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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 12.09.2019

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Judgment pronounced on: 24.01.2020

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ARB.A. (COMM) 5/2019

DALMIA CEMENT (BHARAT) LIMITED

..... Appellant

Through: Mr. Akhil Sibal, Sr. Advocate with
Mr. Sahil Narang, Mr. Saransh Kumar
& Ms. Ridhi Jad, Advocates.

versus

JAIPRAKASH ASSOCIATES LTD.

..... Respondent

Through: Mr. Sandeep Sethi, Sr. Advocate with
Mr. Pawan Upadhyay, Mr. Rajesh
Chhetri, Ms. Meenakshi Rawat, Mr.
Ratik Sharma, Mr. Akash Tyagi &
Mr. Rajeev Chhdetri, Advocates.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J

1. The present appeal has been filed under Section 37(2)(b) of the Arbitration & Conciliation Act, 1996, ('the Act') challenging the order dated 04.11.2018 passed by the Arbitral Tribunal ('Tribunal') whereby it has declined to grant interim relief to the appellant on its application under Section 17 of the Act.

2. Respondent Jaiprakash Associates Limited ('JAL') and Steel Authority of India Limited ('SAIL') incorporated a Joint Venture Company namely Bokaro Jaypee Cement Limited ('BoJCL') for manufacturing, selling and dealing in "Portland Slag Cement" ('Cement'). Respondent had 74%

shareholding and SAIL had 26%. BoJCL established a unit at Bokaro, Jharkhand with an annual manufacturing capacity of 2.1 million tonnes cement.

3. To ensure continued supply of Clinker to Bokaro Plant respondent entered into “Long Term Clinker Sale Agreement” dated 09.07.2008 with BoJCL. In terms of the agreement, Clinker was to be supplied by the respondent from its Dalla Plant in U.P. Clinker is one of the raw materials for manufacturing cement. The Bokaro Plant became operational on 20.05.2011 and the respondent started the supply of Clinker in accordance with the said agreement.

4. In 2014, Dalmia Group Company entered into “Share Purchase Agreement” dated 24.03.2014 with the respondent for purchase of the respondent’s shareholding in BoJCL. On 26.11.2014 itself BoJCL executed an “Amended and Re-stated Long Term Clinker Sale Agreement” with the respondent for continued supply of Clinker from its Dalla Plant.

5. In 2016, respondent started negotiations with UltraTech Cement for sale of Dalla Plant. The appellant objected to this sale vide its letter dated 15.02.2017 apprehending that this would adversely impact the Clinker supply to the Bokaro Plant. The respondent however vide its letter dated 17.02.2017 assured that the said sale would not impact the Clinker supply and that it would ensure long term and uninterrupted supply of Clinker to the appellant. Accordingly, the appellant proceeded to notify an “annual agreed quantity of 9,00,000 MT for 2017-18” which was to be supplied as per a monthly schedule. The respondent in fact accepted this position and supplies commenced for the Financial Year 2017-18.

6. It is averred in the appeal that from April, 2017 the respondent started supplying less than the scheduled monthly quantity and by the end of June,

2017 there was a short fall of about 50% in the supply. Repeated protests by the appellant were met with by several excuses, such as problems with the machinery, non-supply of trucks etc., but with an assurance that the short falls would be made good.

7. Contrary to the assurances, respondent stopped the supply of Clinker from 27.06.2017. Although, the respondent could have supplied Clinker from other plants including the “Rewa Plant”, but the same was not done. Despite the non-supply, the appellant paid an advance sum of Rs.1.5 crore to the respondent on 19.07.2017. In order to mitigate its losses, the appellant tried procuring Clinker from other parties, but most parties were located at far away distances and it was not economically viable to procure Clinker from them.

8. Vide e-mail dated 08.09.2017, respondent again assured that it would resume the supply of Clinker and requested for more advance payment. Meanwhile, the appellant issued a Purchase Order dated 12.02.2018 for the “annual agreed quantity” of 10,00,000 MT for Financial Year 2018-19 and respondent accepted the Purchase Order. However, the short supply continued on the pretext that the production of Clinker was low at the Rewa Plant.

9. It is the averment of the appellant that though the Rewa Plant continued to produce Clinker, which the respondent was consuming for its own purposes and also supplying to third parties, it did not make up the short fall qua the appellant.

10. This action of the respondent prompted the appellant to file a petition under Section 9 of the Act in this Court, seeking interim injunction restraining the respondent from supplying Clinker to third parties and for using the same for its own operations. While the matter was pending in this

Court, respondent issued a Termination Notice dated 30.06.2018 terminating the Clinker Sale Agreement and declaring 'Force Majeure' under the said agreement. The ground of termination was poor financial condition of the respondent coupled with an order of the Apex Court whereby the respondent had been directed to deposit a sum of Rs.1,000 crores for giving a refund to Jaiprakash Infratec Limited, a subsidiary of the respondent. Faced with this, the appellant filed an urgent application in the petition under Section 9 of the Act seeking restraint on the respondent from transferring, selling, alienating or creating third party interests in its Clinker Manufacturing Plant and/or dealing with its Clinker Manufacturing plant in any manner whatsoever, without preserving and protecting the appellant's rights under the Clinker Sale Agreement. The said petition together with the application was heard by this Court on 05.07.2018 and it was directed that the Arbitral Tribunal would be constituted between the parties and the petition under Section 9 of the Act would be treated as an application under Section 17 of the Act before the Tribunal.

11. In the meanwhile, the Apex Court in the final judgment, in the case of ***Chitra Sharma Vs. Union of India & Ors. in W.P.(C) No. 744/2017*** absolved the respondent of its obligation to make the deposit.

12. The respondent filed a detailed reply to the application under Section 17 of the Act filed by the appellant. The Tribunal heard arguments on the application and passed the impugned order, declining relief of injunction to the appellant.

13. The argument of the appellant before the Tribunal was that the terms and conditions of the Share Purchase Agreement as well as the 'Amended and Restated Clinker Sale Agreement' were binding on the respondent and it was under an obligation to ensure uninterrupted supply of Clinker to the

appellant, which was the lifeline for manufacturing cement. It was contended that both the agreements were executed with a solemn assurance for continued supply from the Dalla Plant, but in order to wriggle out of the obligations, respondent sold the Dalla Plant to UltraTech Cement. It was argued that various e-mails exchanged between the parties clearly indicated that repeated assurances were given by the respondent for continued supply of Clinker. Clause 7.2.1 of the Clinker Sale Agreement was relied upon to show the unequivocal commitment of the respondent to supply Clinker to BoJCL and not to supply to any third party, till the commitment towards BoJCL was met.

