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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 27.02.2020

Pronounced on: 12.06.2020

+ O.M.P. (I) (COMM) 254/2019, I.A. 15456/2019, 15460/2019
& 15481/2019

OVERNITE EXPRESS LIMITED Petitioner

versus

DELHI METRO RAIL CORPORATION Respondent

+ O.M.P. (I) (COMM) 255/2019, I.A. 15451/2019, 15479/2019
& 15483/2019

OVERNITE EXPRESS LIMITED Petitioner

versus

DELHI METRO RAIL CORPORATION Respondent

+ O.M.P. (I) (COMM) 256/2019, I.A. 15452/2019, 15480/2019 &
15484/2019, 2050/2020 & 2079/2020

OVERNITE EXPRESS LIMITED Petitioner

versus

DELHI METRO RAIL CORPORATION Respondent

+ O.M.P. (I) (COMM) 257/2019, I.A. 15453/2019, 15482/2019
& 15485/2019

OVERNITE EXPRESS LIMITED Petitioner

versus

DELHI METRO RAIL CORPORATION Respondent

Present: Mr. A.K. Singla, Sr. Advocate with Mr. Divyakant Lahoti,
Mr. Rohit Gandhi & Mr. Ashish Srivastava, Advocates for
Petitioners in all matters.
Mr. Meet Malhotra, Sr. Advocate with Ms. Vibha Mahajan
Seth, Advocate for Respondent in all matters.

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

J U D G M E N T

1. Present petitions have been filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking direction to the Respondent to handover the licensed area on 'as is where is basis' i.e. restore the licensed Areas in Schedule-I to Schedule IV respectively, to the pre-bid status including reinstallation of power, cables etc. Relief is also sought for injuncting the Respondent from raising invoices or any other amount towards the license fee upto 180 days after handing over the licensed areas as well as to make the elevators, escalators and other utilities functional. Petitioner also seeks restraint against the Respondent from taking any coercive steps under the 4 License Agreements all dated 04.02.2019. Since, the petitions raise common questions of fact and law, they are being decided by a common judgment.

2. The brief facts as set out by the Petitioner are that the Respondent Corporation on 09.07.2018 invited open bids by E-tender for licensing of commercial space/area on different floors/levels at New Delhi Metro Station of Delhi Airport Express Line of DMRC network (referred to as 'Areas' hereinafter) on 'as is where is basis'.

3. The Areas were sub-classified under the following four Schedules with approximate proposed areas:-

S.No.	Schedule	Floor/Level	Approx. Proposed Area
1.	Schedule-I	First Floor/Level	624 sq. mtr.
2.	Schedule-II	Ground Floor/Level	868 sq. mtr.
3.	Schedule-III	Concourse Floor/Level	1535 sq. mtr.
4.	Schedule-IV	Concourse Floor/Level	1522 sq.mtr.

License for areas under Schedule-I and II was for a period of 21 years and for Schedule-III and IV was for 24 years. The Areas under the open E-tender could be used by successful bidder to use, develop, manage, promote, operate or sub-license the same for any commercial usage, except those specifically prohibited.

4. In order to enable the prospective bidders to formulate their bid by examining the Areas, the infrastructure and facilities available, the E-tender provided for a pre-bid site inspection and survey. Respondent provided the site visit of the Areas on 19.07.2018. During the visit, the bidders including the representatives of the Petitioner requested for taking photographs/videography of the floors/levels in order to record the condition, status and facilities existing at the site, before formulating the bids, but the same was not permitted by the Respondent citing security reasons.

5. It is the case of the Petitioner that at the time of the site visit, it was found that there were bare-shell/ partly constructed 20 units/outlets and five halls at the Concourse level which could be used for retail outlets and food court with common sitting areas or any other commercial purpose. The following facilities, fixtures and fittings in good working condition were found:-

“(i) White false ceiling in good condition with adequate number of functional LED lights in the entire Concourse Floor/Level as well as the common areas and the areas were well lightened.

(ii) Each unit/ outlet was having individual isolators/MCCBs and power cables for electricity to each unit/ outlet.

(iii) Each unit/ outlet was having separate water inlet.

(iv) Each unit/ outlet was having chill water pipelines/ tapping for air-conditioning along with ceiling suspended AHU for air-conditioning in the sitting area except the double heighted area in Schedule IV and the portion near AFC Gates. The common areas were also duly air-conditioned.

(v) Each unit/ outlet was having fresh air ducting for ventilation and smoke extraction system.

(vi) Each unit/ outlet was having fire sprinklers and smoke/ fire detectors.”

6. Petitioner states that likewise, the Area at the Ground Floor/Level and the First Floor/Level was also inspected and it was found that some

units were constructed, while the other outlets were bare-shell/partly constructed, but with power cables, isolators etc.

7. The bid was submitted by the Petitioner on 08.08.2018 for all four Scheduled Areas along with the tender document fee and Rs. 48,78,000/- towards refundable Security Deposit. Being the highest bidder, Petitioner was declared successful for all the four Areas.

