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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION (LODGING) NO.618 OF 2016

M/s.Resurgere Mines & Minerals India Ltd.)
a company registered under the)
Companies Act, 1956 having their)
registered office at 15, Morvi House,)
28/30, Goa Street, Ballard Estate)
Mumbai – 400 038.) ...Appellant

....Versus....

1). Vyagreshwar Mineral Industrial)
Producers Co-operative Society,)
Dattatraya Smruti, Manohar Chowk)
Tal – Pen, District Raigad.)
2) Mr.Ashok Gangaram Patil,)
Chairman, Flat No.702, 7th Floor)
Plot No.21, Tulashi Classic,)
Postal Colony, Chembur)
Mumbai – 400 071.) ...Respondents

WITH
ARBITRATION PETITION (LODGING) NO.629 OF 2016

Vyagreshwar Mineral Industrial)
Producers Co-operative Society,)
Dattatraya Smruti, Manohar Chowk)
Tal – Pen, District Raigad.) ...Appellant

....Versus....

1). M/s.Resurgere Mines & Minerals)
India Limited Ltd, a company)
registered under the)
Companies Act, 1956 having their)
registered office at 15, Morvi House,)

28/30, Goa Street, Ballard Estate	)	
Mumbai – 400 038.	)	
	)	
2) Mr.Ashok Gangaram Patil,	)	
Chairman, Flat No.702, 7 th Floor	)	
Plot No.21, Tulashi Classic,	)	
Postal Colony, Chembur	)	
Mumbai – 400 071.	)	...Respondents

WITH
NOTICE OF MOTION (LODGING) NO.1581 OF 2016
IN
ARBITRATION PETITION (LODGING) NO.629 OF 2016

Vyagreshwar Mineral Industrial	)	
Producers Co-operative Society,	)	
Through Ashok Patil Chairman	)	...Applicant

IN THE MATTER BETWEEN :

Vyagreshwar Mineral Industrial	)	
Producers Co-operative Society,	)	
Through Ashok Patil Chairman	)	...Appellant

....Versus....

1) Vyagreshwar Mineral Industrial	)	
Producers Co-operative Society,	)	
Dattatraya Smruti, Manohar Chowk	)	
Tal – Pen, District Raigad.	)	
	)	
2) Mr.Ashok Gangaram Patil,	)	
Chairman, Flat No.702, 7 th Floor	)	
Plot No.21, Tulashi Classic,	)	
Postal Colony, Chembur	)	
Mumbai – 400 071.	)	...Respondents

Mr.Sharan Jagtiani with Mr.S.B. Pawar and Ms.Nikita Sawant i/b S.K. Legal Associates for the Appellant in Arbitration Petition (Lodging) No.618 of 2016 and the Respondent No.1 in Arbitration Petition (Lodging) No.629 of 2016.

Mr.D.D. Madon, Senior Counsel with Mr.Mayur Khandeparkar and Mr.Pankaj Kode i/b Mr.Himanshu Kode for the Respondent in Arbitration Petition (Lodging) No.618 of 2016.

Mr.Mayur Khandeparkar with Mr.Pankaj Kode i/b Mr.H. Kode for the Appellant in Arbitration Petition (Lodging) No.629 of 2016.

CORAM : R.D. DHANUKA, J.
DATE : 6TH MAY, 2016.

ORAL JUDGMENT :-

1. By these two arbitration petitions filed under section 37 of the Arbitration & Conciliation Act, 1996 (for short “the said Act”) both the appellants have impugned part of the same order i.e. dated 22nd April, 2016 passed by the learned arbitrator in an application filed under section 17 of the said Act refusing to grant part of the relief in favour of the appellant in Arbitration Petition (Lodging) No.618 of 2016 and granting part of the reliefs against the appellant in Arbitration Petition (Lodging) No.629 of 2016. Both the appellants have therefore, impugned part of the order passed by the learned arbitrator against each other. Since both the petitions are arising out of the same order, both the petitions were heard together and are being disposed of by a common order. Some of the relevant facts for the purpose of deciding these petitions are as under :

2. The appellant in Arbitration Petition (Lodging) No.618 of 2016 was the original claimant, whereas the appellant in Arbitration Petition (Lodging) No.629 of 2016 was the original respondent in the

arbitral proceedings.

