

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

Judgment reserved on May 25, 2015

Judgment delivered on June 29, 2015

+ **OMP 119/2015 & IA 9264/2015**

JINDAL STEEL AND POWER LIMITED

..... Petitioner

Through: Mr.Dhruv Mehta, Sr. Adv. with
Mr. Manish Sharma, Ms.Ranjana
Roy Gawai, Mr.Krishna Keshav,
Advs.

versus

M/S. SAP INDIA PVT. LTD.

..... Respondent

Through: Mr.Parag Tripathi, Sr. Adv. with
Mr.Vikas Dutta, Mr.Siddharth
Silwal, Mr.Nikhil Varshney,
Ms.Mahima Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J.

1. This petition under Section 9 of the Arbitration and Conciliation Act has been filed by the petitioner initially seeking a restraint order against the respondent from terminating the SAP Software End-User License Agreement dated September 27, 2005 entered into between the parties.

2. This relief was in view of the legal notice issued by the respondent dated December 30, 2014 threatening termination of the License. I may only note here that during the pendency of the petition, the respondent has in fact,

terminated the License Agreement dated September 27, 2005, vide order dated April 30, 2015, which compelled the petitioner to file an application seeking the stay of the termination order. Suffice to state, this Court had not stayed the termination of the License Agreement. Even though, the petitioner has not amended the petition incorporating the challenge to order dated April 30, 2015, as the order dated April 30, 2015 has been placed on record and the learned Senior Counsel for the respondent has no objection on this Court proceeding on the premise that the present Petition lay a challenge to order dated April 30, 2015, this Court has heard the arguments on the termination order as well.

The Facts:

3. On September 27, 2005, the petitioner and the respondent entered into a License Agreement whereby the petitioner was granted a non-exclusive perpetual License to use the SAP software documentation and other SAP proprietary information to run the petitioner's internal operation and to provide internal training and testing. Clause 2.1 relates to the 'License'. Clause 3 relates to 'Verification'. Clause 5.1 defines the 'Term' and Clause 11 is the 'Arbitration' clause. According to the petitioner, the total Licenses available with the petitioner are 21,908 and it has made huge one time investment of Rs. 13,86,57,580/- (approximately) and recurring payments of Rs. 15,28,57,254/- (approximately) to procure the SAP Licenses and the

petitioner has been using the SAP applications for business computing, for which the petitioner has been paying a recurring amount as per agreed terms. It is the case of the petitioner that since the initial License of the year 2005, the petitioner has been using the SAP Licenses and during all these years, there has never been any complaint of excess usage or violation of the License agreement, by the respondent. According to the petitioner, on November 13/14, 2014, a team from the respondent's office of License had visited the petitioner's facilities at Raigarh, Chattisgarh and conducted onsite License audit. The petitioner's representatives/officials extended all cooperation and assistance in the conduct of the audit by the respondent's representatives. It is the case of the petitioner that the respondent's officers were required to hold a closing meeting with the representatives of the petitioner after the conduct of the License audit in order to explain the methodology adopted by the respondent in conducting the License audit and to discuss and explain the findings of the audit. However, after completing the audit on November 14, 2014, the representatives of the respondent left the site/facilities of the petitioner without holding any closing meeting or submitting a draft report and without discussing or explaining the findings of the audit with the representatives of the petitioner. The petitioner's case is that on November 20, 2014, the petitioner was completely shocked and surprised to receive an email from the respondent, wherein, for the first time,

it was alleged significant non-compliances/violation in the usage of SAP License by the petitioner on the basis of the License audit conducted on November 13/14, 2014. The respondent also raised a claim of Rs. 193,97,55,773/-. Immediately thereafter on November 20, 2014, the petitioner replied vide an email pointing out that no closing meeting was followed as a standard practice and sought an in-person meeting and presentation from the respondent to explain the basis of audit findings. Thereafter also, three emails were sent to the respondent. On November 25, 2014, the representatives of the respondent visited the Gurgaon office of the petitioner and held a meeting with the representatives of the petitioner. It is their case that the representatives of the respondent could not satisfactorily explain all the queries raised by the petitioner as regards the abnormally high deviation in License usage of the petitioner reported by the respondent. On December 1, 2014, the respondent sought a written certification from the petitioner by December 10, 2014 confirming regularization of use of SAP proprietary information. The aforesaid communication was followed by letter dated December 13, 2014, wherein, it was pointed out by the respondent, the petitioner's failure to regularize the irregularities in usage of proprietary information, which according to the petitioner, was ignoring the fact that all this while, the petitioner was in constant touch with the respondent and seeking clarification and negotiating to amicably resolve the issue. It has

been averred by the petitioner that the respondent realizing that the demand of Rs. 193,97,55,773/- for regularization of the alleged compliance gap was completely baseless, untenable and unjustified, offered a revised commercial proposal of Rs. 17,32,09,613/- for regularization of SAP Licenses vide its email dated December 23, 2014. Upon receiving the aforesaid communication from the respondent, the petitioner on December 24, 2014 sent an email wherein, the petitioner, without prejudice to its earlier contention as regards the completely baseless allegations of non compliance and unjust and unfair claim, intimated the respondent that the unit price indicated for additional SAP Licenses were much higher than the last purchase order prices. The petitioner also indicated that it will check the authenticity of the quantity of licenses as well as the classification proposed by the respondent. It is the case of the petitioner that in one of the meetings held at the petitioner's office in the last week of December 2014, the respondent/SAP Account Manager had proposed a discount of more than 50% on its previous proposal of Rs. 17,32,09,613/-. It is the case of the petitioner that while the discussions were on, it was shocked to receive the notice dated December 30, 2014 from the respondent demanding a claim of Rs. 193,97,55,773/- for regularizing the SAP Licenses by January 31, 2015, failing which, it threatened to terminate the License agreement. In response to the legal notice dated December 30, 2014, the petitioner on January 20,

2015 sent a reply to the notice wherein according to the petitioner, it had pointed out in detail the contentions and allegations and demands raised by the respondent are completely baseless, incorrect and smacks of apparent malpractice. The respondent was called upon to withdraw the said notice. The petitioner would state that the notice is vitiated on account of the respondent's own subsequent proposal of Rs. 17,32,09,613/- and then by its offer of 50% discount on Rs. 17,32,09,613/-. It is also stated by the petitioner that the respondent has accepted from the petitioner an amount of Rs.3 Crores towards annual maintenance charges under the License agreement for the period January 1, 2015 to December 31, 2015.

