCTC for breach of any of the terms and conditions of the Joint Venture Agreement and the Memorandum of Understanding.”

(iv) In ***Sainath Enterprises Pvt. Ltd. Vs. Union of India (UOI) and Ors.***, (supra), it was observed:

“10. I consider that looking into the entire facts it is not a case where Court should restrain the respondent from proceedings further with the work with the help of other contractor and force the respondent to continue to work with the petitioner. The relations between the contracting parties ought to be governed by the contract between the parties. Where a contract is terminable for the reasons given in the contract, a party has a right to terminate the contract. The termination of contract was lawful or unlawful, is a dispute to be raised before the Arbitrator. The Court under Section 9 cannot compel an employer to continue to work with the contractor whose work has not been satisfactory and who has not been able to complete even 30% of the work within stipulated as well as extended period.”

(v) In ***Kunj Bihari Construction Co. Pvt. Ltd. Vs. Nidhi Builders Pvt. Ltd. and Ors.***, (supra), it was observed as under:

“29. The law relating to grant of injunction in exercise of power under Section 9 of the Act in the commercial contract has been discussed by this Court in the case of Techno Construction and Anr. v. Kunj Vihar Co-operative Group Housing Society Ltd. 118(2005)DLT591 wherein it was held as under:

9. Law with regard to grant of interim injunction while exercising jurisdiction under Section 9 of the Arbitration and Conciliation Act, 1996 is well settled.

The protection under this section can be granted only when prima facie case, balance of conveniences and irreparable loss and injury is made out. The first question requiring consideration is, whether the contract for construction of building can be ordered to be specifically enforced? Section 14(1)(a) of the Specific Relief Act, 1963 provides that a contract for non-performance, of which compensation in money is adequate relief, cannot be specifically enforced. In a suit for enforcement of contract for construction of a building, the party seeking specific performance of the contract has to satisfy three conditions, contained in proviso to clause (c) of Sub-section (3) of Section 14. These are (i) the building or other work is described in the contract in sufficiently precise terms to enable the court to determine the exact nature of the building or work. (ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that compensation in money for non-performance of the contract is not an adequate relief; and (iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed. In short, before a construction contract can be ordered to be enforced, it has to be held that compensation in money is not the adequate relief. It cannot be disputed that where a contract which cannot be enforced by a decree for specific performance, the same cannot be negatively enforced by issue of an injunction.”

(vi) *MIC Electronics Ltd. and Anr. Vs. Municipal Corporation of Delhi and Anr.* (supra), relevant paras are as under:

“6. It was then urged on behalf of the Respondent that Section 41(e) of the Specific Relief Act categorically

provided that an injunction could not be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. In this behalf the Respondent relied upon the decisions of this Court in *Rajasthan Breweries Ltd. v. The Stroh Brewery Company* 2000 (3) Arb. LR 509 (Delhi) and *Raj Electricals (Regd.) v. BSES Rajdhani Power Ltd.* 142 (2007) DLT 687. It was further urged on behalf of the Respondent that the 50 sites which were the subject matter of the contract had been identified by the Appellant themselves and were all within the jurisdiction of the Respondent. It was also urged that although the agreement was entered into in the month of June, 2009 the first objection with regard to the purported non-viability of the sites were raised only in the month of December, 2009. It was lastly urged on behalf of the Respondent that if the Arbitral Tribunal came to the conclusion that the cancellation of the contract was bad, in that event, the Appellant would be entitled to damages.

7. In rejoinder, it was urged on behalf of the Appellant that the Respondent were performing a public function or a public duty and that while discharging such a public duty Article 14 of the Constitution of India required it to act fairly, justly and reasonably. In other words, it was urged that the Respondent being State cannot cast off its personality and exercise unbridled power unfettered by the requirement of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of contract without anything more. In this behalf, the Appellant relied on the decision of the Supreme Court in *ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd. and Ors.* (2004) 3 SCC 553.

11. The decision in *Issac Peter*(supra) was re-stated with approval and affirmed by the Supreme Court in *S.K. Jain v. State of Haryana and Anr.* (2009) 4 SCC 357. These

decisions of the Supreme Court therefore affirm the view that in case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms of the contracts, merely because it happens to be the State. In such cases the mutual rights and liabilities of the parties are governed by the terms of the contracts and the law relating to contracts. It is seen that the contract in the present case was entered into pursuant to floating of tender and there was no compulsion on anyone to enter into the contract. Therefore, there can be no question of State power being involved in such a voluntary contract. Therefore, there is no force in the submission made on behalf of the Appellant that only public law principles would exclusively apply to the relationship between the parties and that private law principles flowing from the terms of the contract would have no application to the subject contract. Even otherwise it is noted that the cancellation of the licence had taken place after issuance of a show cause notice and calling for the reply of the Appellant.”

(vii) *Rajasthan Breweries Ltd. Vs. The Stroh Brewery Company*, (supra) it was observed as under:

“At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in

view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.”