3. The original claimant carries on the business of mining and other mining related business and activities. The original respondent no.1 is a co-operative society and is also a leaseholder in respect of the land admeasuring 79.981 Hectares situated at Village Mirya Dongar, Tahsil Pen, District Raigad which is leased by the State Government to the respondent no.1 for the purpose of Bauxite mining. The original claimant and the respondent no.1 entered into an agreement dated 14th December, 2007 for the purpose of extraction and sale of total bauxite deposit in the said mine for a consideration of Rs.2,62,50,000/-. It is not in dispute that out of the said consideration amount of Rs.2,62,50,000/- the claimant has already paid the said amount except a sum of Rs.75,00,000/- which was payable by the claimant to the respondent no.1 on the respondent no.1 receiving MOEF clearance.

4. It is the case of the claimant that though the respondent no.1 had obtained MOEF clearance, the claimant was not able to carry out any mining activity under the said agreement entered into between the parties. There is no dispute that the agreement entered into between the parties was terminated on 3rd September, 2012 by the respondent no.1 by issuing a notice. On 15th January, 2013, the respondent no.1 after termination of the agreement issued a public

notice inviting attention of the public at large that the agreement entered into between the parties was terminated vide notice dated 3rd September, 2012. In the said public notice, the respondent no.1 also stated that along with the said agreement dated 14th December, 2007, the respondent no.1 had also terminated the power of attorney dated 14th December, 2007. In response to the said public notice and also the notice of termination dated 3rd September, 2012, the claimant issued a counter notice on 23rd January, 2013 and called upon the respondent no.1 to withdraw the said notice of termination.

5. It is the case of the original claimant that after termination of the agreement by the respondent no.1, there was meetings held between the original claimant and the respondent no.1 in which the respondent no.1 made an assurance to the original claimant that the notice of termination issued by the respondent no.1 would be withdraw. It is the case of the original claimant that in view of such assurance given by the respondent no.1 in the meetings held after issuing the letter of termination, the original claimant did not invoke arbitration agreement earlier. It is not in dispute that the original claimant issued a notice invoking arbitration agreement for the first time on 26th November, 2015 and thereafter filed a petition under section 9 of the said Act on 29th February, 2016. This Court passed an *ad-interim* order of *status-quo* on 23rd March, 2016.

6. On 16th April, 2016, this Court by consent of the parties, appointed a counsel of this Court as a sole arbitrator to decide the dispute between the parties arising out of the arbitration agreement dated 22nd October, 2007. This Court permitted the parties to treat the said arbitration petition as the petition under section 17 of the said Act and continued the said *ad-interim* order dated 23rd March, 2016 for a period of one week from the date of the said order and granted a liberty to move before the learned arbitrator for *ad-interim* relief. This Court kept all the contentions of the parties including limitation open. In the said order, this Court clarified that the learned arbitrator shall dispose of the *ad-interim* stay / interim application uninfluenced by the order passed by this Court on 23rd March, 2016 which order was not passed on merits.

7. Pursuant to the said order passed by this Court on 16th April, 2016, the parties appeared before the learned arbitrator and advanced submissions. The learned arbitrator passed an order on 22nd April, 2016, rejecting the application filed by the original claimant under section 17 of the said Act. The learned arbitrator however, directed the respondent no.1 to maintain the accounts of the bauxite extracted and sold from the said mine and to furnish the same regularly to the original claimant in accordance with the said order. Being aggrieved by the said order dated 22nd April, 2016, the claimant

filed Arbitration Petition (Lodging) No.618 of 2016 under section 37 of the said Act. The respondent no.1 filed Arbitration Petition (Lodging) No.629 of 2016 being aggrieved by the directions issued in clause (b) of the said order dated 22nd April, 2016.

8. Mr.Jagtiani, learned counsel appearing for the original claimant invited my attention to various provisions of the agreement entered into between the parties and also the correspondence annexed to the Arbitration Petition (Lodging) No.618 of 2016. It is submitted that the respondent no.1 could not have terminated the agreement entered into between the parties without giving 18 years notice. He submits that since the notice of termination itself was illegal, the learned arbitrator ought to have directed the parties to maintain *status-quo* in respect of the notice of termination. He submits that the power of attorney executed in favour of the claimant is not yet revoked by the respondent.