4. The respondent in its reply has stated that the petitioner has not come with clean hands and suppressed material and relevant facts from this Court and sought the dismissal of the petition. According to the respondent, the petitioner has concealed the fact that the petitioner is a repeated defaulter and even during the conduct of audit in year 2011, it was revealed that the petitioner misused the License provided by the respondent and the petitioner paid towards regularization of License. The respondent has taken a stand that the present violation of the petitioner is of high magnitude and cannot be left undealt. It is the case of the respondent that the over usage/excess usage of License granted by the respondent as well as category mismatch/misuse is a material breach of the terms of the License agreement. The respondent has

also pleaded that vide email dated November 20, 2014, the respondent extensively dealt with the compliance gap on the part of the petitioner and the email was concealed by the petitioner before this Court. The respondent would also plead the power to audit the usage of SAP proprietary information in terms of clause 3 relating to 'verification' of the agreement and in the event an audit reveals that Licensee underpaid License and/or Maintenance Fees to SAP, Licensee shall pay such underpaid fees based on SAP's list of prices and conditions in effect at the time of the audit. It is the case, the petitioner has never categorically objected the contents of the audit report and the compliance gap as stated in the audit report except in its response dated January 20, 2015. In other words, the previous emails in the month of November, 2014 only referred to unrealistic and illogical demand of the closing meeting. That apart, the case of the respondent is that the petitioner itself has admitted to the fact that there were compliance gaps on their part which were revealed in the audit done by the independent licensed auditors selected by the petitioner itself. According to the respondent, it is settled law even if the contract does not incorporate a specific termination clause, all commercial contracts except those involve sale of immovable properties are contracts determinable by the very nature, therefore, no injunction can be granted. The respondent has sought the dismissal of the petition.

The submissions:

5. Mr.Dhruv Mehta, learned Senior Counsel for the petitioner would submit that there is no material breach which can entitle respondent to terminate the perpetual License Agreement. He would state, that, on September 27, 2005, the Petitioner and the Respondent entered into a License Agreement and in terms of Clause 2 thereof, the Petitioner has been granted, upon payment of agreed consideration amount, a non-exclusive perpetual license to use the SAP software to run the Petitioner's internal business operations and to provide internal training and testing. Further, in terms of Maintenance Schedule attached with the License Agreement, the Respondent agreed to provide Standard Support Services on the payment of Annual Maintenance Charges by the Petitioner. According to Clause 5.1 of the License Agreement, the Agreement can be terminated by the Respondent by giving 30 days notice only in case of material breach of its provision and not otherwise. It is submitted that the alleged non-compliance of the License usage does not amount to material breach of the License Agreement. In contract law, a "material" breach of contract is a breach (a failure to perform the contract) that strikes so deeply at the heart of the contract that it renders the agreement "irreparably broken" and defeats the purpose of making the contract in the first place. The essence is that the breach must go to the very root of the agreement

between the parties, which is not the case in the present dispute. According to him, the respondent vide email dated November 20, 2014 and the Legal Notice dated December 30, 2014 made allegation of over usage of software and called upon the Petitioner to regularize the same. Further, the purported reason given for termination of the License Agreement in the alleged Notice of Termination dated April 30, 2015 is the alleged failure of the Petitioner to regularize the irregularities mentioned in the purported Audit Report. The alleged over usage of licensed software which is admittedly a mere irregularity and can be easily regularized by payment of money cannot be said to be a "material breach" in law or on facts situation obtaining in the present case. He would also state that the allegation is not that of diversion of licensed software or any third party use. He further states much after the expiry of 30 days notice in terms of Legal Notice dated December 30, 2014, the Respondent has, on February 26, 2015, accepted payment of Rs.3 Crores (approx.) from the Petitioner towards AMC for current year 2015 in advance and thus undertaken to continue to provide support services for the licensed software in question. This clearly indicates that the alleged over usage of licensed software cannot be a material breach of the License Agreement. Fourthly According to Appendix 1, Clause 3, the Petitioner is permitted to use software in excess to what it

has been authorised under the License Agreement, provided it makes payment for additional usage of software by purchasing additional licenses at current price and with increased maintenance fees. The notes circulated by the Respondent during the proceedings before the Court further reinforces the said proposition where it says there is no "No Go" areas as far as the software is concerned. It is clear that doing something that is permitted under the contract cannot amount to breach much less a material breach. Further, non payment of the disputed amount (i.e.Rs.193 Crores), which would become "due" only after adjudication by the arbitral tribunal, cannot be said to have resulted in material breach under the said Clause 5.1.

6. According to him, the alleged findings of the License Audit conducted by Respondent in November 2014 and claim of Rs. 193 Crores raised towards regularization of License is completely arbitrary, illegal and unjustified.

7. He would state, the respondent has been conducting annual license audits since the year 2006 in terms of Clause 3 of License Agreement. All through these years upto 2013 there has never been any complaint of excess usage except for minor deviation in year 2011 for which no claim was made by the Respondent. On November 13-14, 2014 Respondent again conducted annual onsite license audit and for

the first time, vide its email dated November 20, 2014, pointed out abnormally high over usage of licensed software and raised an arbitrary claim of Rs. 193,97,55,773/- for regularization of Licenses without providing any basis or calculation for the same. The Petitioner replied vide email dated November 20, 2014 and thereafter several emails were exchanged but the Respondent failed to explain the abnormally high deviation/excess usage recorded in its purported audit report. The Respondent didn't follow the due procedure in conducting the said audit in as much as; (a)The audit team of the Respondent did not hold any closing meeting to explain the findings after conducting audit on November 13-14, 2014 with the team assigned by Petitioner, which has been the usual/standard practice in the previous years; (b)The Respondent has not provided or explained the audit methodology applied by it in arriving at the findings; (c)The Respondent has not even provided a formal audit report for the audit conducted in November 2014 and; (d) The Respondent did not conduct audit of the licenses by using Standard License Audit (LA) Tool and instead conducted the audit by running Scripps.

8. He would also submit that the Respondent having failed to provide the calculation and basis for the demand of Rs.193,97,55,773 for regularisation of the alleged compliance gap had offered a revised

commercial proposal of Rs. 17,32,09,613/- for regularisation of SAP licenses vide its email dated December 23, 2014. It is completely incomprehensible and defies all business logic that the Respondent within a span of few days reduced its original claim by more than 90% for regularization of licenses and had offered discount of 50% in that amount. This raises a serious doubt about the audit methodology, audit findings and the claims raised by the Respondent for the alleged over usage of software and apparently indicates to a design to coerce and armtwist the Petitioner to purchase extraordinarily high numbers of new software licenses, which the Petitioner otherwise would not at all need to purchase considering the sizable number of Licenses it already has which is sufficient for its business requirement.