8. On 22.10.2018, separate Letters of Acceptance were issued by the Respondent with respect to the four Areas and the Petitioner deposited the advance rental for a period of 12 months for each of the Schedule Areas, totaling to an amount of Rs. 6,35,06,937/-. On 04.02.2019, four License Agreements were executed for each of the Areas respectively and were Registered on 26.04.2019 in the office of the Sub-Registrar.

9. In terms of Clause 6.2 of the License Agreement, there was a 'rent free fitment period' of 180 days from the date of handing over the areas, to enable the Licensee to carry out fit-outs, finishing work and set up business activities. Respondent invited the Petitioner for joint measurements and handed over the Areas on 11.02.2019. On the said date, measurement for only Schedule-I Area, First Floor/Level could be carried out and possession was taken over. The other Levels were in severely damaged condition and different from the one represented at the pre-bid stage, thus, possession was not taken. On the same date, the Petitioner wrote to the Respondent bringing to its notice, the damaged conditions of the Levels and the possession not having been taken over. Request was made to rectify various deficiencies including damaged ceiling, water leakages etc. However, the Respondent vide letter dated 12.02.2019 informed the Petitioner that there was a deemed handing over

of the Areas to the Petitioner. Petitioner also noticed substantial difference in the measurement of the Area in Schedule-II. As per the Petitioner, correspondence was subsequently exchanged between the parties and a meeting took place and the Respondent all through assured that deficiencies would be rectified. Petitioner also wrote to the Respondent on 03.05.2019 and requested for sanctioning the electric load of 5 KW and provide the necessary connection to carry out the finishing work in the Areas and also deposited the requisite charges. However, there was no response from the Respondent. Despite the hurdles, Petitioner submitted the layout plans and drawings on 30.05.2019 regarding the existing spaces and also sent several reminders thereafter to take necessary action to restore the premises for use by the Petitioner.

10. Instead of heeding to the various demands of the Petitioner for rectification of the premises, the Respondent, on 23.07.2019 and 25.07.2019 raised invoices for payment of License Fee w.e.f. 10.08.2019. It is this action of the Respondent that triggered the filing of the present petitions.

11. Mr. A.K. Singla, Learned Senior Counsel for the Petitioner contends that pre-bid site inspection was provided to the bidders to enable the prospective bidders to formulate their bid and assess the commercial viability by examining the areas, infrastructure and facilities including fixtures, fittings etc. in both common and specific areas. It was thus obligatory upon the Respondent to hand over the commercial space as they were on the date of pre-bid site visit i.e. 19.07.2018, without any change or alteration. However, contrary to the tendered terms, Respondent materially altered and damaged the Areas by removing the

cables, fixtures, damaging the ceiling and making the lifts and the escalators from Concourse Level to First Floor, non-operational. It is contended that several requests made by the Petitioner to rectify the defects and restore the premises were of no avail. Officials of the Respondent have admitted to the material alterations and large-scale damage and even undertook to rectify the same, including reinstallation of power cables. It is further submitted that Petitioner is completely dependent on the Respondent for all utilities and facilities including electricity and water. The material alteration from the pre-bid stage to the present state has substantially affected the substratum of the License Agreements and the agreed terms of providing the premises on 'as is where is basis'. Reliance is placed on the judgment in ***Norwest Holdings PTE Ltd. vs. Newport Mining Ltd. (2010) SGHC 144***, wherein the Singapore High Court has held as under:-

“In an “as is, where is” sale, the buyer agrees to take the subject matter “as it is” or “as seen”, without warranty or guarantee as to quality, character, condition, size, weight or kind The buyer cannot ask for the subject matter to be better than it actually is, but, at the same time, and crucially for this case, the buyer had not agreed to accept anything less. Put in another way, it is against all commercial sense to say that an interested buyer who offers to take in existing condition thereby offers to take in any condition henceforth – an agreement to take “as is” does not operate as an entire assumption of risk. Absent any contrary intention, the condition which the offeror-buyer offers to take is, quite naturally, the condition at the time the offer was made and not the time of acceptance, which is by definition a complete and unconditional agreement to the terms of the offer.”

12. It is next argued that the License Agreements between the parties are valid and subsisting and have not been terminated. The Agreements are with respect to immovable property proposed to be sub-licensed for commercial purposes. The Agreements are for more than a period of two decades, with a lock in period of four to five years. There is no clause for 'no fault termination' or 'termination without cause' on the part of either party, except by Respondent for breach of any term by the Petitioner, after expiry of lock in period. Considering the nature of the Agreements, being non-revocable for a substantial period, they are non-determinable in nature. The Agreements create a substantial and vested interest in the Petitioner and if not enforced, cannot be compensated in terms of money. It is thus submitted that the Respondent should be restrained from terminating the Agreements and the subject matter in aid of the Arbitration be preserved and protected.