14. The appellant had further contended that Clauses 4.2.2 and 4.3.1 of the Clinker Sale Agreement cannot be interpreted as diluting the obligation of the respondent to ensure uninterrupted Clinker supply as per the agreed schedule. It was also the case of the appellant that it was not open for the respondent to either rely on Clause 7.4 relating to Liquidated Damages or the 'Force Majeure' Clause 8 to defend breach of its undertakings. Respondent could not fall back on its own requirements as a ground to stop supply to the appellant as the inhouse requirement of the respondent was known to it before executing the Agreements with the appellant.

15. On the issue of supply of Clinker from other sources, appellant had sought to argue that this was not a commodity which was freely available in the market, and thus there was no certainty of its supply. In view of the above, it was prayed that an interim direction be given to the respondent to continue the supply of Clinker to the Bokaro Plant, failing which irreparable injury shall be suffered by the appellant and the plant would have to shut down.

16. Respondent on the other hand had contended that the expression “pre-existing commitment” used in Clause 7.2.1(b) of the Clinker Sale Agreement would include the respondent’s commitment to supply Clinker to its own cement plant and the appellant cannot seek a mandatory direction for supply of Clinker to the Bokaro Plant. It was argued that if the Clinker Agreement is read as a whole it cannot be said that the respondent had undertaken to supply the agreed quantity to the respondent, irrespective of its captive use. The Clause of Liquidated Damages deals with contingencies in which the respondent may not be able to supply Clinker and this itself shows that obligation to supply Clinker to the appellant was not absolute. Respondent also argued that in view of the directions given by the Apex Court, respondent had sold 9 of its plants including the Dalla Plant and in fact even the appellant had given its bid for the purchase of Dalla Plant. However, the plant was sold to the successful bidder UltraTech.

17. Another argument of the respondent before the Tribunal was that the balance sheets of the appellant showed that it had purchased Clinker from the market and the Bokaro Plant did not suffer due to non-supply from the Dalla Plant. In fact UltraTech had offered to supply Clinker from its Sidhi Plant but the appellant had declined to accept the offer. The respondent also sought to argue that even assuming that the appellant had succeeded in making out a *prima facie* case, mandatory injunction should not be granted because the two other ingredients of grant of injunction i.e. irreparable injury and balance of convenience were absent.

18. It is important to note here that during the course of hearing the respondent had made a statement that it shall not sell Clinker to any third party. The Tribunal after hearing the respective arguments declined to grant

the interlocutory injunction sought by the appellant herein. The relevant part of the observations and findings of the Tribunal are as under:

“Although, Dr. Singhvi relied upon the Share Purchase Agreement, we do not find anything in it which may throw light on the issue of supply of Clinker by the respondent to the claimant. Of course, the 'Amended and Re-stated Long Term Clinker Sale Agreement' is relevant for deciding whether the respondent is legally and contractually bound to supply the agreed quantity of Clinker to claimant and whether the tribunal should entertain the prayer made by the claimant. A reading of various clauses of the Clinker Sale Agreement does show that it had a tenure of 30 years effective from 26.11.2014 and during that period the respondent was to supply and deliver the annual agreed quantity of Clinker determined in accordance with the agreed schedule. However, prima facie this was subject to the other provisions of agreement dated 26.11.2014. By virtue of clause 4.2.2, the parties agreed that if the respondent is not able to supply annual agreed quantity in accordance with the agreed schedule then BOJCL (now claimant) shall be free to procure Clinker from other sources. The respondent had agreed to offer additional quantity of Clinker at mutually agreed prices. Clause 7.2 of the Clinker Sale Agreement speaks of rights and obligations of the respondent. By virtue of sub-clause (a) of clause 7.2.1, the respondent undertook and guaranteed to supply Clinker at the Clinker delivery location as per agreed schedule and subject to annual agreed quantity. Sub-clause (b) of Clause 7.2.1 contained a prohibition against the supply of Clinker by the respondent to any third party(ies) without first fulfilling its obligation to supply Clinker to BOJCL (claimant herein). This was prima facie subject to the pre-existing commitments of the respondent and the quantity contracted by the parties. Clause 7.4.1 postulated payment of liquidated damages by the respondent if the shortfall in the supply was more than 15% of the quarterly committed quantity. Sub-clause (a) of Clause 7.4.1 generally provided for payment of liquidated damages by the respondent. Sub-clause (b) of 7.4.1 contained a more stringent provision. It postulated levy of penalty in case shortfall in any quarterly quantity is not made good in the remaining quarters of the financial year. Clause 8.1.1 defines 'force majeure' and Clause 8.1.2 identifies the

events beyond the control of an affected party. Clause 8.2 provided that the party affected by force majeure shall inform the other party about force majeure even(s). A notice of cessation of force majeure event was also contemplated by Clause 8.2.2. However, unavailability, late supply or changes in cost of plant, machinery, equipment, materials, spare parts or consumables of the project, delay in performance I non-performance resulting from normal wear and tear and non-performance caused due to negligent or intentional acts, errors or omissions for non-compliance of the commission of law were not treated as force majeure (Clause 8.3.1). Clause 9.1 identified BOJCL events of default and Clause 9.2 identified the respondent's events of default. Clause 9.3 conferred a right upon BOJCL to terminate the Clinker Sale Agreement by giving one month prior notice to the respondent.

12. Although, there is considerable force in the argument of Dr. Abhishek Singhvi that action taken by the respondent to terminate the Clinker Sale Agreement is not in consonance with the terms of the agreement in as much as Clause 9.3 thereof contemplates termination of agreement by BOJCL (claimant herein) and that the respondent could not have relied upon Clause 8 for terminating the agreement, but at this stage of the proceedings we are neither required nor inclined to pronounce upon the legality of communication dated 30.06.2018 whereby the respondent terminated the Clinker Sale Agreement. At the stage of final adjudication of the arbitral dispute, this tribunal will examine whether in the absence of specific challenge to communication dated 30.06.2018, the claimant can seek a declaration of invalidity thereof and whether the tribunal is entitled to proceed on the premise that the action taken by the respondent to terminate the Clinker Sale Agreement is void-ab-initio.

13. At this stage, the tribunal is required to find out whether the claimant has succeeded in making out a strong prima-facie case warranting issue of a mandatory injunction to restrain the respondent from supplying Clinker to third parties or using the same in its own plant without fulfilling its contractual obligation to supply Clinker to the claimant in accordance with the Amended and Restated Long Term Clinker Sale Agreement

dated 26.11.2014 as per the agreed schedule and also whether the balance of convenience warrants issue of a mandatory injunction in the absence of which irreparable injury will be caused to the claimant.