9. The next submission of the learned counsel for the original claimant is that though the respondent no.1 had obtained clearance from MOEF in the month of July, 2012, the original claimant could not carry out any mining activities under the agreement dated 14th December, 2007. He submits that the said termination notice therefore, was *ex-facie* illegal and thus the learned arbitrator ought to have granted interim reliefs as prayed by the original claimant.

10. It is submitted by the learned counsel for the original claimant that the learned arbitrator in the impugned order has also rendered a *prima-facie* finding on the issue of limitation raised by the respondent no.1. He submits that in view of the fact that after issuance of the notice of termination, the parties had several meetings in which the respondent no.1 had given assurances that the notice of termination would be withdrawn, the notice of termination was given a go-bye. He submits that the learned arbitrator thus could not have rendered a finding on the issue of limitation even *prima-facie*.

11. Insofar as the the finding of the learned arbitrator on the issue of delay is concerned, it is submitted by the learned counsel for the original claimant that the balance of convenience was in favour of the original claimant. The original claimant had good chances of succeeding in the arbitral proceedings. He submits that since various meetings were held between the parties, the original claimant did not invoke the arbitration agreement prior to 26th November, 2015 and thus the alleged delay could not be a ground for rejection of interim reliefs as prayed by the original claimant.

12. The last submission of the learned counsel for the original claimant is that *prima-facie* finding of the learned arbitrator that the respondent no.1 had been carrying on mining activities since

November, 2013 is without rendering any reasons. He submits that on this ground also, the impugned order passed by the learned arbitrator deserves to be set aside and interim measures as prayed by the original claimant deserves to be granted.

13. Mr.Madon, learned senior counsel appearing for the respondent no.1 in Arbitration Petition (Lodging) No.618 of 2016 invited my attention to various provisions of the agreement entered into between the parties, the correspondence exchanged between the parties, statement of claim filed by the original claimant before the learned arbitrator and various *prima-facie* findings recorded by the learned arbitrator.

14. It is submitted that admittedly the clearance from MOEF was obtained by the respondent no.1 in the month of July, 2012. He submits that the last installment by the original claimant to the respondent no.1 was payable upon the respondent no.1 obtaining the clearance from MOEF. He submits that even after the respondent no.1 communicated about the clearance obtained from MOEF in the month of July, 2012, the original claimant did not make balance payment. He submits that *prima-facie* finding of the learned arbitrator on the issue of termination is thus correct and does not require any interference.

15. The next submission of the learned senior counsel is that

though the agreement was admittedly terminated on 3rd September, 2012 and the public notice was issued by the respondent no.1 on 15th January, 2013 and the public notice issued by the original claimant itself on 22nd January, 2013, admittedly the notice invoking arbitration agreement was belatedly issued on 26th November, 2015. He submits that the original claimant had admittedly filed a petition under section 9 of the Arbitration Act for interim measures on 29th February, 2016. He submits that this Court in the order dated 16th April, 2016 has clarified that the order of *status-quo* passed by this Court on 23rd March, 2016, was not on merits.

16. Insofar as the submission of the learned counsel for the original claimant that several meetings were held between the parties after termination of the agreement is concerned, he submits that the allegations about such meetings came to be made for the first time only in the notice invoking arbitration on 26th November, 2015. He submits that the original claimant never placed on record that post termination of the contract any such meetings were alleged to have been held. He submits that the respondent no.1 has denied by writing a letter to the original claimant that any such meetings as alleged were held between the parties.

17. Insofar as the issue of limitation is concerned, the learned senior counsel submits that the cause of action for invoking

arbitration agreement commenced when the notice of termination was issued on 3rd September, 2012. He submits that the notice invoking arbitration was admittedly issued on 26th November, 2015 which was after a period of three years from the date of termination of the agreement. He submits that the learned arbitrator was thus justified in rendering the finding on the issue of limitation. He submits that in any event, the findings recorded by the learned arbitrator are *prima-facie* as is clarified by the learned arbitrator himself in paragraph 21 of the impugned order.

18. It is submitted by the learned senior counsel that 18 years notice period provided in clause 24 of the agreement for termination is an obvious mistake. He submits that since the contract itself was for 11 years, the notice period could not be 18 years. He submits that since the agreement is determinable, the only remedy of the original claimant would be in damages and not for specific performance. Learned senior counsel submits that *prima-facie* finding of the learned arbitrator that the contract is determinable and thus cannot be specifically performed and thus no interim measures can be granted, cannot be faulted. Learned senior counsel placed reliance on the judgment of the Supreme Court in case of ***Indian Oil Corporation Limited vs. Amritsar Gas Service & Ors. (1991) 1 SCC 533*** in support of his submission.