9. According to him, much after the expiry of the 30 days notice period, respondent has first raised the invoices and then accepted the payment of Rs 3 Crores (approx.) on February 26, 2015 towards payment of Annual Maintenance Charges from January 01, 2015 to December 31, 2015 in advance for providing technical support service to the Licensed Software system in question. The Respondent, on the one hand, by accepting the AMC has undertaken to provide technical support to the Software for the current year and on the other issued the

purported Notice of Termination of software licenses on April 30, 2015. Clearly, this is a classic case of "approbate and reprobate" by the Respondent as per its convenience, which cannot be permitted by this Court.

10. It is his submission that in terms of the license Agreement, the Petitioner has made huge One Time investments of Rs. 13,86,57,580/- (approximately) to procure the SAP Licenses and payments of Rs. 15,28,57,254/- (approximately) towards Annual Maintenance Charges (AMC) from year 2005 to year 2014. Additionally, Petitioner has paid an amount of Rs. 3 Crores (Approx.) in advance as AMC for the current year, 2015. As such the Petitioner has invested about Rs. 32 Crores for purchase of approximately 21908 numbers of SAP Licenses and towards Annual Maintenance Charges. These integrated ERP Software system is used to store, process, manage and access data primarily related to sale, finance, inventory and personnel department across its various locations, which is, admittedly, very critical to run the entire business operations of the Petitioner. Disbursement of salary of approx 25000 employees, employment of about 90 SAP certified and trained employees working at remote locations, inventory/stock movements at approx. 50 locations, purchase of raw materials, manufacturing , sales, invoicing and collections across various locations would be gravely impacted as a

consequence of termination. It follows that the software provided under the License Agreement caters to specific business requirement and critical for running the internal business operation of Petitioner and thus has special value to the Petitioner, which cannot be easily substituted by other software products.

11. Mr. Mehta, would deny the allegation of non-compliance in the year 2011. According to him, in the year 2011, the Petitioner's affiliate company, Jindal Power Limited had set up a new power plant in Chhattisgarh which gave rise to the need for purchase of additional licenses by the Petitioner. Therefore, in view of the growing business needs, the Petitioner purchased additional licenses on March 06, 2011 from the Respondent much prior to the alleged over usage pointed out by the Respondent vide its email dated July 04, 2011. It clearly establishes that the said purchase of additional licenses was not done to meet any compliance gap or for regularisation as alleged by the Respondent. Even otherwise, no non compliance report was issued and no claim was made by the Respondent or paid by the Petitioner in connection with the email dated July 04, 2011.

12. Mr. Mehta states there is no concealment of any document as alleged by the respondent. It is submitted that in the email dated November 20, 2014 there is no reference to any attachments/enclosures and

therefore it was an inadvertent error on the part of the Petitioner in not filing the attachments along with the email dated November 20, 2014. Even otherwise the minutes of meeting dated November 13-14, 2014 attached with the said email cannot be relied upon as it is the case of Petitioner that no closing meeting was held after the completion of the audit on November 14, 2014. The Respondent in its Reply has stated that the Petitioner could not impose a unilateral closing meeting which even could not have been conducted on November 13, 2014 and November 14, 2014 as the data was not analysed and just collected. If that is so, how did the said Minutes of Meeting dated November 13, 2014 and November 14, 2014 come into existence. This is a clear case of fabrication of document which is also borne out from the fact that the said minutes of meeting filed by the Respondent is an unsigned document.

13. He would also submit that this Court can stay the operation of the notice of termination dated April 30, 2015 and preserve the subject matter of dispute till the adjudication by the Arbitral Tribunal. According to him, it has been held by the Supreme Court in the case of *Adhunik Steels Ltd. V Orissa Manganese and Minerals (P) Ltd. [2007(7) SCC 125]*, that the principles of Order 39 R.1&2 Civil Procedure Code, 1908 are applicable to petitions under Section 9 of the Arbitration and Conciliation

Act 1996. Further, it has been held that it is open to the Court to pass an order by way of interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of dispute by the arbitrator, provided the Petitioner satisfies well settled principles for grant of interim injunction under Order 39 Rule 1 & 2 of CPC. It is his submission that the Petitioner has established a prima facie case and the balance of convenience is in its favour and that irreparable harm/injury is likely to result if the interim injunction is not granted. He would state that the merits of the claim for final relief have limited relevance at the interim stage. According to Mr. Mehta

(i) The Petitioner has a prima facie case in its favour. This can be seen from the following:

- The Petitioner has sought to terminate the License Agreement, when no material breach of its provision has been committed by the Petitioner. The alleged over usage of Licensed software cannot be said to be a 'material breach' since even as per claim of Respondent, the same can be regularised by payment for the excess usage by Petitioner.
- License regularization Claim of Rs. 193,97,55,773/- made by Respondent is vitiated by its own subsequent revised written proposal of Rs. 17,32,09,613/- and then by its offer of 50% discount thereon.

- The fact as to whether or not a compliance gap has occurred has to be established upon leading evidence since the Petitioner has raised serious doubt about the methodology of audit, audit findings and the claim of Rs. 193 Crores (approx.) without providing any calculation till date.

(ii) The balance of convenience is in favour of the Petitioner.

This can be established from the following:

- The Petitioner has been using the licensed SAP Software for the last 10 years since September 27, 2005 and there has never been issue of excess usage of licensed software except for a minor deviation in year 2011 for which no compliance report was issued nor any regularization claim was made by the Respondent.
- The Petitioner has 21 908 licenses subsisting in its favour under the License Agreement which is very critical to run the internal business operation of the Petitioner.
- The Petitioner has made huge investment of Rs. 32 crores (approximately) towards purchase of SAP software licenses and payment of AMC from year 2005 to 2015.
- The Petitioner has already made a payment of Rs. 3 Crores (approx.) for annual maintenance of the very licenses forming the

subject matter of the present dispute for the period from January 1, 2015 to December 31, 2015.

- The Respondent itself had agreed to reduce its claim from 193 Crores to 17 Crores. Even assuming there was a compliance gap, the extent thereof and the count of additional licenses required to be purchased by the Petitioner can be decided only after ascertaining the over usage which would require leading of evidence before the Arbitral Tribunal.

(iii) Irreparable loss and injury is likely to be caused to the Petitioner unless interim injunction is granted.

- It is the submission that the Petitioner's business operation across various locations is totally dependant on the software licenses granted by the Respondent. Termination of the License Agreement will throw the Petitioner's business out of gear and completely paralyze the same which will cause tremendous financial loss to it, which cannot be reversed. Further, it will severely dent its, reputation, goodwill and standing in the market which cannot be reversed and quantified. There is a strong likelihood that the award which may be passed by the Arbitrator in favour of the Petitioner would be rendered infructuous unless interim protection as prayed for is granted by this Court.

14. He would also submit that the grant of injunction is not barred in the facts of this case, for the following reasons:

(i) The software licenses in favour of the Petitioner are not ordinary articles of commerce which are readily available in the market.