14. A revisit to various clauses of the Clinker Sale Agreement does give an impression that the respondent had undertaken an obligation to supply Clinker to BOJCL (now claimant) as per the agreed schedule determined by the parties. However, prima facie we find that obligation was not absolute. We further find that prima facie, the supply of Clinker by the respondent commencing from the effective date till the end of the term was subject to the provisions of the agreement (Clause 4.2.1). It was also subject to pre-existing commitments of the respondent [Clause 7.2.1 (b)] Clause 4.2.2 contemplated a scenario in which the respondent was not able to supply annual agreed quantity of Clinker to the claimant in accordance with the agreed schedule and that too for reasons other than force-majeure. In that event, prima facie the claimant was free to procure Clinker from other sources. The provisions of Clause 7.4 and its sub-clauses which contemplate imposition of liquidated damages and penalty are also indicative of the fact that the obligation of the respondent to supply Clinker to the claimant for the entire term of the agreement and in accordance with the agreed schedule was not absolute. At the cost of repetition, we deem it proper to observe that Clauses 4.2.2, 7.2.1 (a) and (b), 7.4.1, 7.4.4 are prima-facie sufficient to negate the plea of the claimant that the respondent was duty bound to supply agreed quantity of Clinker to the claimant as per the agreed schedule and it could not commit any default in that regard.

15. In conclusion, we hold that the claimant has not been able to make out a prima-facie case of that degree which warrants issue of a mandatory negative injunction to restrain the respondent from using the Clinker manufactured by it for its own plants or to sell the same to third parties. We may hasten to add that during the course of hearing on the application filed by the claimant under Section 17 of the Act, Shri P. Chidambaram, learned Senior Counsel emphatically stated that

during the pendency of these proceedings, the respondent will not sell Clinker to third parties.

16. In view of our finding on the issue of prima-facie case, the tribunal is not really required to examine whether the claimant would suffer irreparable injury if the tribunal does not grant a mandatory negative injunction and restrain the respondent from using the Clinker for its own plant or selling the same to third parties but keeping in view the fact that learned Senior Counsel for the parties have advanced detailed arguments we have decided to deal with this aspect of the matter.

17. The thrust of the grievance of the claimant is that if the respondent is not restrained from using Clinker for its own plant or sell the same to third parties, adequate quantity of Clinker will not be available for Bokaro Plant and it may have to be shut down due to non-availability of raw-material. If there was substance in the grievance made by the claimant then the tribunal may have taken serious cognizance of the respondent's failure to supply Clinker in accordance with the Clinker Sale Agreement. However, the fact of the matter is that after cessation of supply of Clinker from 'Dalla Plant' which was sold by the respondent to Ultra Tech Cement, the claimant has been procuring Clinker from other sources. This eventuality was contemplated at the time of execution of the Amended and Restated Long Term Clinker Sale Agreement executed between BOJCL and the respondent. Clause 4.2.2 of the agreement provided that if respondent is not able to supply annual agreed quantity in accordance with the agreed schedule for reasons other than force-majeure, BOJCL shall be free to procure Clinker from other sources. This is precisely what the claimant has done in 2017 and 2018. The respondent has given a list of 31 plants situated in Madhya Pradesh, Jharkhand, Chhattisgarh, West Bengal and Orissa which are manufacturing Clinker. The claimant's own plants are also manufacturing Clinker and the claimant has been getting supply from alternative sources. This is evident from reports dated 17.03.2017 and 29.03.2017 of cement business of Dalmia Bharat prepared Axis Security Limited and Aditya Birla Money Limited (these reports have been placed on record by the respondent in Volume RD-1). Thus, there is no escape from the

conclusion that the claimant will not suffer irreparable injury if a mandatory injunction in terms of the prayer made by it is not granted.”

19. The arguments on behalf of the appellant before this Court can be broadly paraphrased as under:

(i) The Tribunal applied the wrong legal test and invoked legal principles which were inapplicable to the facts and relief sought. A perusal of the prayer would show that the appellant had sought prohibitory injunction restraining the respondent from supplying the Clinker to any third party or to itself without fulfilling its obligations under the agreements qua the appellant. The Tribunal however applied the legal test of mandatory injunction and came to an erroneous conclusion that the appellant had not made out a *prima facie* case of the degree which warrants issue of a mandatory injunction. Attention of the Court is drawn to the prayer sought in the application under Section 17 of the Act.

(ii) *Prima facie* interpretation of the various Clauses of the agreement is perverse. The intent of the parties while entering into the Agreements was clearly that the appellant would procure all its Clinker requirement from the respondent and that is the reason why the initial term of the contract was 30 years and there was no right of termination in favour of the respondent. Under Clause 4.2.1 the respondent was under an obligation to supply Clinker to the appellant and the only exception to this obligation was as specified in Clauses 4.2.2 and 7.2.1(b). Only in the event, the respondent failed to supply the agreed quantity to the appellant, could the appellant procure Clinker from other sources and only when the appellant failed to off-take the agreed quantity the respondent could supply to any third party. The respondent's obligation towards the appellant were only subject to any “pre-

existing commitments” and Clause 7.2.1(b) clearly prohibited supply of Clinker to a third party without first fulfilling the obligations towards the appellant. The Tribunal has thus gone wrong in its observation that the obligation to supply Clinker was not absolute, though the observation is *prima facie*. It has also wrongly interpreted Clause 7.2.1(b) by holding that the prohibition was only to supply Clinker to third parties and not to the respondent itself.

(iii) Correspondences exchanged between the parties would indicate that the respondent completely understood that it had a commitment and an obligation to supply Clinker to the appellant. This is clear from the several e-mails sent by the respondent as well as from the minutes of the meeting held on 09.01.2018 wherein the respondent assured the appellant of a continuous supply.

(iv) In terms of Section 42 of the Specific Relief Act, 1963 (hereinafter referred to as ‘SRA’) a negative covenant may be express or implied and can be enforced. A reading of the Clauses of the agreement makes it evident that the respondent was indeed prohibited from supplying Clinker even to itself and any other interpretation would defeat the express provisions. The intent behind the express negative covenant contained in Clause 7.2.1(b) was that except for the pre-existing commitments, the respondent would be obliged to supply Clinker to the appellant and this intent cannot be defeated or circumvented by supplying to itself.

(v) The Tribunal has wrongly relied on Clause 4.2.2 of the agreement to dilute the binding and absolute obligation of the respondent under the agreement. Clause 4.2.2 entitled the appellant to procure Clinker from elsewhere, in the event of respondent’s failure to supply the agreed quantity. This was nothing more than an enabling Clause meant to benefit the

appellant in case of default by the respondent, since continuous supply of Clinker was crucial for the viability of the cement plant.