13. It is next argued that the power and jurisdiction of a Court under Section 9 of the Act is unfettered and Court can pass any order as may appear to the Court to be just and convenient to preserve the subject matter, till the time, the Arbitral Tribunal is constituted and this is clear from a bare reading of Section 9 (a), (d) and (e) of the Act. Till the time, the Tribunal adjudicates on issues of the breach by the Respondent, including non-providing of the Areas on an 'as is where is basis' and inaction to rectify the damages, Petitioner be protected from coercive actions by the Respondent and a direction be given not to raise any further invoices. Reliance is placed on the judgments in the case of *Atlas Interactive (India) Pvt. Ltd. vs. Bharat Sanchar Nigam Limited & Anr.* 2005 SCC OnLine Del 190; *KSL & Industries Ltd. vs. National Textiles*

Corporation Ltd. 2012 SCC OnLine Del 4189; Ascot Hotels & Resorts Pvt. Ltd. vs. Connaught Plaza Restaurants Pvt. Ltd. 2018 SCC OnLine Del 7940; and Old World Hospitality Pvt. Ltd. vs. India Habitat Centre 1996 SCC OnLine Del 580.

14. Learned Senior Counsel further argues that on account of the breach by the Respondent, substantial loss is being caused to the Petitioner who has made substantial investments and has been negotiating with several prospective sub-licensees including Multinational Companies. If interim orders as prayed, are not granted, negotiations would fail as the said Companies are refusing to finalize the terms, unless the Areas are rectified and restored and common facilities are made available by the DMRC.

15. Mr. Meet Malhotra, Learned Senior Advocate, appearing on behalf of the Respondent submits that present petitions are not maintainable as none of the prayers sought therein can be granted in law. He further submits that in prayer Clauses (A) to (B), Petitioner by seeking mandatory injunction, is in principle seeking enforcement of certain obligations or compelling the performance of certain acts by the Respondent to prevent an alleged breach of the obligations under the License Agreements dated 04.02.2019. This, in effect, is seeking specific performance of the contracts. It is argued that the License Agreements being determinable, cannot be enforced by this Court by way of mandatory injunction and the Petitioner has an alternate remedy to claim damages/compensation for the alleged breach of the Agreements. The reliefs sought are barred under Section 14(1), 41(h) read with Section 10 of the Specific Relief Act, 1963.

16. Learned Senior Counsel argues that prayer Clause (D) is for an interim injunction restraining the Respondent from taking coercive steps against the Petitioner under the License Agreements and is clearly barred under Section 41(e) of the Specific Relief Act, 1963 which categorically provides that no injunction can be granted to prevent the breach of a Contract, the performance of which cannot be specifically enforced.

17. Learned Senior Counsel next argues that the petition is otherwise liable to be rejected as the Petitioner has failed to make out any *prima facie* case in its favour. The contention of the Petitioner that Respondent is in breach of the Agreement is neither borne out from the pleadings nor could the petitioner substantiate the breach during the arguments. No case of balance of convenience or irreparable loss has been set out by the Petitioner. On the contrary, non-payment of license fee for the commercial space in question would cause serious loss to the Respondent who needs money for its various projects. DMRC, it is submitted, was established in 1995 with the principle object of planning, designing, constructing and maintaining a world class Mass Rapid Transport System. The Metros are highly Capital Intensive Projects and therefore, to ensure their financial stability and also to subsidize the charges for the passengers without any Government subsidies, property development by Metro Project has been allowed by Ministry of Urban Development. The purpose is to augment the non-operational revenues i.e. from Advertisement, retailing etc. at Metro Stations and outside and parking lots.

18. Learned Senior Counsel submits that the terms and conditions of the Tender categorically stated that the Scheduled spaces offered on

license basis were on 'as is where is basis'. Thus, a duty was cast upon the bidders to satisfy themselves with regard to the status of the Areas in question and the facilities available therein by during the inspection. It was for the Petitioner to have assessed the commercial viability on the basis of the existing facilities. Petitioner had conducted the site visit on 19.07.2018 and only after inspection and assessing the conditions at site had submitted its bids. Letters of Acceptance were issued to the Petitioner for all the commercial spaces on 22.10.2018 and without any objection, the License Agreements were executed on 04.02.2019. Subsequent thereto, Petitioner had taken over deemed possession of the commercial spaces in terms of Clause 5.2 of the Agreement. When the Petitioner did not come forward for three months to seek approvals from the Respondent for starting the work, Respondent vide letter dated 30.05.2019 called upon the Petitioner to obtain necessary clearances/sanctions from DMRC and other Statutory Authorities. Clause 6.2 was also cited to inform the Petitioner that 'rent free fitment period' was restricted only to 180 days from the date of handing over the licensed spaces. Clause 6.2 reads as under:

"6.2 For carrying out the fit-outs, finishing works etc., licensee would be permitted a rent free fitment period of 180 (one hundred eighty) days from the date of handing over of the license space. Licensee shall have to complete in all respects the development of the license space, within the period of 180 (one hundred eighty) days from the date of 'handing over' of the space by DMRC under the License Agreement. For any delay in completion of work, DMRC shall not be responsible. In any case, the License fee shall become chargeable immediately after fitment period of 180 (one hundred eighty) days."

19. It is only thereafter that the Petitioner communicated vide letter dated 30.05.2019 seeking necessary approvals for electric layout and fire fighting layout for the various Schedules, by furnishing drawings. For the first time in June 2019, Petitioner started raising false and frivolous objections alleging non-operation of elevators, washrooms, laying down of electric cables etc., despite being well-aware of the existing position of the site and the facilities thereon, since 19.07.2018.