As per Explanation (ii)(a) to Section 10 of the Specific Relief Act, there is a presumption in favour of grant of specific performance in case of such goods. (reliance placed on *Jabalpur Cable Network Pvt. Ltd. Vs. E.S.P.N Software India Pvt. Ltd. & Ors. AIR 1999 MP 271 & UP State Electricity Board vs. Ram Barai Prasad AIR 1985 All 26*)

(ii) The contract is not covered by Section 14(1) (a) to (d) of the Specific Relief Act. It is his submission that none of the facts necessary to attract these provisions have been established by the Respondent in the present case. He would rely on the judgment of this Court in *KSL & Industries v. National Textile Corporation 2012 (3)ARB L R 470 Del.*

(iii) He states, in the facts of the case, the contract is not by its very nature determinable. As per Clause 5.1, while it is open to the Petitioner to terminate the contract 'for any reason', it is not so for the Respondent. Respondent may only terminate by giving 30 days notice on occurrence of a 'material breach'.

15. His submission is also that petition is not rendered infructuous by virtue of the letter dated April 30, 2015 as according to him, the grant of a mandatory injunction so as to direct a party to continue with the status quo obtaining before the termination is permissible in law. The effect of such an order is that the operation of the termination notice is not immediate and is suspended during the pendency of the proceedings. It is submitted that this has been recognised by the Supreme Court in *Adhunik Steels [supra]*. Similar order of injunction in a challenge to a termination order has also been granted by this Court in *KSL & Industries (supra)* and *Old World Hospitality Pvt. Ltd.v. India Habitat Centre [73(1997)DLT 374]*.

16. Mr. Mehta would argue that the respondent by accepting Rs. 3 Crores has waived its right of termination. A perusal of the letter dated April 30, 2015 reveals that it is stated to be issued pursuant to the notice dated December 30, 2014. It is submitted that as per Clause 5.1 of the Agreement, the notice period expired on the expiry of 30 days from the said notice. However, despite the same, the Respondent has expressly waived the right to termination sought to be exercised vide the notice. This is evident from the action of the Respondent of executing an AMC and accepting payment of Rs. 3

Crores (approx.) from the Petitioner on February 26, 2015, subsequent to expiry of 30 days from the notice dated December 30, 2014. He states, the Respondent cannot be permitted to approbate and reprobate[*Cauvery Coffee Traders v Hornor Resources (International) Co. Ltd. 2011(10)SCC420*)]

17. In the last, it is his submission that the purported notice of termination dated April 30, 2015 is not in conformity with the Clause 5.1 of the License Agreement and hence illegal and void. Merely stating that the termination is 'with immediate effect' will not amount to compliance with the requirement of Clause 5.1, which provides that in case of a failure of the Petitioner to cure a 'material breach' within 30 days, the contract will stand terminated. In addition to the submissions made hereinabove regarding 'material breach', it is his submission that the letter dated April 30, 2015 is at best a notice in terms of Clause 5.1 and the Petitioner has 30 days to cure the breach alleged. He has sought the stay of the termination notice dated April 30, 2015.

18. On the other hand, Mr.Parag Tripathi, learned Senior Counsel appearing for the respondent would at the outset challenge the maintainability of this petition. According to him, in the petition, the Petitioner has made for three Prayers essentially asking for the same

relief i.e., to restrain the Respondent from terminating SAP agreement dated September 27, 2005 which was the subject matter of the notice dated December 30, 2014. These prayers have become infructuous as the said SAP agreement was terminated on April 30, 2015 and the said termination has been given effect to.

19. According to him, in any event, even if the said SAP agreement had not been terminated, the prayers sought for in the Section 9 petition are contrary to law. This is so because the SAP agreement itself is clearly a contract determinable from its very nature. He would state, it is settled law that even if the contract does not include a specific termination clause, all commercial contracts, except those which involve sale of immovable property, are contracts determinable by their very nature and therefore, no injunction can be given in such a case. He states, the present SAP agreement has a specific termination clause, namely clause 5.1. Such a contract in any case is determinable by its very nature.

20. It is also his submission that Section 14 (1) of the Specific Relief Act, 1963 specifically bars injunction sought for in the present case. The bar under Section 14 of the Specific Relief Act, 1963 contains sub-clauses (a), (b), (c) & (d) and each one of them apply to the present case.

21. The Section 14(1)(a) of the Specific Relief Act, 1963 is attracted,

as assuming without admitting in the present case, that the termination by the Respondent is contrary to law, the present case would be the one where for any alleged non-performance of the SAP agreement, compensation of money would be adequate relief. According to him, it has not even been pleaded in the petition that compensation in money will not be adequate relief for non-performance of the SAP agreement.

22. He states, Section 14 (1) (b) of the Specific Relief Act, 1963 is equally applicable, as the SAP agreement requires minute and numerous details dependent on the personal qualifications principally of the Respondent and also of the Petitioner. For the working of the said agreement, there is an annual maintenance contract where an online minute and numerous details of the performance of the contract is monitored and helped by the dedicated staff of the Respondent. He would state, the working of the software involves minute and numerous details and the implementation and troubleshooting thereof are brought about by the working and functional annual maintenance contract. He would state, there is no pleading in the section 9 petition, which would rule out the application under Section 14 (1) (b) of the Specific Relief Act, 1963.

23. It is further submitted by him, that the contract by its very nature is determinable. It is a commercial contract. It is a contract, which

additionally has a termination clause and lastly and significantly, it is not even pleaded by the Petitioner that the contract in question is not one which by its very nature is determinable. This being so, and in view of the settled law, there is and can be no answer to the applicability of Section 14 (1) (c) of the Specific Relief Act, 1963.

24. He states, for the same reasons, for which the specific performance of the SAP agreement would be contrary to law in view of the Section 14 (1) (b) of the Specific Relief Act, 1963, the prohibition of Section 14 (i) (d) of the Specific Relief Act, 1963 would be applicable. It is his submission that there is no pleading in Section 9 petition to shut out the applicability of Section 14 (1)(d) of the Specific Relief Act, 1963.

25. It is his submission that the entirety of Section 14 (1) of the Specific Relief Act, 1963 stands in the way, as law to the contrary, which rules out the consideration, much less grant of any relief if the performance of the contract itself cannot be specifically enforced. For, on account of the applicability of each of the sub-clauses of 14(1) of the Specific Relief Act, 1963, there can be no specific performance granted of the SAP Agreement. Therefore, in that view of the matter, Section 41 (1)(e) of the Specific Relief Act, 1963 clearly applies by which there can be no injunction which can be granted to prevent the breach of the

contract, the performance of which cannot be specifically enforced.