(vi) The Tribunal further erred in placing reliance on Clause 7.4.1 which was a Clause of liquidated damages to hold that the obligation was not absolute. This *prima facie* finding is in the teeth of settled position of law that if a contract provides for enforcement through specific performance, mere inclusion of a Liquidated Damages Clause will not preclude grant of specific performance. This is clear from a reading of Section 23 of the SRA. In fact Clause 11.4 of the agreement grants power to order specific performance.

(vii) The Tribunal has completely erred in holding that the balance of convenience was not in favour of the appellant on the ground that the appellant could procure Clinker from elsewhere in the market. This course of action was certainly open to the respondent as well. Importantly, the Tribunal had itself come to a *prima facie* finding that the appellant was not at fault and in fact the respondent had wrongfully terminated the contract.

(viii) The Tribunal has erred in holding that even if the appellant suffers an irreparable loss due to refusal to grant mandatory injunction, it could claim damages and can be adequately compensated in terms of money. It is submitted that Section 14 of the SRA prior to amendment contained Clause (a) which reads as under:-

“14 The following contracts cannot be specifically enforced, namely:-

“(a) contract for non-performance of which compensation in money is an adequate relief”

However, an amendment was carried out and the said Clause (a) has been deleted by Specific Relief (Amendment) Act, 2018 (hereinafter referred to as ‘Amendment Act, 2018’). Thus, even though a party can be adequately

compensated by damages in terms of money this alone cannot be a ground to refuse grant of mandatory injunction.

20. The contentions and arguments of the respondent can be summed up as under:

(i) The agreement between the parties no longer subsists as the Agreement has been terminated on 30.06.2018. There is no challenge to the termination before the Tribunal or in the present appeal. Since there is no contractual relationship existing between the parties, the interim relief sought does not even survive for consideration. The application under Section 17 was filed with the prayers for restraining the respondent from supplying Clinker to any third party or for its own operations. The agreement was terminated on 30.06.2018. On 03.07.2018 an application was filed by the appellant for restraining the respondent from transferring, selling, alienating interest in the Clinker manufacturing plant to third party, but even at this stage no prayer was made seeking to challenge the termination. Attention of the Court is drawn to the observations of the Tribunal in para 12 of the impugned order where the Tribunal has observed that it is at the stage of final adjudication only that the Tribunal will examine whether in the absence of specific challenge to termination, the appellant can seek a declaration of the invalidity of the termination.

(ii) It is not open to the appellant to question the sale of the Dalla plant to UltraTech. Respondent had sold ten cement plants on account of its financial crises and pursuant to the orders of the Apex Court the ICICI Bank had auctioned the plant for sale. The appellant had obviously accepted the sale of the plant inasmuch as it had participated in the auction process and had bid for the plant. It is another matter that the appellant was not a

successful bidder and the plant was sold to UltraTech. However, two things fall out from this viz: obligation under the Clinker Agreement was to supply from the Dalla Plant and since the same was sold, the obligation no longer subsisted and secondly, the appellant has lost its right to question the sale by participating in it and at this stage cannot question the sale of the plant. The respondent was compelled to terminate the agreement dated 26.11.2014 on account of severe financial crises and legal proceedings. Respondent was compelled to sell its Clinker manufacturing plant, including the Dalla Plant which had a manufacturing capacity of 1.5 million tonnes. Efforts were made by the respondent through the sale of its assets to meet its huge liabilities towards the Banks and financial Institutions. Rewa Plant is the only captive source of Clinker left for the respondent's own cement production. This situation was at complete variance with the conditions prevailing when the agreement was entered into with the appellant. The commercial basis of the agreement had completely eroded and this pushed the respondent to terminate the contract.

(iii) The Tribunal has rightly interpreted Clause 7.2.1(b) of the agreement which is unambiguous in terms. In absence of any ambiguity, ordinary meanings of the words used in the provision must be given effect to. The agreement is a commercial contract entered into between two sophisticated parties and it has to be presumed that the intention of the parties is accurately recorded in the express words of the agreement. There are no express words in the said Clause which bar the respondent from captive consumption of Clinker and therefore it has to be presumed that the intent of the parties was not to create any such impediment for the respondent to use Clinker for its own cement plant. The said Clause expressly prohibits sale of Clinker to third parties only and that too subject to pre-existing commitments. The

word “third party” clearly denotes parties other than the appellant and the respondent and the express words of the provision cannot be stretched beyond this. Black’s Law dictionary defines third party as “one not a party to an agreement or to a transaction, but who may have rights therein”. Thus, the interpretation sought to be given by the appellant would be re-writing the contract which is not permissible. Clause 16.1 specifically records that the understanding between the parties is contained entirely in the agreement itself without regard to any other material. Once the agreement is a commercial contract between parties with equal bargaining strength having detailed covenants presumably drafted under legal advice, it is not open for the Court or a Tribunal to go beyond the express words of the agreement. Reliance is placed on *State Bank of India Vs. Mula Sahakari Sakhar Karkhana Ltd (2006) 6 SCC 293* for the proposition that a commercial contract must be construed as per the express terms thereof. Reliance is also placed on *Usha International (India) Vs. Omicron Electronics GMBH 114 (2004) DLT 740* where the Court while dealing with a similar exclusivity term held that a restriction against third party cannot disentitle the principal itself.

(iv) Grant of interlocutory injunction is a discretionary remedy. The Tribunal has exercised its discretion to deny the appellant an injunction based on cogent reasons. The Supreme Court in *Wander Limtied Vs. Antox India Pvt Ltd. (1990) (Supp.) SCC 727* has circumscribed the grounds of appeal only to arbitrariness, capress or perversity. A plausible view taken by the Tribunal cannot be interfered in a judicial review in an appeal. In any case, the grant of mandatory injunction sought by the appellant at this stage would amount to grant of final relief of the specific performance claim. The Apex Court in *Anand Prakash Aggarwala Vs. Tarkeshwar Prasad (2001) 5*

SCC 568 has held that the Court shall resist from holding a mini trial at an interlocutory stage. At the stage of *prima facie* determination, the Court would only interpret an unambiguous term by its express words. The principle objective of interlocutory injunction is to preserve status quo and cannot be granted to perpetuate a new status quo. This is so held by the Apex Court in ***Dorab Cawasji Warden Vs. Coomi Sorab Warden & Ors. (1990) 2 SCC 117.***

(v) It is undisputed that the respondent was using Clinker for its own captive consumption and that the appellant was procuring Clinker from its own Clinker manufacturing plants as well as third parties. Since this was the situation when the appellant sought mandatory injunction the Tribunal has rightly not varied the status quo. The Apex Court in ***Wander Limited (supra)*** has held that it would be a relevant consideration if the defendant is already undertaking the acts sought to be enjoined.