(viii) *Raj Electricals (Regd.) Vs. BSES Rajdhani Power Ltd.*

(supra), it was observed as under:

“10. The relationship between the petitioner and respondent was purely a contractual relationship. Erstwhile DVB was unable to handle the problem of distribution of electricity to the unauthorized colonies which stood regularized. There was lot of theft of electricity and due to its inability to handle the problem, a scheme was drawn up by DVB to engage contractors for distributing electricity to the cluster of houses in unauthorized colonies all over Delhi. These contractors were being supplied electricity at single point and the contractors were to further distribute electricity to the cluster of houses in the unauthorized colonies in terms of the agreement. The contract was entered into initially for a period of seven years. The agreement could be terminated by DVB as well as by the respondent like any other contract. The respondent would be liable to face the consequences of the termination of the contract, if by termination the respondent has violated certain terms and conditions of the agreement resulting into loss to the petitioner. Similarly, if the petitioner had terminated the agreement or failed to comply with the agreement, the respondent could claim damages/loss from the petitioner. The contract is of the nature of a service provider where petitioner is the service provider to the respondent. If the respondent is not satisfied by the services being provided by the petitioner, the respondent is always at liberty to terminate the contract. The contract is a pure commercial contract and has to be governed by commercial laws. It is not a statutory contract either under Indian Electricity Act, 1910 or under Delhi Electricity

Reforms Act, 2000 or under The Electricity Act, 2003 entered into by State Governments or by the instrumentalities of the State and is not governed by any statutory provisions.

11. Like any other contract this contract is also to be governed by the commercial interest of the parties. If the respondent considers that the arrangement which was made by DVB of Single Point Distribution seeking services of the contractor has outlived its utility and the respondent was in a better position to serve the people of the area, the respondent can terminate the contract and suffer the consequences in terms of agreement between the parties. The Court cannot compel the respondent to continue with an agreement. The respondent who is a company incorporated for supply and distribution of electricity has a better infrastructure available with it to fulfill the needs of the electrification of the areas. While the contractors who are either individuals or firms in fact were introduced merely to overcome a problem which erstwhile DVB could not tackle at the time. A contractor cannot be made a permanent feature of the electricity supply system. It is a right and obligation of the respondent to supply electricity in the area for which respondent is a licensee under Delhi Electricity Reforms Act, 2000. If the respondent considers it can provide better services and facilities it can always terminate the contract of the contractors.”

53. Various judgments are referred by the learned senior counsel appearing on behalf of the petitioner. Each and every judgment is not necessarily required to be discussed in the matter as learned counsel for respondent is not disputing the proposition laid down in most of the cases. Some of the relevant paras of the decisions referred by the petitioner are extracted on the issue of the continuation of status quo already granted till the time Arbitral Tribunal renders the award. The same are referred as under:

(i) In ***Atlas Interactive (India) Pvt. Ltd. vs. Bharat Sanchar Nigam Limited*** (supra), it was held as under:-

“17. After considering the submissions made by learned Counsel for the parties and considering the facts and circumstances of this case and as discussed hereinbefore also, this Court is of the considered view that Section 14 of the Specific Relief Act does not stand in the way of the Court to grant the relief as prayed in as much as by the impugned act of respondent No.1 the petitioner may be unreasonably ousted from Indian market and, therefore, compensation in terms of money may not be adequate relief. The contract may be determinable in nature but the instrumentality of the State has to act in a fair and just manner and not arbitrarily. This principle may hold good between private parties but not in those cases where the highhandedness appears to be on the part of the State or its instrumentality. It also cannot be said that the contract between the parties runs into minute details or the Court cannot enforce specific performance of its material terms nor it can be said that the contract involves performance of continuous duty, which the Court cannot supervise. The Franchisee Agreement between the parties is a detailed agreement containing duties and obligations of both the parties. Respondent No.1 has to provide its cable network and the rest of the performance is to be by the petitioner. The agreement between the parties is non-exclusive and on revenue sharing basis under which the respondent No. 1 has to gain only. The nonperformance or the failure of the petitioner would not cause any financial loss to respondent No.1 inasmuch as under the agreement itself, the respondent No.1 can involve itself or others also for providing the same services. The plea of respondent No. 1 that the petitioner may utilize its equipment in other areas

and through other service providers is also no answer to the claim of the petitioner that it is being ousted arbitrarily and without any good and sufficient cause.

19. Considering the submissions made by learned Counsel for the parties and the facts and circumstances of this case, this Court has no hesitation in coming to a *prima facie* conclusion that the time was not the essence of the contract and the respondent No.1 is acting arbitrarily, unreasonably and in an inequitable manner by terminating the Franchisee Agreement merely on the ground of some delay to which the respondent No.1 was also a party and to which it had never raised any serious objection. The respondent No. 1, by its conduct, allowed the petitioner to invest more and more funds in the project and thereby drove petitioner to a situation where it would not only suffer huge financial loss but loss of trade reputation and goodwill also which may not be compensated in terms of money. The balance of convenience is more in favour of the petitioner inasmuch as the agreement can still be acted upon by both the parties in terms of their obligations as detailed in the agreement. In this petition under Section 9 of the Act, this Court is not at all in a position to order specific performance of the contract inasmuch as it can be ordered by the Arbitral Tribunal only in terms of the arbitration agreement between the parties. This Court can only restrain respondent No.1 from terminating the Franchisee Agreement in question till the Arbitral Tribunal adjudicates the controversies between the parties.”