19. Insofar as the submission of Mr.Jagtiani, the learned counsel for the original claimant in Arbitration Petition (Lodging) No.618 of 2016, that the respondent no.1 has not terminated the power of attorney is concerned, Mr.Madon, learned senior counsel for the respondent no.1 submits that the power of attorney executed in favour of the original claimant was not *de-hors* the agreement entered into between the parties but was co-terminus with the said agreement. In support of this submission, the learned senior counsel invited my attention to the provisions of the said power of attorney. My attention is also invited to the public notice issued by the respondent no.1 stating that along with the agreement, power of attorney also was terminated by the respondent no.1.

20. Mr.Khandeparkar, the learned counsel appearing for the appellant in Arbitration Petition (Lodging) No.629 of 2016 invited my attention to clause 22 of the agreement entered into between the parties and would submit that it was provided in the agreement that the contract was not that of agency, partnership or that of master – servant relationship. He submits that since the learned arbitrator has already rendered a finding that the contract was rightly determinable and the claims made by the original claimant were *prima-facie* barred by law of limitation, the learned arbitrator could not have directed the respondent no.1 to maintain accounts. He submits that there was no

such prayer in the statement of claim or in the application under section 17 of the said Act against the respondent no.1 to maintain accounts and to furnish copies thereof to the original claimant. Learned counsel invited my attention to the prayers in the statement of claim and would submit that the original claimant having made a specific claim for damages i.e. more than Rs.37.57 crores, no such order of maintaining accounts could be passed by the learned arbitrator. He submits that the mechanism of arbitration cannot be used for the purpose of collecting an evidence.

21. Mr.Jagtiani, the learned counsel for the original claimant in rejoinder submits that it had referred to various meetings held in the letter dated 22nd January, 2013 also and has not alleged for the first time in the notice invoking arbitration issued on 26th November, 2015. He submits that the issue of limitation is a mixed question of fact and law and has to be proved by the parties before the learned arbitrator. He submits that since the original claimant has paid substantial amount towards consideration of the respondent, the original claimant was required to be protected by the learned arbitrator.

22. Insofar as the submission of Mr.Madon, the learned senior counsel that there was a mistake of providing 18 years notice period in the clause for termination is concerned, he submits that admittedly the respondent no.1 has not filed any counter claim *inter-alia* praying

for rectification in the agreement and thus no such plea can be raised by the original claimant against the respondent no.1 at this stage.

23. Insofar as the submissions of Mr.Khandeparkar, the learned counsel appearing for the appellant in Arbitration Petition (Lodging) No.629 of 2016 are concerned, it is submitted by the learned counsel that admittedly the original claimant had made a claim for damages as and by way of alternate relief. He submits that the original claimant has also sought *ad-interim* relief in respect of such reliefs for damages. He submits that the learned arbitrator thus has ample power to issue the directions to maintain accounts so as to protect the subject matter of the arbitration. He submits that this Court shall not interfere with that part of the order. There is no dispute that the original claimant was already informed that MOEF clearance obtained by the respondent no.1 in the month of July, 2012 itself. The agreement is already terminated on 3rd September, 2012. The respondent no.1 had issued a public notice on 15th January, 2013 recording that the agreement as well as the power of attorney were already terminated by a notice dated 3rd September, 2012. There is no dispute that the original claimant also issued a separate notice dated 23rd January, 2013 in the newspaper protesting against the letter of termination.

REASONS AND CONCLUSIONS :

24. There is no dispute that the notice invoking arbitration agreement was issued on 22nd November, 2013. In its affidavit, the original claimant has alleged that there were meetings held between the parties in which the respondent no.1 had alleged to have made various assurances that the notice of termination would be withdrawn. The claimant has not given any details of any such meetings held between the parties. Claimant did not prepare any minutes of such alleged meetings. There is no dispute that the application under section 9 of the said Act was filed for the first time on 29th February, 2016. This Court while passing an order on 16th April, 2016, clarified that the *ad-interim* order of *status-quo* granted on 23rd March, 2016 was not on merits.