20. Learned Senior Counsel, without prejudice to the above contentions submits, that even on merits Petitioner has no case. Attention of the Court is drawn to Annexure IV and the Clauses therein, being 1.1/1.4/1.6 for Schedule I, First Floor and Annexure IV-C to argue that the responsibility for the entire cable work to tab off the supply from the fixed points and to avail the same within the premises, was that of the Petitioner and the Contract provided that the licensee shall not seek any claim, damage, compensation on account of time and cost associated with making provision of electricity. In fact, with respect to the First Floor, Schedule I, no issue of cables was even raised earlier by the petitioner.

21. It is further submitted that with regard to the lifts and elevators from inside the Ground Floor to the First Floor, Petitioner was well-aware of their non-operation at the time of inspection. The accessibility to First Floor had been made available from outside the Complex due to security reasons and which is why the bid price for the First Floor was minimum out of all the Schedules, keeping in mind the commercial viability. Insofar as the facilities of removal of garbage, maintenance of common areas etc. are concerned, there was adequate provision in the premises. Public utilities had been provided at the Concourse level which were

sufficient for the commuters. However the Petitioner unnecessarily insisted on provision of further facilities, which was beyond the terms of the licenses. In any case, it is argued that these are matters which are beyond the scope of examination by this Court in the present petitions and as and when the Petitioner invokes arbitration, would be decided by the Arbitrator.

22. It is next contended that the petitions have been filed only with a view to seek extension of the 'rent free fitment period' and avoid payment of the License Fee by blaming the Respondent and alleging breaches. The 180 days 'rent free fitment period' has expired on 09.08.2019. License period has begun from 10.08.2019 and invoices for the payment have been raised on the Petitioner. Since the licensee failed to honour the invoices, Respondent in terms of Clause 7.1(j) of Chapter 7 of the License Agreement issued a Cure Notice on 13.08.2019, but the Petitioner has failed to remit the License Fee.

23. In support of the proposition that prayers (A) and (C) are barred under Section 14(1), 41(h) read with Section 10 of the Specific Relief Act, 1963 and prayers (B) and (D) are barred under Section 41(e) of the said Act, Learned Senior Counsel for the Respondent has relied on judgments of the Supreme Court in *Adhunik Steels Ltd. vs. Orissa Manganese & Minerals Pvt. Ltd.* 2007 (7) SCC 125; *Jindal Steel & Power Ltd. Vs. SAP India Pvt. Ltd.* 2015 (4) Arb.L.R.24 (Del); *Anukampa Solutions Private Limited vs. Uttar Pradesh State Road Transport Corporation & Ors.* 2013 SCC Online Del 332; and *Airport Authority of India vs. Kanwar Singh Yadav* 82 (1999) DLT 546.

24. Reliance is further placed on the judgment in *O.M.P. 329/2001 titled D.R. Sondhi & Ors. vs. Hella KG Hueek and Co. & Ors., decided on 29.11.2001*, for the proposition that Court under Section 9 of the Act cannot compel an employer to continue to work with a contractor, whose work is unsatisfactory and that termination of a Contract is a facet of commercial law and the remedy for an aggrieved party only lies in claiming damages. Reliance is placed on the judgment in *O.M.P. 186/2009 titled Sainath Enterprises Pvt. Ltd. vs. Union of India (UOI) & Ors. decided on 17.09.2009*, wherein it has been held that where the Agreement is in its very nature determinable, even if one party commits breach by prematurely cancelling the same, remedy of the other party is to seek damages and no injunction can be sought.

25. Reliance is also placed on the judgment in *Anukampa (supra)* to argue that balance of convenience and irreparable injury has to be seen from the perspective of legal bar against grant of injunction in Sections 14(1) and 41 of the Specific Relief Act, 1963. Learned Senior Counsel has also distinguished the judgments relied upon by the Petitioner.

26. Learned Senior Counsel for the Petitioner, in rejoinder, reiterated that the Agreement between the parties herein is for a period of more than two decades with a lock-in period of 4 to 5 years and there is no Clause for 'No fault termination' or 'Termination without cause'. The Agreements are by nature not determinable, and therefore, the judgments cited by the Respondent would not apply. It is further argued that even otherwise, whether the Agreements are determinable or not in their nature, is an aspect which will be adjudicated by the Arbitral Tribunal and cannot be decided in the present petitions. It is further argued that

the License Agreements create substantial rights and interest in the Petitioner and cannot be compensated in terms of money. A party which is admittedly in default cannot plead that the contracts cannot be enforced by this Court.

27. It is next argued that Respondent has issued invoices and is continuing to charge the License Fee without handing over the premises in a condition where they can be put to use by the Petitioner as was envisaged at the time of inspection and subsequently at the time of entering into the License Agreements.

28. Learned Senior Counsel relies on paras 23 and 24 of the judgment in *Ascot Hotels (supra)* and argues that there are exceptions to the Rule in Section 14(1)(a) of the Specific Relief Act, 1963 and in the said case, the Court, after *prima facie* observing that it did not appear that the Agreement was terminated in accordance with Clause 22.4 of the Agreement, granted a relief of injunction.