(ii) In ***Softline Media Ltd. vs. Delhi Transport Corp.*** (supra), it was held as under:-

“16. A proposition advanced by the learned counsel for the respondent that in case of a license the same can be terminated by the licensor in terms of license agreement cannot be disputed (Refer to 2000 VI AD 741). It also cannot be disputed that even if such a termination is invalid the general rule is that injunction should not be granted and the remedy of the licensee whose license is terminated illegally is to sue for damages. However, it cannot be treated as absolute principle of law to govern all types of cases. In the present case, the important factor which has to be borne in mind is that the respondent had only given site for construction of bus queue shelters to the petitioners and it is the petitioners who had constructed the same out of their own funds. In the process the petitioners spent substantial amounts. No doubt even after the construction of the bus queue shelters, the title in the property would vest and remain with the DTC. However, the fact remains that such a huge investment was made by the petitioners with legitimate expectation to have the license of the bus queue shelters for a period of 3/5 years so that during this period they are able to earn by displaying the advertisements of the prospective advertisers and not only recover the cost of construction but make some profits out of these investments. It is not a case where some premises/structures, already existing and exclusively belonging to the respondent, are given on license basis to the petitioners. But a case where the petitioners have themselves raised the construction on various sites. In such a case, unless the respondents are able to show fundamental breach it may not be permissible for the respondents to terminate the contract. After all the respondent is a statutory body/“another body” within the meaning of Article 12 of the Constitution of India and

therefore being instrumentality and/or agency of the State it is expected to act fairly. The breach has to be fundamental as narrated by J.W. Carter in his afore-quoted book after dealing with the judgment in the case of *Telfair Shipping Corp. v. Athos Shipping Co.* S.A. reported in (1983) 1 Lloyd's Rep.127.”

(iii) In ***Pioneer Publicity Corporation vs. Delhi Transport Corporation***, (supra), relevant paras are as under:-

“A distinction must be drawn between a termination and determination. The present contract was determinable in the context of the Specific Relief Act on the expiry of three years. It could be terminated prior thereto but as has been laid down by the Hon'ble Supreme Court, where this power is to be employed by the State, it should be founded and predicated on good and expressed reasons and it should be unbiased. After the expiry of two and a half years of the contract nothing new has crept up to sufficiently justify its precipitated termination.”

(iv) In ***KSL & Industries Ltd. vs. National Textiles Corporation Ltd.***, (supra), relevant paras are as under:

“100. From the facts narrated above, it, prima facie, appears that there is no justification offered by the respondent for the sudden termination of the MOU without furnishing any reasons thereof, when both the parties and, in particular, the petitioner, had taken all the steps that were expected of it in furtherance of the MOU. I may note that the respondent has not even offered to explain or justify its conduct in terminating the MOU and its defence is only that the termination is in terms of the MOU. Prima facie, I am, therefore, of the view that the termination of the

MOU vide letter dated 14.09.2010 is arbitrary, irrational and illegal.

101. The result of the aforesaid discussion is that I find that the petitioner has made out a prima facie case in its favour for grant of an injunction against the respondent from giving effect to the termination of the MOU dated 14.09.2010. The balance of convenience lies in preserving the subject matter of the dispute. If the respondent is permitted to give effect to the termination letter and, consequently, to deal with the subject matter of the MOU, namely, the textile mills in question, even if the petitioner were to succeed in the arbitration proceedings and to secure an award in its favour, it may be met with a *fait accompli*. The arbitration proceedings are already in progress since the arbitral tribunal has been constituted. The interim protection has continued in favour of the petitioner since 01.10.2010, that being the first hearing of the matter, and there is no reason to disturb the said status quo during the pendency of the arbitral proceedings. Even if the respondents were to succeed in the arbitration proceedings, they would then be in a position to proceed further in the matter of rehabilitation or winding up of the textile mills in question.

102. The petitioners would certainly suffer irreparable loss and injury if the said textile mills are not preserved during the pendency of the arbitral proceedings, as the alienation or disposal of the said textile mills and their assets would destroy the subject matter of the petitioners claim. Without the said textile mills and their assets, the MOU and the definitive agreements would lose their meaning and would be of no avail. Consequently, I allow these petitions and confirm the order dated 01.10.2010 till the making of the

award by the arbitral tribunal, which is seized of the disputes between the parties.”

(v) *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.* (supra), relevant paras are as under:

“23. The question here is whether in the circumstances, an order of injunction could be granted restraining O.M.M. Private Limited from interfering with Adhunik Steels' working of the contract which O.M.M. Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the O.M.M. Private Limited terminating the arrangement entered into between itself and Adhunik Steels. In terms of Order XXXIX Rule 2 of the Code of civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a prima facie case for restraining O.M.M. Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. It is in that context that the High Court has held that this was not a case where the damages that may be suffered by Adhunik Steels by the alleged breach of contract by O.M.M. Private Limited could not be quantified at a future point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These are impoundable to some extent but at the same time it cannot be said that at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award.