26. He also states that on the ground of concealment, this petition need to be dismissed. According to him, the Petitioner in support of its petition deliberately placed incomplete audit report on record and concealed the attachments thereto despite the same being in its knowledge and possession. The complete audit report together with the attachments was placed by the Respondent. The minutes of meeting dated November 13/14, 2014 clearly shows the admission of the Petitioner to the use of multiple logons and generic id's. The said minutes of meeting have never been denied by the Petitioner.

27. He also states that there is material and wilful breach of contract inasmuch as under clause 5.1 (ii) of the EULA, SAP has a right to terminate the EULA after giving 30 (thirty) days' notice to the Licensee of Licensee's material breach of any of the provisions of the EULA including more than thirty days delinquency or Licensee's payment of any money due hereunder, unless Licensee has cured such breach during such thirty days period. The said clause gives right to SAP to terminate the license after giving thirty days' notice to the Petitioner. A material breach is a breach that is fundamental to the contract's subject matter and adversely affects the outcome of the contract. The consideration amount paid under the License Agreement by Petitioner was towards license of

the software for exact and purchased quantity of Named Users and Software Engines. As per the Use Restrictions provided under Clause 3 of Appendix 1, the quantity of Named Users, Software Engines, SAP Industry Solutions and the content licensed have to be adhered to by the Licensee or if there are any changes in the same, the Licensee has to intimate the same to SAP and the License Agreement has to be modified accordingly by the addition of such additional Named Users, Software Engines, SAP Industry Solutions and the said content licensed at the current pricing in effect. The maintenance charges will also have to be modified and paid accordingly. The use of the software by the Petitioner as appearing from the Audit Report either by over-usage/ excess usage of the license granted as well as category mismatch/misuse constitutes a material breach of the terms of the License Agreement and its appendix and therefore entitles Respondent to terminate the License Agreement as per Clause 5.1 of the License Agreement.

28. He states that there is no communication by the Petitioner in which the audit report has ever been denied as incorrect.

29. He would submit that it is a settled principle of law that protection u/S 9 of the Act cannot be granted in a contract determinable by its nature. Section 14(1) of the Specific Relief Act, 1963 specifies that the contracts which cannot be specifically enforced is a contract which in its

nature determinable. Further Section 41 (e) of the Specific Relief Act, 1963 categorically provides that an injunction cannot be granted to prevent breach of a contract, the performance of which would not be specifically enforced. He relies upon the following judgments:

(i) Indian Oil Corporation Ltd. v. Amritsar Gas Service and Others, 1991 (1) Arb. LR 97. (Para 12, 14)

(ii) Adhunik Steels Ltd. v. Orissa Manganese and Minerals Pvt. Ltd; (2007) 7 SCC 125 (Para 16, 23 & 27)

(iii) Rajasthan Breweries Limited v. The Stroh Brewery Company, 2000 (55) DRJ 68 (DB) (Para 69, 73, 75 & 76)

(iv) MIC Electronics Ltd. & Anr. v. Municipal Corporation of Delhi & Anr., 2011 (1) Arb LR 418 (Para 5, 6 & 12).

(v) D.R. Sondhi & Ors. v. Hella KG Hueck & Co. & Ors., (2001) ILR (2) Delhi 679(Para 7 to 11 and 20)

30. He states, that, contract once terminated cannot be revived, on the following grounds:

(i) The License Agreement between the Petitioner and the Respondent has been terminated by Respondent's termination letter dated April 30, 2015. Therefore the License Agreement having being terminated cannot be restored in the present proceedings or any directions can be passed to make the Respondent comply with the terms of the License Agreement.

(ii) It is a principle of law that the scope and ambit of Section 9 is not to restore the contract which has already been terminated and no interim relief can be granted against termination. Further the court under Section 9 cannot give direction to a party for not terminating the contract or to continue with the contract.

(i) Bharat Catering Corporation v. Indian Railway Catering & Tourism Corp. Ltd., 2009(162) DLT 219

(ii) Bharat Catering Corporation v. Indian Railway Catering & Tourism Corp. Ltd., 2009(164) DLT 530

(iii) VF Services (UK)Ltd. v. Union of India & Anr., 2011(10)AD269 (Delhi) (Para 7 & 8)

(iv) Progressive Constructions Ltd. v. Chairman, National Highways Authority of India & Ors., 2009 (157) DLT 537 (Para 6)

He seeks dismissal of the petition.

31. Having heard the learned counsel for the parties and considered the written submissions filed by them, this Court is of the view, the following questions arise for its consideration:-

(i) Whether in view of the order dated April 30, 2015 the petition under Section 9 of the Act, seeking relief of injunction against notice dated December 30, 2014 has become infructuous?

(ii) Whether in the facts of this case, the agreement in its very nature determinable and no injunction of termination notice dated April 30, 2015 can be granted?

(iii) Whether in the facts of this case, in view of the Explanation (ii)(a) to Section 10 of the Specific Relief Act, 1963, the relief for specific performance can be granted?

(iv) Whether, in view of the agreement having been terminated, an injunction can be granted to the termination notice dated April 30, 2015?

Question No.1:

32. As pointed out in para 2 above that during the pendency of the petition, the respondent has in fact terminated the License agreement dated September 27, 2005. This Court had not stayed the termination of the License agreement. Even though the petitioner has not amended the petition, incorporating the challenge to the order dated April 30, 2015, as the said order has been placed on record by way of an IA and the learned Sr. Counsel for the respondent has no objection on this Court proceeding on a premise that this petition lay a challenge to the termination notice dated April 30, 2015, hence, suffice to state, the petition has not become infructuous.

Question No. 2

33. The License agreement dated September 27, 2005 includes four

clauses which are relevant for the purpose of this case. They are Clause 2.1, clause 3, clause 5.1 and clause 11, which are reproduced as under:-

“2.1 License:

(a) SAP grants a non-exclusive, perpetual (unless terminated in accordance with Section 5 herein) license to Use the Software, Documentation, other Sap Proprietary Information at specifies site(s) within the Territory to run Licensee s internal business operations and to provide internal training and testing for such materia business operators and as further set forth in Appendices hereto. This license does not permit Licensee to (i) sub-license or rent the Software Documentation or Third-Party Database or (ii) use the SAP Proprietary Information to provide services to third parties (e.g. business process outsourcing service bureau applications or third party training) Business Partners may have screen access to the Software solely in conjunction with Licensee's Use and may not Use the Software to run any of their business operations. "

"3. VERIFICATION: *Sap shall be permitted to audit (at least once annually and in accordance with SAP standard procedures) the usage of the SAP Proprietary Information. In the event an audit reveals that Licensee underpaid License and / or Maintenance Fees to SAP Licensee shall pay such under paid fees based on SAP's list of prices and conditions in effect at the time of the*

audit. "