29. Learned Senior Counsel submits that a Coordinate Bench of this Court in *KSL (supra)*, after observing that there was no justification offered by the Respondent for the sudden termination of the MOU, had confirmed the order of the Tribunal granting status quo and held that the Petitioners would suffer irreparable loss and injury if the Textile Mills were not preserved during the pendency of the Arbitral proceedings, as the alienation of the Mills and their assets would destroy the subject matter of the Claim of the petitioners.

30. In sum and substance, the argument of the Petitioner is that the License Agreements are valid and subsisting between the parties and have not been terminated. Thus, the subject matter of the Arbitration

proceedings be preserved and Respondent be restrained from taking any coercive actions against the Petitioner.

31. It is further argued that the Respondent cannot dispute that the areas were to be handed over on 'as is where is basis' i.e. in the status and condition as on 19.07.2018, the date of pre-bid site visit. Respondent has admitted that the pre-bid site visit and existing facilities, fixtures, fittings installed and available at the areas played a significant role in bidding and assessing the commercial viability. It is thus not open to the Respondent to argue that the Petitioner is bound to accept the Areas which have been materially damaged and deficient in utility and lifts and escalators which are not operational. The term 'as is where is basis' has to be interpreted in a meaningful manner to give effect to the Tender conditions and not to frustrate the same. It is settled principle of *contra proferentem* that interpretation of an ambiguous Clause has to be read against the author of the document which in the present case is DMRC. Reliance is placed on the judgment in the case of ***Bank of India vs. K. Mohandas (2009) 5 SCC 313*** on this aspect.

32. Learned Senior Counsel also points out that during the pendency of the petitions, Petitioner has invoked the Arbitration Agreement through a notice dated 02.11.2019. Thus, the requirement of Section 9(2) of the Act has been complied with and the Court may pass an order protecting the Petitioner till the Arbitral Tribunal considers the disputes between the parties.

33. I have heard the learned Senior Counsels for the parties and examined their rival contentions.

34. Before proceeding further, it is necessary to refer to some of the Clauses which have been referred to and relied upon by the parties herein. The relevant clauses are as under:

“Chapter: 2

Definitions

e. “As is where is basis” means LICENSEE shall be licensed the said commercial spaces, equipments and installations, fittings and fixtures (if any) on ‘as is where is basis’ and the LICENSEE shall not make any additions or alterations in the licensed space, installations including electric installations and wiring without the prior permission of DMRC in writing and when permitted by the LICENSOR the said additions and alterations shall be carried out by the LICENSEE at their own cost. They shall not be entitled to any compensation for any additions carried out by them in the licensed commercial space rather LICENSEE shall be required to hand over the licensed commercial space in original condition at the end of license period.

q. “License Period” means the period beginning from the Commencement Date and ending on the Termination Date by efflux of time or sooner determination in accordance with the date of this Agreement.

v. “Termination” means termination of this Agreement by efflux of time or sooner determination in accordance with the provisions of this License Agreement.

Chapter-5

Grant of License and Handing over of Space

5.2 The vacant commercial space, as mentioned in Annexure-I shall be handed over for commercial activities

within 7 (seven) days from the signing of License Agreement.

5.3 Area of scheduled commercial space specified in Annexure-I is approximate. Actual area handed over subsequent to issue of Letter of Acceptance shall be final. If the handed over area varies from the area specified in Annexure-I, the License Fees, Other Charges/GST shall be chargeable on actual super area handed over. If the handed over area further varies on account of subsequent additions, the actual area shall be also got revised from the effective date.

5.4 Licensee shall not claim any compensation on account of any variation in handing over of occupied space from that of the mentioned in the Annexure-I.

Chapter-6

Tenure of License Agreement

6.1 Tenure of the License Agreement shall be for a period of 21 (twenty one) years, unless otherwise terminated by DMRC or surrendered by Licensee, in term of provisions of this agreement. The tenure of License Agreement shall commence from the date of handing over of the licensed space. Tenure of the License Period of any space handed over subsequently shall be co-terminus with above period irrespective of date of actual handing over.

6.2 For carrying out the fit-outs, finishing works etc., licensee would be permitted a rent free fitment period of 180 (one hundred eighty) days from the date of handing over of the licensed space. Licensee shall have to complete in all respects the development of the licensed space, within the period of 180 (one hundred eighty) days from the date of 'handing over' of the space by DMRC under the License Agreement. For any delay in completion of work, DMRC shall not be responsible. In any case, the License

Fee shall become chargeable immediately after the specified fitment period of 180 (one hundred eighty) days.

6.3 There shall be a lock in period of 4 (four) years from the date of commencement of the license agreement. If the Licensee is desirous of terminating the license hereby created before expiry of aforementioned lock-in period of 4 (four) years, the License Agreement shall deemed to be terminated on the date mentioned in termination/ surrender notice, subject to confirmation by DMRC. In such a case, the balance Interest Free Security Deposit shall be forfeited in favour of DMRC after adjustment of outstanding dues, if any, payable to DMRC. No grace period shall be provided to Licensee in such a case. DMRC may also recover the balance outstanding dues, if are more than Interest Free Security Deposit, from the other contracts of Licensee in DMRC. Balance outstanding dues, if are more than Interest Free Security Deposit, shall also be recoverable from the Licensee before Licensee is permitted to remove their establishment(s) or else DMRC will seize their property at nil/zero value. DMRC shall be free to dispose-off the said property/ goods in whatsoever manner as it deems fit. License shall have no claim for compensation or consideration/damages on this account.