24. But, in that context, we cannot brush aside the contention of the learned Counsel for Adhunik Steels that if O.M.M. Private Limited is permitted to enter into other agreements with others for the same purpose, it would be

unjust when the stand of O.M.M. Private Limited is that it was canceling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. Going by the stand adopted by O.M.M. Private Limited, it is clear that O.M.M. Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct O.M.M. Private Limited not to enter into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings.”

(vi) *Olympus Superstructures Pvt. Ltd. Vs. Meena Vijay Khetan & Ors.*, (supra), in Para 36, it was observed as under:

“36. Further, as pointed in the Calcutta case, merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms. Ruma Pal, J. observed:

“...merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not means that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties should be precluded from referring the dispute to arbitration.””

(vii) *Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Ors.*, (supra), it was observed as under:

“The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as

the parties to the contract are concerned, they had agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant-vendor to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and willing to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that the time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant-appellant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction.”

(viii) *Bhatia International vs. Bulk Trading S.A. and Anr.*, (supra),

it was observed as under:

“31. If a party cannot secure, before or during the pendency of the arbitral proceedings, an interim order in respects of items provided in Section 9 (i) & (ii) the result may be that the arbitration proceedings may themselves get frustrated e.g. by non appointment of a guardian for a minor or person of unsound mind or the subject matter of the arbitration agreement not being preserved. This could never have been the intention of the Legislature”

(ix) *Transmission Corporation of A.P. Ltd. & Ors. vs. Lanco Kondapalli Power Pvt. Ltd.* (supra), relevant paras are as under:

“Dispute

4. The Plant was commissioned. In terms of the said agreement, the power generated in the Plant constructed by the Respondent herein was to be supplied to the

Appellant Corporation. The price to be paid therefore by the Appellant included 'capacity charges' and 'variable charges'. Upon commission of the Plant, various tests as regard capacity of the plant to generate electricity were carried out. The Appellant herein had been paying capacity charges on the output of the Plant which was fixed at 368.144 MW from 08.11.2001. A notice, however, was issued by the Appellant alleging that the capacity charges payable by it with reference to the installed capacity should have been fixed at 334.75 MW x Rh (relative humidity) factor with tolerance limit of + or - 5% as per the agreement which works out at 351.49 MW and on that premise as to why future payments should not be made accordingly and why the previous bills should not be revised with reference thereto. The Respondent by a letter dated 17.12.2003 demanded withdrawal of the said notice from the Appellant."

45. In *Wander Ltd. and Anr. v. Antox India P. Ltd.* 1990 Supp SCC 727, it is stated: (SCC P.732, para 9)

"The interlocutory remedy is intended to preserve in status quo, the rights of parties which may appear on a prima facie case. The court also, in restraining a defendant from exercising what he considers his legal right but what the plaintiff would like to be prevented, puts into the scales, as a relevant consideration whether the defendant has yet to commence his enterprise or whether he has already been doing so in which latter case considerations somewhat different from those that apply to a case where the defendant is yet to commence his enterprise, are attracted."

54. I find that most of the judgments cited by the petitioner are distinguishable on facts. In certain cases, this court has held that the provisions of Section 14 of Specific Relief Act does not come in the way of the petitioner in seeking the interim relief and in other ones it has been stated that the

state has to function fairly while terminating the contract by giving the reasoned terminations and lastly are those where the other side is completely at fault or the termination has been done by not giving the cogent reason but an excuse and the court finds that the injury caused is of such a nature that the compensation is not the adequate remedy. There is no quarrel to these proposition and the court may in the given facts exercise such powers provided under the provisions of section 9 of the Act to preserve the rights of the parties in the interim till the disposal of the arbitral proceedings. However, it is also noteworthy to mention that the onus of proof for the grant of the interim mandatory injunction which positively directs the party to perform the contract is always higher than that of the preventive nature of the relief. A very high degree of prima facie case is required to be shown before the court in order to seek relief of such nature. In the facts of the case, the petitioner seeks the relief of interim mandatory directions seeking the directions from this court to compel the respondent to continue the contract with the petitioner and not to enter the contract with the third party. The reasoning accorded by the petitioner by informing the faults of the respondents are not the ones which are *ex facie* apparent on the face of it but on the contrary the correspondences exchanged between the parties reflect that the same are disputed questions which are ultimately going to form the subject matter of the arbitral proceedings. Therefore, prima facie, the reasonings for termination as given by the respondent cannot altogether be brushed aside by calling it frivolous in nature in view of the subsisting disputes between the parties. In such a case, the grant

of the relief of the specific performance at the interim stage, where it is yet to be discovered after adjudication of the disputed question who is ultimately breached the obligations would be legally impermissible. No such case of high degree of prima facie case exists in the present case.

55. On the otherhand, there is a contra material available on record which suggests that the petitioner was also not much inclined to proceed with the contract in view of the stale mate position arising in the state of the affairs as existed at the relevant time. The petitioner in the present matter admittedly by his letter dated 3rd April, 2014 was ready for off-loading the part of the work and to complete the remaining work on the following terms which are different to the original contractual understanding inter se the parties :

- a. Offloading at no risk and cost to Petitioner;
- b. All works relating to statutory clearances (like ROW, Forest Clearance and Way Leave Clearance) will stand excluded hereon from Petitioner's scope;
- c. Rates for balance work to be revised per rates finalized for service contract re offloaded works;
- d. Return of Proportional performance bank guarantee;
- e. Release of loss of profits.