"5.1 Term: This Agreement and the license granted hereunder shall become effective as of the date first set forth above and shall continue in effect thereafter unless terminated upon the earliest to occur of the following (i) thirty days after Licensee gives SAP written notice of Licensee's desire to terminate this Agreement for any reason but only after payment of all License and Maintenance Fees then due and owing (ii) thirty days after SAP gives Licensee notice of Licensee's material breach of any provision of the Agreement (other than Licensee's breach of its obligations under Sections G or 10 which breach shall result in immediate termination) including more than thirty days delinquency in Licensee's payment of any money due hereunder unless Licensee has cured such breach during such thirty day period (iii) immediately if Licensee files for bankruptcy becomes insolvent or makes an assignment for the benefit of creditors. "

11. ARBITRATION

Except for the right of either party to apply to a court of competent jurisdiction for an injunction or other equitable relief available under applicable law to preserve the status quo or prevent irreparable harm pending the selection and confirmation of a panel of

arbitrators and for the right of SAP to bring suit on an open account for any payments due SAP hereunder, any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration in New Delhi, India in accordance with the Rules of Conciliation and Arbitration of ICC and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Arbitration shall be conducted in the English language by a panel of three (3) members, one member selected by SAP, one member selected by Licensee and the third member, who shall be chairman, selected by agreement between the other (2) members. The chairman shall be a solicitor, and the other arbitrators shall have a background or training in computer law, computer science or marketing of computer industry, products. The arbitrators shall have the authority to grant injunctive relief in a form substantially similar to that which would otherwise be granted by a court of law. The parties agree that the arbitration proceedings and the outcome shall be kept strictly confidential and that obligations under this Section 11 shall survive termination or expiration of this Agreement. "

34. A perusal of clause 5.1 of the license agreement, it is noted that the agreement contemplates, the licensee, the petitioner herein gives the respondent written notice of its desire to terminate the agreement for any

reason, whereas, for the respondent to terminate the agreement, it contemplates, 30 days' notice of petitioner's material breach of any of the provisions of the agreement. It is conceded by the counsel for the petitioner that there is no negative covenant in the agreement which bars a termination. His submission is that the Court can stay the operation of the notice of termination dated April 30, 2015 to preserve the subject matter of the dispute till the adjudication of the Arbitral Tribunal. In other words, it is his submission, that on principle, the Courts recognize the stay of termination, provided, the petitioner satisfies, the well recognised principles of grant of interim relief in view of the judgment of the Supreme Court in *Adhunik Steels Ltd (supra)*. In *Adhunik Steels Ltd (supra)*, the Supreme Court was concerned with a case where the facts were, a company named OMM Pvt. Ltd. obtained the mining lease from the government of Orissa for mining manganese ore from certain extents of land situated in Sundergarh District in the State of Orissa. The OMM Co. entered into an agreement dated May 14, 2003 with Adhunik Steels, the petitioner/appellant before the Supreme Court, for raising the manganese ore on its behalf. The term of agreement was 10 years w.e.f. May 18, 2003. It conferred on Adhunik Steels an option to seek a renewal for a further term. It was the case of the Adhunik Steels that pursuant to this agreement, it had mobilized huge resources for carrying out excavation and extraction of minerals by arranging necessary labour, staff,

equipment etc. On November 24, 2003, the OMM Co. issued a notice to Adhunik Steels purporting to terminate the agreement. According to the OMM Co. it had realized that the contract it had entered with Adhunik Steels was one in violation of Rule 37 of the Mineral Concessions Rules, 1960 and since there was danger of OMM Co. itself losing its rights as a lessee, the contract had to be terminated. Adhunik Steels filed a petition before the District Court at Sundergarh u/S 9 of the Act for an injunction restraining the OMM Co. from terminating the contract and from dispossessing the Adhunik Steels from the sites of mines and other consequential reliefs. The District Court held that Rule 37 of the Mineral Concession Rules, 1960 cannot be held to be applicable to the working arrangements between the parties which has been termed a raising contract. It further held, the balance of convenience was in favour of the grant of an injunction against OMM Co. and if the injunction is granted, the very purpose of the arbitration proceedings would be defeated.

35. Aggrieved by this order, OMM Co. filed an appeal before High Court of Orissa. It was argued on behalf of OMM Co. that the contract between the parties, was in violation of Rule 37 of the Mineral Concession Rules, 1960, hence, the agreement itself was illegal and no right could be founded on such an illegal agreement by Adhunik Steels. It was alternatively contended that in terms of Section 41 of the Specific Relief Act, 1963, no injunction can be

granted for continuance of the contract and the working of the contract involved intrinsic details in its performance extended over a period of 10 years and the Court could not be in a position to supervise the working of the contract and in such a situation, an interim injunction ought not be granted. It was also contended that in terms of Section 14 of the Specific Relief Act, 1963 the agreement was not specifically enforceable as it was terminable and in any event, since Adhunik Steels could be compensated in terms of the money, even if its claim was ultimately upheld, it was not a case for grant of interim injunction.

36. The High Court came to a prima facie conclusion, Rule 37 of the Mineral Concession Rules, 1960 has no application to the facts of the case. It was held, in view of clause 8.2 of the agreement, Section 14(1)(c) of the Specific Relief Act, 1963 was not attracted. But the High Court upheld the contention on behalf of OMM Co. that the loss, if any, that may be sustained by Adhunik Steels could be calculated in terms of money and in view of that and in the light of Section 14 (3)(c) of the Specific Relief Act, an injunction as prayed for by Adhunik Steels could not be granted.

37. Feeling aggrieved by the order of the High Court, the Adhunik Steels approached the Supreme Court. The OMM Co. also approached Supreme Court against a finding of the High Court that Rule 37 of the Mineral Concession Rules, 1960 has no application. Before the Supreme Court, the

parties have argued on the scope of Section 9 of the Act. The Supreme Court considering various judgements and commentaries on arbitration as relied upon by the parties, was of view that the power of the Court under Section 9 of the Act is not totally independent of the well known principles governing the grant of an interim injunction that generally governs the Court. In other words, while considering an application u/S 9 of the Act, the Court will be governed by the well known principles of grant of interim injunction by a Civil Court. The question that was determined by the Supreme Court was, whether in the circumstances, the order of injunction can be granted restraining the OMM Co. from interfering with the Adhunik Steels' working of the contract, which the OMM Co. has sought to terminate. In para 24, Supreme Court noting the contention of Adhunik Steels that if OMM Co. is permitted to enter into other contracts with others for the same purpose, it would be unjust when the stand of OMM Co. is that it was cancelling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. The Supreme Court, going by the stand adopted by the OMM Co. held that it was clear that OMM Co. 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. In this background, the Supreme Court has held that it would be just and proper to direct the OMM Co. not to enter into a contract for mining and lifting of

minerals with any other entity until the conclusion of the arbitration proceedings. The Supreme Court also observed, that it see no justification in preventing OMM Co. from carrying on the mining operations by itself. The Supreme Court also observed that if Adhunik Steels succeeds, would be entitled to get if not the main relief, compensation for the termination of the contract on the principles well settled in that behalf.