6.4 There shall be a lock-in period of 4 (four) years from the date of commencement of the license agreement. The Licensee shall have option to exit from the License Agreement immediately after completion of the above said lock-in period of 4 (four) years. For it, the Licensee shall have to issue 180 days prior notice to DMRC. Such prior notice intimation can be given after 3½ (three and half) years however option to exit will be available only after 4 (four) years of lock-in period. In this case, Balance Interest Free Security Deposit of the Licensee shall be refunded after adjusting the dues, if any, to be payable by the Licensee. DMRC may also recover the balance outstanding dues, if are more than Interest Free Security

Deposit, from the other contracts of Licensee in DMRC. Balance outstanding dues, if are more than Interest Free Security Deposit, shall also be recoverable from the Licensee before Licensee is permitted to remove their establishment(s) or else DMRC will seize their property at nil zero value. DMRC shall be free to dispose-off the said property / goods in whatsoever manner as it deems fit. Licensee shall have no claim for compensation or consideration/ damages on this account.

Chapter: 12

Breaches/Surrender/Termination of License Agreement

12.1 Surrender of License Agreement:

- (i) No partial surrender of licensed space or part of the licensed space which has been handed over to the Licensee by DMRC shall be permissible during the currency of the License Agreement.*
- (ii) The Licensee shall have option to surrender the license agreement after **4 (four) years** lock in period provided –*
 - a) The Licensee successfully completes initial **4 (four) years** lock in period.*
 - b) There is no arrear pending with the Licensee on the date of issue of surrender notice.*
 - c) DMRC receives a 180 days advance notice, in writing, from licensee for its intention to surrender the license agreement. Such notice of 180 days can be given as per the provisions of Clause No. 6.3, 6.4 & 6.5 of this license agreement and as per Clause No. 12.1 (iii), (iv) & (v) as given below.*
 - d) Licensee continues to pay all dues as per schedule to DMRC till the date of pre-mature closure of License Agreement.*

- e) *Licensee hand over peaceful possession of the all Licensed space to DMRC free from all encumbrances within 30 (thirty) days from the termination of License agreement.*

If Licensee satisfies the above said conditions, DMRC shall terminate the Agreement and refund interest free Security Deposit/ Performance Security after adjusting any outstanding amount on the part of Licensee.

- (iii) *There shall be a lock in period of 4 (four) years from the date of commencement of the license agreement. If the Licensee is desirous of terminating the license hereby created before expiry of aforementioned lock-in period of 4 (four) years, the License Agreement shall deemed to be terminated on the date mentioned in termination/ surrender notice, subject to confirmation by DMRC. In such a case, the balance Interest Free Security Deposit shall be forfeited in favour of DMRC after adjustment of outstanding dues, if any, payable to DMRC. No grace period shall be provided to Licensee in such a case. DMRC may also recover the balance outstanding dues, if are more than Interest Free Security Deposit, from the other contracts of Licensee in DMRC. Balance outstanding dues, if are, more than Interest Free Security Deposit, shall also be recoverable from the Licensee before Licensee is permitted to remove their establishment(s) or else DMRC will seize their property at nil/zero value. DMRC shall be free to dispose-off the said property/goods in whatsoever manner as it deems fit. Licensee shall have no claim for compensation or consideration/damages on this account.*

- (iv) *The Licensee shall have option to exit from the License Agreement immediately after completion of*

*the lock-in period as detailed in Clause No. 12.1 (iii) above. For it, the Licensee shall have to issue 180 days prior notice to DMRC. Such prior notice intimation can be given after 3½ (**three and half**) years however option to exit will be available only after 4 (four) years. In this case, Balance Interest Free Security Deposit of the Licensee shall be refunded after adjusting the dues, if any, to be payable by the Licensee. DMRC may also recover the balance outstanding dues, if are more than Interest Free Security Deposit, from the other contracts of Licensee in DMRC. Balance outstanding dues, if are more than Interest Free Security Deposit, shall also be recoverable from the Licensee before Licensee is permitted to remove their establishment(s) or else DMRC will seize their property at nil/ zero value. DMRC shall be free to dispose-off the said property I goods in whatsoever manner as it deems fit. Licensee shall have no claim for compensation or consideration I damages on this account.*

- (v) *If the Licensee is desirous of terminating the license after expiry of lock-in period, as detailed in Clause No. 12.1 (iii) above without serving any prior intimation period or shorter intimation period than 180 days, the agreement shall deemed to be terminated on completion of such short I irregular intimation period. In such cases, the Interest Free Security Deposit shall be refunded to the Licensee after adjustment of license fee for period shorter than 180 days (notice period) and outstanding dues, if any. DMRC may also recover the balance outstanding dues, if are more than Interest Free Security Deposit, from the other contracts of Licensee in DMRC. Balance outstanding dues, if are more than Interest Free Security Deposit, shall also be recoverable from the licensee before Licensee is*

permitted to remove their establishment (s) or else DMRC will seize their property at nil/ zero value. DMRC shall be free to dispose-off the said property I goods in whatsoever manner as it deems fit. Licensee shall have no claim for compensation or consideration I damages on this account.