56. All these factors atleast show on prima facie basis that the petitioner at the relevant time also showed inclination to off load the part of the work and had also sought the release of the loss of profit. Thus, the injury as per the petitioners own stand taken at

the relevant time can be compensated in terms of money. This position also stares at the face of the petitioner cast the doubts on the grant of the interim relief in the manner sought by the petitioner.

57. On the otherhand, as per the case of the respondent, the respondent has paid an amount of Rs.166,37,06,359/- to the petitioner for the Supply Agreement which is almost 95 % of the Contract Value. Similarly, an amount of Rs.68,87,53,487/- has been paid for the Service Agreements and Rs.12,67,26,714/- have been paid under the Supplementary Agreements. It is alleged by the respondent that despite substantial money having been paid by the respondent, the petitioner has failed to meet its core obligations under the Contracts, failed to obtain the required ROW and Forest Clearances and less than 50 % of the total work has been completed till date. It is also argued by Mr. Sandeep Sethi, learned Senior counsel also appearing on behalf of the respondent that the petitioner has not invested any monies of its own as all the payments under the Contracts were made by the respondent. The respondent released the required payments as and when demanded by the petitioner for various items like supply, services, tools and equipments, tree cutting and ROW compensation etc. Despite all the payments made by the petitioner, no progress has been made towards completion of the work. The respondent vide several correspondences including ones dated 22nd January, 2014, 3rd April, 2014, and 24th May, 2014 and even informed the petitioner that even though all required payments were made in time, the petitioner had completely failed to meet its

obligation under the Contracts and progress towards timely completion of the work. Thus, as far as the argument of the petitioner about the investment, loss, injury, damages and compensation, the same can be raised by the petitioner before the Arbitral Tribunal, the said aspect finally cannot be determined in the present proceedings. In fact both the parties are at liberty to raise their claims and counter claims which have to be decided on merit at the strength of evidence and submissions of the parties.

58. In the written submissions filed by the respondent, it is mentioned that the following are the immediate concerns as regards ensuring commissioning of the Project by January, 2015 :

- a) The Teesta III HEP consists of 6 units of 200 MW each. Since the commissioning of the 1st Unit has to commence by January, 2015, it is critically important that the transmission line be constructed by December, 2014.
- b) The deadline of June, 2015 (as wrongly submitted by the petitioner) is the deadline for the commissioning of all the 6 Units. However, the transmission line shall be required from the time the 1st Unit is commissioned in January, 2015.
- c) In the event power from TEESTA III HEP commencing from January 2015 cannot be evacuated, it will lead to a penalty of Rs. 50 Crores being imposed upon the respondent by the Government of Sikkim.

- d) The Servicing of loan amounts need to begin with EMI of Rs.80 Crores per month with effect from April, 2015.
- e) The respondent stands to face severe loss of revenue from any non-execution of the Transmission Line within timelines.
- f) The Transmission Line is to serve other Hydro Electric Projects: such HEPs will not be able to evacuate power in the absence of a running and operational Transmission Line. The non-supply of any power will lead to severe power shortages.
- g) In the event the deadline is not achieved by January 2015, large sections of the public would be denied electricity in the concerned areas – the extent of public interests affected would be not quantifiable/compensable, and would significantly outweigh alleged losses claimed by the petitioner (which can in any event be subject matter of arbitration proceedings).

59. The respondent has admitted about the issuance of the Notice Inviting Tender (“NIT”) dated 28th February, 2014 to M/s. Tata Projects Ltd. prior to the issuance of the termination of the Contract with the Petitioner on 30th May, 2014. The following are the reasons and explanation given by the respondent :

- (i) On account of the various concerns of delays in the execution of the contractual works by the petitioner, the respondent time and again informed the petitioner of the unsatisfactory nature of works being undertaken by the petitioner on the Project.

- (ii) In the absence of any satisfactory response/justification forthcoming as regards the delays despite the unstinting Schedule offered/committed by the Petitioner as also the cumulative impact of the delays being caused to the overall implementation of the Project works, respondent on a parallel basis approached eight pre-qualified experienced bidders on the panel of Power Grid in February 2014 inviting them for presentation of bids for the remaining works in the Project.
- (iii) The respondent on 26th February, 2014 again put the petitioner to notice that in light of the several delays accruing in the contractual works, it would be constrained to complete the remaining works either on its own or through another contractor. The NIT to M/s. Tata Projects Ltd. was eventually issued on 28th February, 2014 and in this context.

60. Subsequently and in the absence of any further progress in the construction works, the respondent was constrained to issue the Notice of Cure (as per the provisions of the Contract) on 9th May, 2014 – requiring the petitioner to cure the various breaches committed by it and as had already been indicated to it through extensive correspondence on record. Owing, however, to the petitioner's failure to comply with the same within a stipulated time and in the absence of any immediate response to this Notice (the response only coming on 28th May, 2014 without addressing any specific concerns over the form and content of the 9th May, 2014 Notice), the respondent was constrained to terminate the Contract

forthwith on 30th May, 2014 and award the remaining works as regards the same to M/s. Tata Projects Ltd. on the same date.