(vi) The Tribunal has rightly found that no irretrievable injury shall be caused to the appellant by denying injunction. This is because the appellant is procuring Clinker from its own Clinker manufacturing plants. Damages thus would be an adequate compensation for the loss, if any, caused to the appellant. The Tribunal has rightly found that even the balance of convenience is not in favour of the appellant for the reason that the harm caused to the respondent, if the injunction is granted, will ruin the business of the respondent and this would be irretrievable injustice, if the respondent succeeds in the arbitration proceedings.

(vii) The appellant is not entitled to specific performance under the SRA. The present arbitration commenced on 04.07.2018. The Amendment Act, 2018 came into force on 01.10.2018 and cannot have a retrospective application. Parliament has not expressed any intention to apply the

Amendment Act retrospectively. The Apex Court in ***Union of India Vs. Indusind Bank Ltd. & Anr. (2016) 9 SCC 720***, has restricted the scope of retrospective application of laws in case of remedial statutes. Amending laws that remedy lacuna in existing laws shall be prospective and the Statement of Objects and Reasons of the Amendment Act becomes relevant for this purpose.

Since Section 14 as unamended stipulated that if damages could be awarded specific performance is not the remedy, the appellant cannot seek specific performance of the agreement. In light of the fact that appellant has been procuring Clinker from its own manufacturing plant and from third parties, damages is the adequate compensation. At the highest, the appellant can claim difference between the price payable to the respondent under the agreement and the price so paid for procurement through third parties. Clause 4.2 of the agreement, in any case, permitted the appellant to procure Clinker through third party.

(viii) The appellant has wrongly relied on Section 42 of the SRA seeking specific performance of Clause 7.2.1(b). The Apex Court in ***Gujrat Bottling Co. Ltd. Vs Coca Cola Co. (1995) 5 SCC 545*** decided the enforcement of a similar term and held that Section 42 does not envisage grant of mandatory injunction in every case of a negative covenant. In a given case the Court can refuse to grant injunction which adversely affects the party against whom the injunction is sought.

(ix) Lastly, it is submitted that Clinker is only an item of ordinary commerce and is available through various sources in the market. The appellant itself is a leading manufacturer of Clinker and has been unable to show any irreparable harm caused to it by captive consumption by the respondent. The appellant has not discharged its burden of showing that it

was precluded from acquiring Clinker from the market and the balance sheets in fact show that it was procuring Clinker for the Bokaro cement plant.

21. Countering the submission made by the respondent, the argument of the appellant in rejoinder can be summarized as under:

(i) The Tribunal has erred in holding that the threshold for grant of injunction was not met. The provisions of the agreement when read together clearly indicate that there was an absolute obligation on the part of the respondent to supply Clinkers to the appellant and a contrary interpretation of the terms of the contract can only be termed as perverse and therefore following the judgment of the Apex Court in *Wander Limited (supra)*, the appeal lies.

(ii) The main plank of the impugned order is the finding that the appellant could have taken Clinkers from third parties, but this foundation misses the point that the appellant was entitled to procure Clinkers from third parties only when the respondent defaulted. There were mutual obligations of the parties under the agreement and till such time that the respondent supplied the Clinkers the appellant was not entitled to approach third parties.

(iii) Under Clause 11.4 of the Clinker Sale Agreement the parties had by an agreement vested the arbitrators with the power to order specific performance of the agreement. The said Clause reads as under:

"The arbitration award shall be final. The Arbitrators shall have the power to order specific performance of this Agreement."

(iv) In view of the said specific Clause in the agreement it is neither open for the respondent to argue nor for the Arbitral Tribunal to hold that damage is an adequate remedy in lieu of enforcement of the contract through specific

performance. The finding of the Tribunal is even otherwise erroneous inasmuch as the respondent has been held to be in breach and there is a *prima facie* finding of the Tribunal that the termination was unlawful. It is an undisputed position between the parties that the appellant was not in breach of the contract and yet the appellant is suffering immense monetary loss due to non-supply of Clinker. The balance of convenience definitely is thus in favour of the appellant. The argument of the respondent that the appellant had lost its right to question the sale of Dalla Plant is fallacious. When the agreement was entered into between the parties, the sale of the plant was not envisaged. In fact, right upto April, 2018 the respondent had repeatedly assured the appellant that they would fulfil their obligation and supply the Clinkers. Reliance is placed on the judgment of the Apex Court in the case of ***Kamal Kant Jain Vs. Surinder Singh (Dead) through LR's 2017 SCC OnLine SC 1340*** for the proposition that even though the contract may have a Clause of Liquidated Damages but if it expressly provides for enforcement through specific performance, the contract can be enforced.

(v) It is wrong for the respondent to contend that Clause 7.2.1(b) permitted the respondent to use Clinker for captive consumption. The agreement between the parties had two Clauses 7.1 and 7.2, both Clauses are mirror images of each other and while 7.1 is qua the appellant's obligation 7.2 refers to the obligation of the respondent. 7.2.1(b) clearly stipulates the obligation of the respondent to supply Clinker to the appellant. Clause (b) has to be read along with and in the context of other Clauses. This Clause clearly mandates that the respondent would continue supply to the appellant after it has fulfilled its pre-existing commitments and thus even self consumption is a breach of the Clause.

(vi) The deletion of Clause (a) under Section 14 of the SRA by virtue of the Amendment Act, 2018 would apply retrospectively. Specific Relief is in essence a part of law in procedure and not substantive law. It provides a remedy rather than creating rights or obligations. Remedial statutes are to be applied retrospectively and not prospectively. Reliance is placed on the judgments in the case of *Hazara Singh Vs. Custodian of Evacuee Property, Pepsu, Patiala, AIR 1960 P&H 133*; *Moulvi Ali Hossan Mian & Ors. Vs. Rajkumar Haldar & Ors. AIR 1943 Cal 417 (FB)* and *Radheyshyam Kamila Vs. Smt. Kiran Bala Dasi & Ors. AIR 1971 Cal 341*.

Ordinarily, an Amendment which substitutes the original provision is retrospective in its operation, unless expressly so stated or found from the Legislative intent. Sections 3 and 5 of the Amendment Act, 2018 which amended Sections 10 and 14 actually substitute them. Thus, they would have a retrospective operation. The appellant relies on *Gottumukkala Venkata Krishnamraju Vs. Union of India 2018 SCC OnLine SC 1386* for this proposition.

Amendment to Section 14 of SRA would apply to pending proceedings where a decree is yet to be passed as held in *Church of North India Vs. Ashoke Biswas 2019 SCC OnLine Cal 3842*.