12.3 Termination of License Agreement by DMRC:

Provided that in the event of application of clauses 12.2(a), (b) and (p) above, DMRC shall give to the Licensee 15 (fifteen) to 30 (thirty) days time as applicable to cure the default prior to considering the events specified therein as Licensee's events of default and in the event the Licensee remedies the default to the satisfaction of the DMRC within the cure period, the event shall not be considered as a Licensee's Event of Default. In case the licensee fails to remedies the default to the satisfaction of the DMRC within the cure period, then DMRC shall be within its rights to disconnect the utility services & terminate the License Agreement as per the provisions of this license agreement along with forfeiture of Interest Free Security Deposit after adjustment of all dues payable. The Licensee voluntarily agrees not to seek any claim, compensation, damages or any other consideration whatsoever on any ground in this regard. However, in the event of Clause 12.2(d) to (o) DMRC may terminate the License Agreement with immediate effect."

35. The first and foremost question that arises for consideration in the present petition is whether the reliefs sought by the Petitioner are barred under Sections 14(1)(a), 14(1)(c), 14(1)(d), 41(h), 41(e) and Section 10 of the Specific Relief Act, 1963. In order to answer this question, it is

important to examine the reliefs that have been sought and since all are identical relief from one of the petitions is being extracted hereunder:

“A. Pass an ex-parte ad interim order and confirm the same upon return of notice directing the Respondent Corporation to hand over the schedule/license areas as per its obligation of 'as is where is basis' i.e. restore the licensed areas of Schedule III to the same condition as it was on the date of pre-bid site visit and carry out all acts and deeds including and not limited to re-installation of power cables and isolators/MCCBs, repair of damaged ceiling, repair of water leakages etc;

B. Pass an ex-parte ad interim order and confirm the same upon return of notice injuncting the Respondent Corporation from raising invoices or demanding any amount towards license fees upto 180 days after handing over of Schedule-III licensed areas on as is where is basis.

C. Pass an ex-parte ad interim order and confirm the same upon return of notice directing the Respondent Corporation to make functional and operational toilets, lifts, elevators, escalators and other essential utilities in working and functional condition;

D. Pass an ex-parte ad interim order and confirm the same upon return of notice injuncting the Respondent Corporation from taking any coercive steps against the Petitioner or under license agreement dated 04.02.2019.

E. Pass any other or further order as this Hon'ble Court may deem fit and proper.”

36. Sections 14(1)(a) to (d) of the Specific Relief Act, 1963 are extracted hereinunder:

“14. Contracts not specifically enforceable.—

(1) The following contracts cannot be specifically enforced, namely:—

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

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise.”

37. In the case of ***Indian Oil Corporation Limited v. Amritsar Gas Service 1991 1 SCC 533***, Supreme Court considered exactly the same issue that arises in the present case, that if the contract by its nature is determinable, then granting relief of restoration of Distributorship, even if there was a breach by the other party, was impermissible under Section 14(1) of the Specific Relief Act, 1963. Court held that in a determinable contract granting such a relief would be contrary to the mandate in Section 14(1) and held as under:

“12. The arbitrator recorded finding on Issue No. 1 that termination of distributorship by the appellant-Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on Issue No. 2 relating to grant of relief and held that the plaintiff-respondent no. 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of

the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:

“This award will, however, not fetter the right of the defendant corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises.”

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having said so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement it is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is in its nature determinable. In the present case, it is not necessary to refer to the other clauses of sub section (1) of section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the

contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in section 14(1) of the Specific Relief Act and there is an error of law apparent on the face of the award which is stated to be made according to 'the law governing such cases'. The grant of this relief in the award cannot, therefore, be sustained."

38. Following this judgment, this Court in ***Rajasthan Breweries Ltd. vs. The Stroh Brewery Company 2000 (55) DRJ (Division Bench)***, held that if ultimately the termination was found to be illegal, the remedy of the aggrieved party would be to seek damages for wrongful termination and a claim for specific performance of the Agreement cannot be entertained. Relevant para of the judgment reads thus:

"20. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The

application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same."