61. All these facts as narrated by the respondent are relevant for the purposes of the weighing of the balance in equities. Upon hearing the respondent versions, it can be seen that the respondent is also deeply aggrieved by the fact that despite providing the substantial moneys to the petitioner and giving the petitioner the obligations towards fetching forest approvals, right of way, surveying etc by way of the supplementary agreements, there is no progress in the works which became the compelling reason to terminate the contract and also introduce the third party for the purposes of the performance in the contract. The said submissions are required to be tested while determining the arbitral claims before the Arbitral Tribunal. But the said reasonings prima facie show that the respondent at this stage has been able to give plausible reasons for termination of the contract and the same cannot be altogether be said to be frivolous in nature and the same cannot be overlooked at present. The money claims of the respective sides are adjustable in nature after the determination of the same before the Arbitral Tribunal. It is also seen from the submission of the respondents that the balance of convenience and public interest which is involved in the present case do not warrant further deference in the project in as much as if on account of the interim orders of the court, the progress in the works is further delayed, the same may not be merely inconvenient to the parties commercially but also would not be in public good as the

public would be further denied with the electricity due on already belated progress in the work. Therefore, in view of my prima facie view that the injury in the present case is of the nature which can be compensated in terms of the money, the balance of the convenience and irretrievable loss is also in favour of the respondent.

62. It is rightly observed in the case of ***Lalbhai Dalpatbhai & Co. Vs. Chittaranjan Chandulal Pandya***, AIR 1966 Guj 189 as under:

“The Court has a discretion whether or not to enforce the negative stipulation by grant of an injunction that discretion is declared in no uncertain terms by Section 36 and is further emphasized by Section 38. Sub-sections (1) and (2). The language of Section 42 also shows that the discretion of the Court is not intended to be taken away by anything stated in the section. The words used are "the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction" so that Section 41, Clause (e) shall not stand in the way of the Court in granting an injunction; but the Court would still have to consider whether in the exercise of its discretion it should grant the injunction or not.”

“If this principle is to be applied, it is clear that two conditions must be fulfilled before a restraint imposed by a negative covenant can be held enforceable by an injunction in the first place it must be reasonable in reference to the interest of the contracting parties and secondly it must be reasonable in reference to the interest of the public. In the case of each condition the test of reasonableness must be satisfied. To be reasonable in reference to the interest of the contracting parties the restraint must afford no more than adequate protection to the party in whose favour it is imposed. To be reasonable in reference to the interest of the public, it must be in no way injurious to the public”.

In view of above, this Court is of considered opinion that in termination cases, there is no thumb rule that injunction must or must not be granted rather I feel that each case depends upon its own circumstances and facts of each case.

63. As regard the judgments referred by the petitioner are concerned, the findings arrived by various courts are that Arbitral Tribunal be constituted immediately. Both parties raised their specific disputes and Arbitral Tribunal would look into the matter on the basis of pleadings and other material and status quo would remain valid. With regard to termination of contract and liberty was granted to the parties to move an interim application under Section 17 of the Act which would be decided at its own merits and conduct of the parties is also relevant factor. The other set of judgments referred by the respondent lays down the law otherwise, it is held in these judgments that if a contract is a terminable contract which is specified in the contract, the same can be terminated and no case of exception is made out by the petitioner and termination is bad in law or contrary to the terms, the remedy of a party to seek compensation for wrongful termination but not a claim for specific performance and injunction sought is prohibited with respect of a contract which is determinable in nature as such relief cannot be granted under Section 9 of the Act which would be contrary to Section 14(i)(c) read with Section 41 of Specific Relief Act. Under these circumstances, it appears to the Court that each case depends upon its own merit. In case no prima facie case is made out and the petitioner failed to satisfy the Court

about exception to Section 14 and 41 of the Specific Relief Act, the relief claimed for specific performance cannot be granted under Section 9 of the Act.

64. As regard other judgments referred by the petitioner are concerned, it is argued by the respondent that the judgments referred by the petitioner do not help the case of the petitioner as facts in the present case are materially different and petitioner has failed to make any case for grant of interim order. It is a settled law that the court while granting the interim measures under Section 9 of the Act cannot arrive at the conclusive finding as to the fact that the agreement is validly terminated or it is invalid as it is for the Arbitral Tribunal to decide whether the termination was valid or invalid. As held by the Supreme Court and various Courts that in case the party, who is seeking the interim order, has made out a prima facie case is entitled to take action for termination of agreement. Its validity at this stage of interim measure is only for the limited purpose as to whether any prima facie case is made or not.

65. Few judgments which are heavily relied upon by the petitioner, in my view are distinguishable for the following reasons :

- i) In the case of **Atlas** (supra), it was a franchise agreement. The delay on the part of contractor was not too much. The respondent was not spending anything on the project but is to share only the income that may be made by the contractor after launching the project. In fact the respondent was not in a position to launch the project on its own very soon. In the instant case, the respondent has shown the substantial sum

of the amount which was spent over the project along with the public interests involved in the same which clearly tilts the equity in its favour. The facts in the present case are different.