(vii) The judgments relied upon by the respondents are distinguishable and will not apply to the present case. The judgment of *Yogesh Radhakrishnan Vs. Media Networks & Distribution (India) Ltd. and Ors. 201 (2013) DLT 773* no doubt holds that express terms of the contract have to be followed, but this judgment is not in the context of Section 42 of the SRA. Section 42 itself provides for enforcement of a negative covenant, express or implied and thus the judgment will have no application. For the same reason the judgment in the case of *State Bank of India (supra)* would not apply.

Zenit Mataplast Private Limited Vs. State of Maharashtra and Ors. (2009) 10 SCC 388 is a case where the Court held that a mini trial should not be conducted at interlocutory stage. The appellant herein is not seeking a mini trial but an interim prohibitory injunction.

Orissa Manganese and Minerals Limited Vs. Synergy Ispat Private Limited (2014) 16 SCC 654 is a decision which is based on the peculiar facts of its case and lays down that legal principles do not have a precedential value. The fact situation of this case and the legal principles being urged are completely different from the ones in the said case. Learned Single Judge had refused interlocutory injunction. Division Bench had reversed the order and restrained the respondent to sell the iron ores to any third party without first offering to the appellant. In the SLP filed by the party aggrieved, the Apex Court had noted the stand of the appellant therein that it had already set up a plant where the entire quantity was being consumed in house and nothing was being sold to the third party. In the light of this, binding the appellant to its undertaking, the SLP was disposed of but no law has been laid down.

Case of ***Indusind Bank Ltd. (supra)*** deals with amendment of Section 28 of the Indian Contract Act, 1872, which is a substantive provision of law and not a procedural law.

The case of ***Wander Ltd. (supra)*** lays down the grounds for interference in an appeal and all of the said grounds are applicable to the present case.

22. I have heard the learned senior counsels for the parties and examined their rival submissions.

23. The present appeal has been filed seeking setting aside of the impugned order dated 04.11.2018 passed by the Tribunal on an application

by the appellant under Section 17 of the Act. A prayer is also sought to restrain the respondent from supplying any Clinker to a third party from any of its plants, including the Rewa Plant, before supplying the agreed quantity to the appellant, as also a restraint order to the respondent from using Clinker manufactured or procured by the respondent, for its own operations before supplying the agreed quantity to the appellant.

24. It is an undisputed fact that the agreement between the parties stands terminated on 30.06.2018 and no longer subsists. It is equally undisputed that till the date of passing of the impugned order, there was no challenge to the termination order before the Tribunal. Thus, when the impugned order was passed, the parties were no longer in a contractual relationship. Mr. Sethi, senior counsel for the respondent is right that the appellant could not have sought a relief of restraining the respondent from using Clinker for captive consumption, under Section 17 of the Act. No order of interlocutory injunction, prohibitory or mandatory can be passed by this Court once the contract stands terminated. On this ground alone even the argument of the appellant that the contract is enforceable under the SRA, assuming it is in law, cannot be accepted.

25. The fulcrum of the arguments between the parties was the interpretation of Clause 7.2.1(b) of the agreement. The said Clause reads as under :-

“7.2.1 Delivery of Clinker

(a) xxx

(b) Subject to the pre-existing commitment of JAL and limited at all times to the quantity contracted hereunder, JAL shall not supply Clinker to any third party(ies) until JAL has fulfilled its obligation of supply to Clinker to BOJCL as per the Agreed Schedule, If BOJCL fails to off-take the Clinker as per the Agreed Schedule then, notwithstanding any other rights available to JAL under this Agreement or any other

agreement between the Parties, JAL may supply that Clinker to any third party(ies).”

26. The argument of the appellant is that the said Clause is a negative covenant which prohibits the respondent from selling Clinker to any third party which includes captive consumption, without first fulfilling its unequivocal commitment to supply the Clinker to the appellant. The only exception to the same was pre-existing commitments of the respondent which did not exist in the present case. The respondent, on the other hand, argues that the Clause was carefully drafted between the parties and there is no specific or express prohibition against the use of Clinker for its captive consumption. In fact, it is the interpretation of this Clause on which elaborate arguments were addressed before this Court. The relevant part of the impugned order dealing with this contention has been extracted in the earlier part of the judgment.

27. The Tribunal in para 14 of the impugned order has delved into the issue and has given a *prima facie* finding that the respondent was not duty bound to supply the agreed quantity of Clinker to the Claimant (appellant herein) as per the agreed Schedule without any default in that regard. The Tribunal visited Clause 7.2.1(b) as well as the other related Clauses of the Agreement. Analyzing the Clauses, it came to a *prima facie* conclusion that the Clinker Sale Agreement does give an impression that the respondent had undertaken to supply Clinker to the appellant as per the agreed schedule, but the obligation was not absolute. The supply was subject to provisions of Clause 4.2.1 of the Agreement as well as pre-existing commitments of the respondent. Clause 4.2.2 stipulated that if the respondent was unable to supply the annual agreed quantity of Clinker to the appellant, for reasons other than force majeure, then the appellant was free to procure Clinker from

other sources. In the opinion of the Tribunal, the provisions of Clause 7.4 and its sub-Clauses contemplating imposition of Liquidated Damages and penalty are indicative of the fact that the obligation of the respondent to supply Clinker to the appellant for the entire term of the agreement was not absolute.

28. Interpretation of the Clauses of the Contract is in the domain of an Arbitral Tribunal. This has been so held in the case of ***Associate Builders Vs. Delhi Development Authority (2015) 3 SCC 49***. Relevant para of the said judgment reads as under :-

“42.3. (c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

*“28. Rules applicable to substance of dispute.—(1)-(2)****

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.”

29. In the case of ***Ssangyong Engineering and Construction Company Ltd. Vs. National Highways Authority of India (2019) SCC OnLine SC 677*** the Supreme Court has reiterated the said position and also noted the change made in Section 28(3) of the Act by the Arbitration and Conciliation (Amendment) Act, 2015.

30. In the present case, Tribunal has interpreted the various Clauses of the agreements between the parties and has come to a finding that the obligation of the respondent to supply Clinker to the applicant was not absolute under the provisions of the Contract. On one hand it was open to the respondent to use Clinker for captive consumption and on the other hand the appellant was at liberty to procure the same from other sources, including its own Clinker manufacturing plant.