25. Insofar as the issue of limitation raised by the respondent no.1 and the *prima-facie* finding recorded by the learned arbitrator in the impugned order is concerned, a perusal of the said order clearly indicates that the learned arbitrator has recorded such *prima-facie* finding on limitation based on the letter of termination dated 3rd September, 2012 and the notice invoking arbitration agreement dated 26th November, 2015. In my view the learned arbitrator has rightly rejected the contention of the original claimant that the limitation for invoking the arbitration agreement would commence on the date of notice invoking agreement. In my view, the cause of action for

invoking arbitration agreement does not commence when the notice invoking arbitration agreement is issued. The limitation stops when the notice under section 21 of the said Act is received by the opposite party. The cause of action for claiming damages arising out of termination commences when the agreement was terminated. Be that as it may, the learned arbitrator has made it clear in the impugned order that the observations made on the issue of limitation by the learned arbitrator were *prima-facie* and the same can be conclusively decided after the parties led oral as well as documentary evidence before the learned arbitrator. I am thus not inclined to interfere with such *prima-facie* finding of the learned arbitrator in this petition.

26. Insofar as the observations of the learned arbitrator that the contract being determinable and thus no specific performance of such contract can be granted and consequently no interim measures can be granted is concerned, the fact remains that the contract is already terminated by a notice dated 3rd September, 2012. In my *prima-facie* view, the learned arbitrator has rightly held that the remedy of the original claimant would be in the nature of damages. Be that as it may, the observations made by the learned arbitrator being *prima-facie* observations, the validity of the termination will have to be decided by the learned arbitrator in the final award.

27. Insofar as the submission of the learned counsel for the

original claimant that the learned arbitrator did not render any reasons while holding that the respondent no.1 was carrying out mining activities since November, 2013 is concerned, the fact remains that the original claimant was not carrying out any mining activities and has not paid the balance amount. I am thus not inclined to interfere with this observation of the learned arbitrator. I am thus not inclined to interfere with the impugned order passed by the learned arbitrator which the subject matter of Arbitration Petition (Lodging) No.618 of 2016.

28. Insofar as the directions issued by the learned arbitrator in clause (b) of the impugned order dated 22nd April, 2016 is concerned, a perusal of clause 22 of the agreement entered into between the parties clearly indicates that the said agreement entered into between the parties was not that of agency, partnership or that of master – servant relationship. The respondent no.1 had granted rights to the claimant for sale of bauxite deposit in the said mine on the terms and conditions recorded in the said agreement. In my view, the learned arbitrator having *prima-facie* held that the agreement was determinable and the claims made by the original claimant were *prima-facie* barred by law of limitation and that there was gross delay in invoking arbitration by the claimant, the learned arbitrator could not have directed the respondent no.1 to maintain any accounts and to

furnish the copies thereof to the original claimant. In my view, Mr.Khandeparkar, learned counsel for the appellant in Arbitration Petition (Lodging) No.629 of 2016 is right in his submission that such direction issued in clause (b) of the operative part of the impugned order is contrary to the *prima-facie* finding rendered by the learned arbitrator in favour of the respondent no.1.

29. A perusal of the statement of claim and also the application filed under section 17 of the said Act clearly indicates that there was no prayer for accounts made by the original claimant. Merely because the original claimant had claimed damages as and by way of final relief and also as and by way of *ad-interim* relief, no such order of maintaining accounts or for furnishing the copies thereof could have been passed by the learned arbitrator. The appellant in Arbitration Petition (Lodging) No.629 of 2016 has thus made out a case for interference with the directions issued by the learned arbitrator in clause (b) of the impugned order.

30. I therefore, pass the following order :

- a). Arbitration Petition (Lodging) No.618 of 2016 is dismissed.
- b). Arbitration Petition (Lodging) No.629 of 2016 is allowed in terms of prayer clause (a).
- c). It is made clear that the observations made by the learned arbitrator in the impugned order are *prima-facie*. The learned

arbitrator shall decide the matter on merits and in accordance with law without being influenced by the observations made by the learned arbitrator in the impugned order.

d). There shall be no order as to costs.

31. In view of the order passed by this Court in Arbitration Petition (Lodging) No.629 of 2016, the notice of motion filed by the appellant does not survive and is accordingly disposed of.

(R.D. DHANUKA, J.)