- ii) In the case of ***Pioneer Publicity*** (supra), it was the admitted position that the contract itself stipulated that damages could not be claimed the objection pertaining to the provisions of Specific Relief Act could not have come to play. Similar is the position of ***Softline Media Ltd.*** (supra) where the petitioners have spent substantial amounts on the construction of the shelters with legitimate expectation to run the same for specific period. Such situation and facts are missing in the present case. On the contrary, the petitioner in the present case at the relevant time sought offloading of the works in relation to the part of the work and also demanded the release of loss of profits which prima facie show that the claim of the petitioner can be compensated in terms of the money.
- iii) In the case of ***Mayor Health*** (supra), where an ex-parte order was passed in view of facts that there was automatic renewal of the license deed. The renewal was granted to other parties/tenant but the petition was declined without any valid reasons.
- iv) In the case of ***Sundaram Finance Ltd.*** (supra), it was held by the Supreme Court that the interim order can be

sought from the court even before commencement of Arbitration proceedings and conditional order can be passed. In the case of **Adhunik Steel** (supra), the agreement was entered on 14th May, 2003. The terms of agreement was 10 years with effect from 18th May, 2003. It was terminated on 24th November, 2003 after about six months. The **Adhunik** was ready and willing to perform the contract. The respondent alleged that the contract between the parties was in violation of Rule 37 of Mineral Concession Rules, 1960. The court held that power to grant injunction by way of specific relief is covered by the Specific Relief Act by coming to the conclusion that the effect of the agreement and right to terminate it prematurely to be decided by the Arbitrator. The court while passing of order has observed that on the one hand it was alleged that agreement was hit by Section 37 of the Mineral Concession Rule, 1960 and on the other hand the respondent is trying to enter into a similar transaction with their entity. Under these circumstances, the interim order was passed. In such a case, the conduct of the respondent was clearly malafide and not beyond the suspicion and besides the fact that the violation of rules as an excuse to terminate was not found favourable by the court. There is stark contrast which exists in the factual matrix of the present case where the parties have attempted to perform their obligation by the extending the contract beyond the original date of the completion and still there is no progress in the

works and are alleging the breaches against each other. Therefore, the present case is distinct from the one where it is clear on face of it that the conduct of the employer is *malafide* in nature.

The facts in the present case are different and are not of same nature. The petitioner in the instant case is keen and ready to offload the part of work at no risk and cost of the petitioner for which the respondent is not agreeable. For rest of the work, new conditions are suggested to the respondent. The petitioner has not denied that it is prestigious project in the interest of the public and it has to be completed within time scheduled. In fact the petitioner in its July, 2013 letter has assured the respondent to complete the work however, the project has gone in slow speed because of the fault of the respondent who has denied and refuted the said argument. Thus, the said judgment is distinguishable and not applicable to the facts of the present case.

- v) In the case of **KSL** (supra), it was the admitted position that as per clause 2.1 and 5.1 of MoU, admittedly the petitioner had not entered into any definite agreement with the respondent. MoU lapsed due to efflux of time. No possession was given to any of mills and on the other hand claim of the petitioner was that possession and/or possession right, title and interest in the mill premises or parts are with them. The court after hearing both sides, prima facie come to the

conclusion that there is no justification offered by the respondent for the sudden termination of the MoU without furnishing any reason thereof when the petitioners have taken all the steps in furtherance of the MoU and in order to preserve the titles of textile mills, an interim order was passed. The court found that petitioner would suffer irreparable loss and injury if the textile mills are not preserved and their assets would be destroyed. The present case is entirely different, the petitioner itself is alleging that the petitioner is facing trouble for non-grant of permissions and approvals. The case of the respondent is that it is obligation of the petitioner who even prepare to off load the part of the work subject to conditions. Thus, the facts and circumstances are different.

66. In the present case, the respondent has provided the details of comparison between scheduled works and actual works from July, 2013 when the letter was issued by the petitioner to respondent after getting the third extension to complete the work to April, 2014 is given as under:

	Activity	Schedule to be completed from July 2013 to April 2014: committed by petitioner	Actual	Activity (if any) performed in April	Remarks

Tower Package A1 (Hilly Section) (Teesta III HEP to Panighatta)/ (Teesta III HEP to LILO at Rangpoo (priority)+ LILO at Rangpoo to Panighatta)/ (Priority+Balance Sikkim+Darjeeling)	Foundation (Nos.)	152	18	2	Only 12% achieved against schedule as per
	Tower Erection (Nos.)	176	65	2	Only 37% achieved against schedule as per
	Stringing (km)	54	6.7	NIL	Only 12% achieved against schedule as per

	Activity	Schedule to be completed from July 2013 to April 2014: committed by petitioner	Actual	Activity (if any) performed in April	Remarks
Tower Package A2 (Plain Section) (Panighatta to Kishanganj)	Foundation (Nos.)	32	7	1	Total foundations Should have been completed by January-2014
	Tower Erection (Nos.)	37	6	2	Total erections should have been completed by February-2014
	Stringing (km)	67	26.8	12.8	Total Stringing should have been completed by March- 2014

	Activity	Schedule to be completed from July 2013 to April 2014: committed by petitioner	Actual	Activity (if any) performed in April
Total (Tower Package A1 + Tower Package A2) (Teesta III HEP to Kishanganj)	Foundation (Nos.)	184	25	3
	Tower Erection (Nos.)	213	71	4
	Stringing (km)	121	33.5	12.8