31. Though, in view of the fact that the contract stands terminated, this argument is irrelevant at this stage, but even otherwise it is not open to this Court under Section 37 of the Act to give an interpretation to the Clauses of the Contract, unless the Arbitrator construes the contract in such a manner that no fair minded or reasonable person would give such an interpretation. The said law would apply with a greater vigour at the stage when this Court is dealing with an appeal under Section 37 of the Act, examining an interim order passed by the Tribunal under Section 17 of the Act. As the impugned order itself indicates, the findings are only *prima facie* in nature subject to the final adjudication on the issue. Findings cannot be termed as so unreasonable that no prudent person would have arrived at. Moreover, since the proceedings are still pending, this Court is refraining from giving any finding one way or the other, lest it may influence the ultimate decision of the Tribunal or prejudice either of the parties.

32. The other factor that weighs with this Court in not interfering with the impugned order is that for grant of interlocutory injunctions, a party has to make out a strong *prima facie* case in its favour. The Tribunal has after a *prima facie* analysis of the Clauses of the Contract and the submissions of the parties come to a conclusion that the appellant was not able to make out a *prima facie* case of the degree which warranted issue of a mandatory

injunction, to restrain the respondents from using Clinker for its own plants. Once in the opinion of the Tribunal, the threshold for grant of interlocutory injunction was not achieved and it decided to decline the grant of injunction, which decision is also within the domain of the Arbitral Tribunal, it calls for no interference by this Court.

33. In so far as the argument of the appellant before the Tribunal that if adequate quantity of Clinker will not be available for Bokaro Plant, it may have to shut down, the Tribunal has observed that after cessation of supply of Clinker from Dalla Plant, the appellant has been procuring Clinker from other sources. The Tribunal also relies on Clause 4.2.2 of the Agreement and holds that this eventuality was contemplated at the time of execution of the 'Amended and Restated Long Term Clinker Sale Agreement'. The observation is that in fact in the years 2017 and 2018, appellant did procure from other sources and in fact respondent had given a list of other 31 plants which are manufacturing Clinker. In fact, the Tribunal also notes that the appellant's own plant is manufacturing Clinker. *Prima facie*, the reasoning is justified.

34. The issue of grant of interim measures by the Court under Section 9 of the Act came up for consideration before the Supreme Court in the case of *Adhunik Steels Ltd. (supra)*. In fact it needs to be mentioned that the facts of the said case are very close to the facts of the present case. The only difference that needs to be mentioned is that the order impugned therein was passed by the High Court under Section 9 of the Act, whereas in the present case the order has been passed under Section 17 of the Act. It is no longer res integra that the powers of a Tribunal under Section 17 of the Act, post Amendment, are akin to the powers of a Court under Section 9 of the Act. In the said case, the respondent had a mining lease from the Government of

Orissa and it entered into an agreement with Adhunik Steels for raising the Manganese ore on its behalf. The term of the Agreement was 10 years. The case of Adhunik Steels was that it had mobilized huge resources and incurred expenditure and the issue of notice to terminate the agreement was not justified. Adhunik Steels moved the District Court under Section 9 of the Act restraining OMM from terminating the contract and dispossession. The District Court allowed the application and restrained OMM from giving effect to the letter of termination and dispossessing till the final Award by the Tribunal. Aggrieved by this, OMM filed an appeal before the Orissa High Court. The High Court upheld the contention of OMM that the loss sustained by Adhunik Steels could be calculated in terms of money and in the light of Section 14(3)(c) of the SRA an injunction could not be granted. The order of the District Court was set aside. This order of the High Court was challenged by Adhunik Steels before the Supreme Court.

35. The Supreme Court relying on various judgments on the issue of interlocutory injunction as well as the provisions of the SRA held that injunction is a form of specific relief. In relation to a breach of contract, the proper remedy against the defendant who is in breach of his obligation, is either damages or specific relief. Analyzing Sections 36, 39, 40, 41 and 42 of the SRA, the Court held that power to grant injunctions by way of specific relief is covered by the SRA. Reference was made to the judgment of the Madhya Pradesh High Court in *Nepa Ltd. Ltd. Vs. Manoj Kumar Agarwal AIR 1999 MP 57*, wherein it was held that grant of interim injunction has necessarily to be based on the principles governing a grant emanating out of the relevant provisions of the SRA. Finally, it was held as under :

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for

Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

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23. The question here is whether in the circumstances, an order of injunction could be granted restraining OMM Private Limited from interfering with Adhunik Steels' working of the contract which OMM Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the OMM Private Limited terminating the arrangement entered into between itself and

Adhunik Steels. In terms of Order 39 Rule 2 of the Code of Civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a prima facie case for restraining OMM Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. It is in that context that the High Court has held that this was not a case where the damages that may be suffered by Adhunik Steels by the alleged breach of contract by OMM Private Limited could not be quantified at a future point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These are imponderables to some extent but at the same time it cannot be said that at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award.

24. But, in that context, we cannot brush aside the contention of the learned counsel for Adhunik Steels that if OMM Private Limited is permitted to enter into other agreements with others for the same purpose, it would be unjust when the stand of OMM Private Limited is that it was cancelling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. Going by the stand adopted by OMM Private Limited, it is clear that OMM Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct OMM Private Limited not to enter into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings.

25. At the same time, we see no justification in preventing OMM Private Limited from carrying on the mining operations by itself. It has got a mining lease and subject to any award that may be passed by the arbitrator on the effect of the contract it

had entered into with Adhunik Steels, it has the right to mine and lift the minerals therefrom. The carrying on of that activity by OMM Private Limited cannot prejudice Adhunik Steels, since ultimately Adhunik Steels, if it 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. Therefore, it is not possible to accede to the contention of learned counsel for Adhunik Steels that in any event OMM Private Limited must be restrained from carrying on any mining operation in the mines concerned pending the arbitral proceedings.”

36. The Supreme Court clearly held that there was no justification in preventing OMM from carrying out the mining operation itself, subject to any Award that may be passed by the Arbitrator on the effect of the Contract it had entered into. It was also held that the carrying on the said activity by OMM cannot prejudice Adhunik Steels since ultimately if it succeeds it would be entitled to get compensation for the termination of the contract. Thus, no restraint order could be passed against OMM. The appeal was dismissed leaving the questions on merits open to the Arbitral Tribunal.

37. It is a settled law that grant of interlocutory injunctions is a discretionary remedy. The interlocutory injunctions are granted to preserve the property or the rights of the parties during the pendency of a *lis* and till its final adjudication. As held by the Supreme Court in **Anand Prakash Aggarwala (Supra)** the Courts should desist from holding a mini-trial at the interlocutory stage, the objective of the injunctions being to preserve a status quo, as rightly pointed out by the respondent, and not to create or perpetuate a new status quo. In the case of **Wander Ltd. (supra)**, the Supreme Court held that if the defendant is already undertaking the acts sought to be enjoined, this would be a relevant consideration while considering an application for injunction.