38. Suffice to state, it is clear from the above, the Supreme Court has not enjoined the termination of agreement with Adhunik Steels. It had only restrained the OMM Co. from entering into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings. In other words, the Supreme Court had only restrained the OMM Co. from entering into a contract with a third party. It is also noted that the Supreme Court has approved that the agreement is liable to be terminated for which compensation would be the remedy on the principles well settled in that behalf. The reliance placed by Mr. Mehta on *Adhunik Steels (supra)* is totally misplaced and would not be applicable in support of his contention that the Supreme Court recognizes the stay of termination.

39. Insofar as the submission of Mr. Mehta that in terms of clause 5.1 which stipulates the petitioner to terminate the contract for any reason, it is not so for the respondent as the respondent may only terminate the contract by giving 30 days' notice on occurrence of material breach and the Contract

is not covered by Section 10 (1) (a) to (d) of the Specific Relief Act, 1963 by relying on the judgment of this Court in *KSL & Industries (supra)* is concerned, in that case, the reliefs claimed by three petitioners under Section 9 of the Act, were inter alia, for stay of letter dated September 14, 2010 issued by the respondent NTCL, terminating the MOU dated November 14, 2008 entered into with the three petitioners and with a further direction, not to create any third party right/interest and not to dispose of any land, machinery and fixed assets of the eleven textile mills covered by each of the MOUs and for a direction to take such steps that are necessary to preserve the value of textile mills and to discharge all the obligations under MOUs.

40. Clause 2.1 of the MOU stipulated that the MOU shall come into force on the date of execution of the MOU and shall be valid for a term of 240 days from the date of execution of the MOU unless mutually extended or till the execution of definitive agreements, whichever is earlier. It is clarified that the MOU shall be superseded by the definitive agreements.

41. Clause 5.1 of the MOU stipulated that the NTCL shall have the right to terminate the MOU forthwith upon serving written notice on the strategic partner in the event the definitive agreements are not executed to the full satisfaction of NTCL within 240 days of the date of execution of the MOU. Clause 5.2 of the MOU stipulated that either party shall have the right to terminate the MOU upon the happening of the following events by giving the

other party 30 days' prior notice in writing; (i) should the other party become insolvent or a Receiver is appointed in respect of its properties (ii) should the other party commit a breach of any of the provisions of the MOU which is not remedied with 30 days of the receipt of written notice in this respect from the non-defaulting party.

42. The reasons for terminating the MOU were, that in terms of clauses 2.1 and 5.1 of the MOU as the definitive agreements were not executed by KSL (Petitioner) NTCL had the right to terminate the MOU. Similarly, the MOUs entered into by the other two petitioners were also terminated by NTCL.

43. It was contended on behalf of the respondent that being a pure commercial transaction, money would be an adequate compensation in case the petitioner is able to prove that the MOU was wrongly terminated. It was also argued on behalf of the respondent NTCL that the MOU is determinable as it provides for termination in clause 5.1, which confers unilateral rights upon the respondent to terminate the MOU at any time after 240 days of the signing of the same. Strong reliance was placed by the respondent on the judgment of this Court in ***Rajasthan Breweries Ltd. (supra)***, which in turn, relied upon the Supreme Court's judgment in the case of ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Ors. (supra)***. This Court had in para 75 posed itself a question whether or not in all cases, where a contract is determinable specific performance shall not be ordered and

whether the present contract was determinable or that prima facie, it was not legally determined. This Court, while, dealing with the aforesaid question and referring to the judgment of the Supreme Court in ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service (supra)***, was of the view that the Supreme Court in para 12 of the decision noted that the award itself accepted that the agreement could be terminated in accordance with clauses 27 and 28 and the same was revocable in accordance with the said clauses. This Court had also observed that the Supreme Court did not go into the question of validity of question of agreement where the power to terminate is contingent and could not be exercised otherwise than on the happening of the contingency. The Court was of the view that the facts before the Supreme Court were that the agreement could be terminated by either of the parties by simply giving a notice. Therefore, the ratio of the said judgment cannot be extended to all cases where the contract could be determined only on the happening of a particular contingency. In para 80 in ***KSL & Industries case (supra)***, this Court had also observed that there is no provision akin to clauses 27 & 28.

44. Before I deal with the facts of this case, I deem it appropriate to consider here, the judgment of the Supreme Court in ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service (supra)***. In the said case, the Supreme Court was concerned with a termination of distributorship by the Indian Oil

Corporation. The terms and conditions vide clause 27 of the agreement provided for termination of the agreement by the corporation forthwith on the happening of any certain specified events. Clause 28 permitted either party without prejudice to the foregoing provisions or anything to the contrary contained in the agreement to terminate the agreement by 30 days' notice to the other party without assigning any reason for such termination. An argument was advanced on behalf of the Indian Oil Corporation that the relief of restoration of the contract granted by the arbitrator is contrary to law being against the express prohibition in Section 14 and 16 of the Specific Relief Act, 1963. It was urged that the contention the contract being admittedly revocable at the instance of either party in accordance with clause 28, the only relief can be granted on the finding of breach of contract by the appellant-corporation is damages for the notice period of 30 days and no more. The Supreme Court was of the view that the finding of the Arbitrator that the corporation is within its right to terminate the distributorship of the plaintiff in accordance with the terms of the agreement if and when an occasion arises along with the reasons given in the award clearly accepts, the distributorship could be terminated in accordance with the terms of the agreement which contain the aforesaid clauses 27 and 28. The Supreme Court held that the finding in the award being that the distributorship agreement was revocable and the same being admittedly for rendering

personal service, the relevant provisions of the Specific Relief Act were automatically attracted.

45. I agree with the submission of Mr. Tripathi that in ***Indian Oil Corporation Vs. Amritsar Gas Service (supra)***, the conclusion of the Supreme Court that an agreement incorporating provisions akin to clauses 27 and 28, are necessarily in its nature determinable and in view of Sub-section (1) of Section 14 of the Specific Relief Act, a contract cannot be specifically enforced.

46. Similar is the provision in the case in hand. Since we are concerned with (ii) of clause 5.1 (akin to clause 27) which contemplates 30 days notice by the respondent to the licensee i.e. the petitioner herein, of material breach of any provision of the agreement including more than 30 days delinquency in licensee's payment of any money due under the agreement unless the licensee, the petitioner herein, has cured such breach during such 30 days' period. That apart, para 80 of the judgment of this Court in ***KSL & Industries (supra)***, wherein this Court has referred to the fact that in the said case, there is no provision akin to clauses 27 & 28 as was in existence in ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Service (supra)***, the judgment in ***KSL & Industries (supra)***, would not be applicable to the facts of this case.