67. It appears from the details provided by the respondent, scheduled works and actual works done by the petitioner at the site despite of its insurance given to the respondent in July, 2013 letter, it is evident that the petitioner under no circumstances may not be able to complete the works by October, 2014. Considering such situation which speaks for itself, that it is not possible to complete the work as it was slow as per chart schedule mentioned above between the period July, 2013 upto April, 2014, and it might be reason as it appears to the Court that the respondent has terminated the contract before the expiry period after having assessed the situation at the site. Therefore, it is rightly alleged by the respondent that it was not possible to complete the same by October, 2014 which prima facie appears to be reasonable. The petitioner under these circumstances cannot be allowed to perform the work at the site as the Court feels that in the interest of public and nature of the project, further delay would cause difficulties as the interest of various parties are involved. However, as mentioned earlier and it is clarified that whether the contract is rightly terminated or wrongly done, is a disputed fact and the same has to be determined on merit and without any influence of

this order. The petitioner is also at liberty to raise his claim to the effect that no proper cure notice is issued or cure notice is not issued for remaining part of work where termination is done or the termination of works are contrary to contract. In the present case, the Court finds that no prima facie case for specific performance is made out. The following are also the main reasons :

- (i) From the entire gamut of the case, it is clear to this Court that the determinable Contract cannot be specifically enforced except under peculiar reasons which is an exception to the general rule. He relied upon clause 36 of the contract. Clause 36.1 and 36.2 mandates that in case of termination for employers' convenience, he may at any time terminate the contract for any reason by giving the contractor a notice of termination that refers to this GCC SUB CLAUSE 36.1. As per the provision of Section 14(1)(c) and Section 41 (e) of the Specific Relief Act, (a) a contract which in its nature is determinable cannot be specifically enforced, and (b) no injunction can consequently be granted to enforce its performance and petitioner's relief for injunction seeking specific enforcement of the Contract dated 22nd February, 2010 is statutorily prohibited in view of the clear and unambiguous determinability of the said Contract as per Clauses 36.1.1 and 36.2.2. the present case is not such a case where a contract comprises an affirmative agreement to do a certain act couple with a negative

agreement, express and implied, not to do a certain act under only those circumstances that the Court is unable to compel specific performance of the affirmative agreement, which shall not preclude it from granting an injunction to perform a negative agreement meaning thereby the party seeking the relief is also to establish the case of exception under Section 42 as the provision of Section 14 and 41 of the Specific Relief Act are subject of the said exceptions. However in the present case, case of the petitioner being an exception is missing.

- (ii) The present case does not fall within the purview of any of the exceptions to the general rule as admittedly there is no negative covenant in the Contracts entered into between the parties; and the petitioner does not have any vested right in the Contracts as its position under the Contracts is merely that of an ordinary Contractor, who is entitled to a fixed payment for the work carried out under the Contract.
- (iii) In the present case, the contract in question is a determinable. Circumstances are not enough from a departure of settled law i.e. specific performance would not be ordered where damages are adequate remedy. This however is subject to exception as provided in Section 42 of Specific Relief Act. The petitioner has failed to plead or satisfy the Court about the requirement of said provision. It does not even otherwise falls under an exception.

Therefore, there are no specific pleadings. The petitioner did not even file copies of supplement agreements along with the petition.

- (iv) The said facilities as per clause 3 of GCC as amended by way of supplementary contract include the survey and contouring, preparation of proposals for forest clearance for entire route of the transmission line, follow up with the concerned government and other agencies culmination with accord of the forest approval by MOEF and other clearances. Thus, it becomes a disputed question as to whether it is actually the respondent to blame at this stage when there exists prima facie contra material on record. Therefore, drawing any inference in favour of the petitioner on the premise that it was the respondent who was at fault in not providing the right to way, forest clearances or other requirement would be preference of one set of facts over the other without in depth examination. Suffice it to say that the disputed question of the said kinds as narrated by the petitioner cannot act as the special equities in favour of the petitioner. The question relating to providing the right to way or forest clearances by the respondent is a disputed question and cannot aid the petitioner at this stage.

68. Thus, from the entire gamut of the case, this Court finds that the circumstances do not compel the Court to pass an order of

specific performance. The petitioner is hence not entitled for a relief as prayed for.

69. The petition is accordingly dismissed.

CCP(O) No.90/2014

70. The learned counsel for the respondent states that since the contract was terminated on 30th May, 2014 forthwith, the procedure under clause 36.3 was to be complied with. Therefore, the question of contempt on part of the respondent does not arise and the contempt petition is not maintainable.

71. As regards the contempt petition filed by the petitioner, no cogent evidence is brought on record to show that the respondent has committed contempt of order dated 6th June, 2014 i.e. status quo orders. No order at this stage can be passed. However, petitioner is allowed to raise all pleas made by him in the said petition, in its statement of claim, if necessary and the same would be decided on merit. The petition is accordingly disposed of.

72. No costs.

**(MANMOHAN SINGH)
JUDGE**

SEPTEMBER 03, 2014