38. Applying the law laid down by the various Courts, this Court is of the opinion that if the injunction sought by the appellant is granted, it would amount to creating and perpetuating a status quo which does not exist at present and virtually reviving a terminated contract. It is also of significance that the prime basis of the appellant in seeking the interlocutory injunction is interpretation of contractual terms between the parties and alleged wrongful termination of the contract. Both these issues are in the domain of the Arbitral Tribunal and can only be decided after evidence is led and the matter is taken up for final adjudication. At this stage, if the injunction sought for is granted, it would amount to a relief of specific performance against the respondent which cannot be granted by this Court. The appellant contends that it is only seeking a relief of prohibitory injunction by way of restraining the respondent from using Clinker for captive consumption, but in the opinion of this Court the relief, if given would indirectly amount to directing the respondent to supply Clinker to the appellant. It has been clearly held by the Supreme Court in the case of *U.P. Cooperative Federation Ltd. v. Singh Consultants & Engineers (P) Ltd., (1988) 1 SCR 1124* that one cannot be permitted do something indirectly what one cannot do directly.

39. In view of the above, the contention of the learned senior counsel for the appellant that the Tribunal erred in understanding that the appellant had sought mandatory injunction while in fact what was sought was a prohibitory injunction becomes irrelevant. To put it differently, the mandatory injunction would be to direct the respondent to supply Clinker to the appellant to the exclusion of third parties and for his own captive consumption. The prohibitory injunction sought would restrain the respondent from use of Clinker for his cement plant. Taken from any angle, the net effect of the

prohibitory injunction would only be that the respondent would be compelled to supply Clinker to the appellant and therefore, the Tribunal in my opinion, has correctly perceived the relief sought.

40. It is also important to refer to the observations of the Supreme Court in the case of ***Orissa Manganese & Minerals Ltd. (Supra)*** where the appellant had sought to enforce a Covenant of exclusive supply by an injunction under Section 9 of the Act, preventing supply to third parties. The defending party was only using the material for captive consumption. The Court held that a direction to supply the material to the appellant would amount to granting a final relief at an interlocutory stage. In the present case also, the order impugned is only an interim order and a direction by this Court prohibiting the respondent from captive consumption will amount to a final adjudication in the matter which is impermissible in law.

41. The next contention of the appellant is that a Court under Section 9 of the Act can enforce an implied negative covenant by giving *prima facie* interpretation to the terms of the contract. Reliance is placed on ***Dirk India Pvt Ltd. Vs. Mahagenco, 2007 SCC OnLine Bom 211*** and ***Jairam Valjee Vs. Indian Iron & Steel Co. Ltd. AIR 1940 Cal 466***. In ***Dirk India Pvt Ltd (Supra)***. In ***Dirk India (supra)*** the covenant was with respect to an obligation of the respondent to sell the PFA to outsiders only, over and above the contracted quantity. The Court held that an injunction could be granted restraining the respondent from selling the PFA to an outsider, in view of the implied negative covenant in the Agreement. In the present case, the Tribunal in the impugned order, has *prima facie*, interpreted the covenant in question and held that there is no express or implied prohibition in the Clause against captive consumption of the Clinker by the respondent. Taking support from the other Clauses of the Contract which enabled the

appellant from buying Clinker from other sources and the Clause of liquidated damages, it has come to a *prima facie* finding that the liability of the respondent to supply to the appellant was not absolute. This Court finds no reason at this stage to give a different interpretation to the covenant and upset the finding.

42. The argument of the appellant relying on ***Jairam Valjee (Supra)*** is that an implied negative covenant can be enforced by a Court and the same is not dependent on the negative or affirmative language in the Contract, in matter of construction and substance, rather than form. The said judgment would not enure to the advantage of the appellant, as it is no longer res integra that construction of a covenant in a contract is the domain of the Arbitrator. The appellant in the present case is calling upon this Court to interpret Clause 7.2.1(b) and hold that it is a negative covenant in which it is implied that the respondent would not use Clinker for captive consumption. This in my opinion is not the domain of this Court and the interpretation is left open to the Tribunal at the stage of final adjudication.

43. In the case of ***Coal India Limited vs. M/s. Vidharbha Industries Power Limited & Ors. being LPA 169/2018, decided on 21.08.2019***, a Division Bench of this Court has held as under:-

*“24. Having heard the parties and examined the position of law, we agree with the contention of the appellants that the learned Single Judge could not have passed an interim order directing supply of coal to the petitioner therein, till the issues raised by both sides, and some of which we will enumerate hereinafter, are adjudicated upon and decided finally in the writ petition. The direction to supply coal to the respondent in our view amounts to allowing the writ petition finally. It is well settled that an interim relief which amounts to granting final relief cannot be granted by any court, as held by the Supreme Court in **Samir Narayan Bhojwani (supra)***

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25.... However, it is equally well settled, as observed by us above, that an interim relief cannot be such that it amounts to granting final relief to a petitioner. In the present case, the impugned orders have virtually allowed the writ petition, without even adjudicating the rival contentions of the parties and more particularly the issue, whether the respondent has any right to demand that coal should be supplied to him in a particular category, on the basis of an LOA of 2008, whose validity itself is questionable today. Thus, in our view, the judgments relied upon by the learned senior counsel for the respondent would be of no avail to the Respondent and the impugned orders certainly call for an interference.”

44. For all the aforesaid reasons, in the opinion of this Court, the relief sought by the appellant to restrain the respondent, by way of a prohibitory injunction, to use Clinker for its captive consumption, cannot be granted. There is no infirmity in the impugned order passed by the learned Tribunal. The findings are only *prima facie* and are subject to final adjudication by the Tribunal.

45. All contentions of the appellant raised herein regarding interpretation of the Clauses of the Agreement, including 7.2.1 (b); breach of Agreement; reciprocal obligations under the Contract; enforcement of Contract under Section 23 of SRA as well as the effect of amendment to Section 14 of SRA are left open to be decided by the Arbitral Tribunal.

46. It is made clear that this Court has noted the contentions of the parties at length only for the purpose of examining the order impugned in the present petition, but this Court has expressed no opinion on the merits of the case.

47. Respondent will, however, remain bound by its undertaking given before the Tribunal as well as this Court that during the pendency of the Arbitration Proceedings, it will not supply Clinker to any third party.

48. The Tribunal is free to decide the matter uninfluenced by any observations made by this Court.

49. There is no merit in the appeal and the same is dismissed.

I.A. No. 4182/2019 (stay)

Present application is hereby dismissed in view of the order passed in the appeal.

JANUARY 24th, 2020
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JYOTI SINGH, J.