47. On the other hand, I note, in ***Rajasthan Breweries Ltd. (supra)***, this

Court was concerned with an appeal against the order of the learned Single Judge of this Court dated March 23, 1997, dismissing the application filed by the appellant under Section 9 of the Act, seeking ad interim temporary injunction staying the two notices of termination dated January 19, 1999, terminating the two agreements namely Technical knowhow and Technical Assistance executed between the parties.

48. The learned Single Judge dismissed the appellant's application on the ground that injunction prayed for was statutorily prohibited on conjoint reading of Section 41 and Section 14(1)(c) of the Specific Relief Act, 1963 since the contract in question was determinable in nature. The appellant's case was that the contract was not determinable in nature as contemplated by Section 14(1)(c) of the Specific Relief Act, 1963 since there is no clause in the agreement, which permits the respondent to terminate the agreement by giving a notice of a few days. This Court has held, although the clause does not add the word "by the parties or by the defendant" yet that is the sense in which, it ought to be understood. The Court went on to hold that all revocable deeds and voidable contracts may fall within "determinable" contracts and the principles on which specific performance of such an agreement would not be granted is that, the Court will not go through the idle ceremony of ordering the execution of a deed or instrument which is revocable at will of the executants. The Court also relied upon the judgment of the Supreme

Court in the case of *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service (supra)*. This Court has also held that the facts in the case of Rajasthan Breweries Ltd. (supra) are identical to those in the decision of the Supreme Court in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service (supra)* inasmuch as the agreements in *Rajasthan Breweries Ltd. (supra)* are also terminable by the respondent on happening of certain events, which is also the position in the agreement in the case in hand vide clause 5.1 (ii). This case covers the case of the respondent inasmuch as the injunction as sought for by the petitioner is statutorily prohibited with respect to a contract which is determinable in nature. I note for benefit the judgment of this Court in the case of *MIC Electronics Ltd. and Anr. (supra)*, wherein, in para 12, this Court has observed as under:

“12. The next question that needs to be considered is the contention of the Respondent that the contract between the parties was in its very nature determinable and consequently could not be specifically enforced by way of the present proceedings. In this behalf, it is observed that the Appellant did not pay the agreed License fee in terms of the License agreement. Consequently, after issuance of the show cause notice and calling for a reply from the Appellant the Respondent cancelled the License under the terms of the

agreement between the parties. Therefore, the License stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the License fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's refusal to decrease the number of LED screens in terms of clause 6 of the agreement, would also be considered by the Arbitral Tribunal. In this behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the

parties themselves”.

49. In ***D.R. Sondhi (supra)***, on which reliance was placed by Mr. Tripathi, it is noted, that there is no provision of termination simplicitor yet the Court found that the contract as determinable as the particular event, commission of material breach as per clause 13.4 of the agreement, had happened.

50. In view of the aforesaid position, the answer to Question No. 2 must be that the agreement in this case was determinable and the relief as sought for by the petitioner cannot be granted in view of Section 14 (1)(c) read with Section 41 of the Specific Relief Act, 1963.

Question No. 3

51. That apart, the petitioner is also not entitled to the relief of Specific Performance, the software licenses in favour of the petitioner are not ordinary articles of commerce which are readily available in the market. The reference made by Mr. Mehta to Explanation (ii) (a) to Section 10 of the Specific Relief Act, 1963 is reproduced as under:

“10. Cases in which specific performance of contract enforceable.—Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced—

.....

(ii) that the breach of a contract to transfer movable

property can be so relieved except in the following cases:—

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market”.

52. Mr. Mehta would rely upon the aforesaid provision to contend that there is a presumption for grant of specific performance in the case of software licenses in favour of the petitioner as the licenses are not ordinary articles of commerce which are readily available in the market. Such a submission may not hold good in view of the stand of the petitioner in its own pleadings wherein the petitioner has conceded in para 7 of the petition, wherein, the petitioner has stated that the respondent is a third largest enterprise software in India with 6.2% of total market share. In other words, the software Licenses granted under the agreement is not unique to the respondent. There are other vendors available who can also cater to the needs of the petitioner with the same software and which makes such a software as an ordinary article available in the market. Insofar as the reliance placed by Mr. Mehta on the judgments of the Allahabad High Court in ***UP Electricity Board, Lucknow (supra)*** and of the Madhya Pradesh High Court

in the case of *Jabalpur Cable Network Pvt. Ltd. (supra)* are concerned, in *UP Electricity Board, Lucknow (supra)*, the Court was concerned with coal ash and wherein there is a finding that coal ash is a type of property which is not easily available in the market, it is a waste product. Bulk supply of coal ash is available only where, there is a thermal power station. Coal ash thus comes within the term “*where the property is not an ordinary article of commerce*”. The Court was of the view, that if there is a breach of contract to transfer coal ash, the plaintiff cannot be compensated in terms of the money thereof and the money being not an adequate relief.

53. Similarly, in *Jabalpur Cable Network Pvt. Ltd. (supra)*, the Court held that the electronic TV signals to be supplied by the respondent to the appellant under agreement were not ordinary articles of commerce and were of special value to the appellant and they were the goods not easily obtainable in markets and breach of contract to transfer these goods cannot be relieved by payment of money in lieu thereof and it would be most inequitable not to grant relief to appellant to transmit information which is of great value when it is live and loses its importance after the telecast is over.

54. Suffice to state, the aforesaid judgments could not be made applicable to the facts of the present case and the relief of specific performance cannot be granted even on this ground.

55. Even the judgment of this Court in *Old World Hospitality (supra)*,

relied upon by Mr. Mehta has no applicability in the facts of this case in as much as, in the said case, this Court was dealing with an objection based on Section 14 (1) (d) of the Specific Relief Act. Even otherwise, it is not the case of the petitioner in its pleadings that damages are not an adequate remedy so as to entitle the petitioner, the relief of specific performance.

Question No. 4

56. Apart from my conclusion to Question Nos. 2 & 3, a further ground on which the injunction of the termination order dated April 30, 2015 cannot be granted, is that the termination having been effected and damages being an adequate remedy, the agreement cannot be revived.

57. The rest of the submissions, including there is no material breach, made by Mr. Mehta are on the merit of the termination, which need to be urged before the appropriate forum i.e. the Arbitral Tribunal.

58. In view of the above discussion, no relief can be granted to the petitioner and the petition is dismissed.

IA 9264/2015

59. In view of the order passed in the petition, the miscellaneous application is dismissed.

**(V.KAMESWAR RAO)
JUDGE**

JUNE 29, 2015
akb