39. In the case of ***V.F. Services (UK) Ltd. vs. Union of India & Ors.*** **2011 XAD (Delhi) 268**, a Coordinate Bench of this Court while dealing with a petition under Section 9 of the Act wherein a direction was sought to stay the operation of a letter issued by Embassy of Government of India at Netherlands, terminating a Contract held that the contract by its very nature was determinable. Facts and circumstances of the case were not extenuating enough to warrant a departure from the settled law that a Court cannot grant interim relief of enforcing a Contract which is determinable. The legal bar erected by Section 14(1)(c) read with Section 41(e) of the Specific Relief Act, 1963, cannot be overlooked, is what the Court observed. Relevant part of the judgment is as under:

"7. The VOC is a contract which by its very nature is determinable. Although in exceptional facts of individual cases involving agencies of the State, this Court has granted interim relief even against the termination of a contract (for e.g., Pioneer Publicity Corporation v. Delhi Transport Corporation), the settled law is that even where a contract has been illegally terminated the aggrieved party would be able to only claim damages and no interim relief against termination of the contract. In Indian Oil Corporation v. Amritsar Gas Service, (1991) 1 SCC 533, the Supreme Court explained that even where one of the contracting parties was an agency of state, the constitutional limitations of Article 14 as explained in Dwarkadas Marfatia and Sons v. Board of Trustees of the

Port of Bombay (1989) 3 SCC 293, Mahabir Auto Stores v. Indian Oil Corporation, (1990) 3 SCC 752 and Shrilekha Vidyarthi v. State of U.P., (1991) 1 SCC 212 would not apply since the case was based only on breach of contract and remedies flowing therefrom. Therefore (SCC, p.541) “the further questions of public law based on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts.” On the facts of that case it was held that (SCC, p.542 “granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant- Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act.

8. Here the VOC dated 26th November 2010 is by its very nature determinable. There appear prima facie to be no extenuating circumstances that warrant a departure from the settled legal position that the court will not grant an interim relief of continuing a contract that is by its very nature determinable. In other words, this Court is not persuaded to overlook the legal bar erected by Section 14(1)(c) read with Section 41(e) of the SRA. Clause 11 of the VOC, which has been invoked by Respondent No. 2, envisages either party terminating the contract by giving two months’ advance notice “of being unable to carry on the services any longer”. Respondent No. 2 did give two months’ advance notice to the Petitioner”

40. In the case of ***Cox and Kings India Limited v. Indian Railways Catering Tourism Corporation Limited (2012) 7 SCC 587***, Supreme Court was dealing with a case of restoration of a Lease Agreement, which stood terminated. The aggrieved party had invoked Section 9 of the Act and one of the pleas raised was that it had invested huge sums of money

in the Project. Mandatory injunction was sought by the party. Supreme Court held as under:

“25. It is evident from the submissions made on behalf of the respective parties that the arrangement between the Respondent No. 1, IRCTC, was with the Appellant Company and, although, it was the intention of the parties by virtue of the Joint Venture Agreement that the luxury train, belonging to the Respondent No. 1, was to be operated by the Joint Venture Company, at least for a minimum period of 15 years, what ultimately transpired was the termination of the Agreement by the Respondent No. 1 in favour of the Joint Venture Company. As pointed out by the Division Bench of the High Court, the Appellant was not entitled to question such termination as by itself it had no existence as far as the running of the train was concerned and it was not a party to the proceedings. In fact, what the Appellant has attempted to do in these proceedings is to either restore the Lease Agreement, which had been terminated, or to create a fresh Agreement to enable the Appellant to operate the luxury train indefinitely, till a decision was arrived at in Section 9 Application.

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

27. Taking into consideration the totality of the circumstances, we are inclined to agree with the suggestions which had been made by IRCTC before the Division Bench of the High Court regarding the operation of the train by IRCTC, with liberty to the parties to appoint an Arbitral Tribunal to settle their disputes. We, therefore, dismiss the Special Leave Petitions, but make it clear that if an Arbitral Tribunal is appointed, the aforesaid arrangement will be subject to the decision of the Arbitral Tribunal. We also make it clear that the observations made by the learned Single Judge, the Division Bench of the High Court and by us, shall not, in any way, influence the outcome of the arbitral proceedings, if resorted to by the parties.”

41. In this context the findings of the Division Bench in ***Indian Railways Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd. and Another***, 2012 SCC OnLine Del 113, are very significant and are as under :

“25. Based on the facts projected above, we come back to the main issue, namely, whether direction in the nature given, which are in the nature of mandatory injunction amounting to specific performance or directing continuation of the arrangement even when the agreement had been terminated could be given or not. Once the Joint Venture Agreement is terminated, prima facie we feel that even in the main arbitration proceedings, it would be difficult for M/s C&K to seek the final relief of specific performance and for restoration of the agreement. There is a huge possibility that in such a situation, normally M/s C&K would be entitled to damages even if it is held that Joint Venture Agreement was illegally terminated. After all, Joint Venture Agreement was a contract between the parties. It was only in the realm of contractual arrangement with no statutory flavour and no element of public law. While dealing with the contractual obligations

under the realm of contract in a private field without any insignia of public element, it may be somewhat difficult for M/s C&K to maintain the relief of specific performance. The agreement was in commercial field to be governed by contract law, as between two private parties. In Rajasthan Breweries Ltd. v. The Stroh Brewery Company, AIR 2000 Delhi 450, the Court enunciated the principle on this aspect in the following words:

“Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.”

26. We are unable to accept the contention of learned counsel for the appellant that since IRCTC is a corporation which is wholly owned by the Ministry of Railways and is, thus, subjected to Article 12 of the Constitution of India, the appellant can maintain the prayer for mandatory injunction. This plea of the appellant flows from the argument that the action of the State or instrumentality of the State has to be fair, just and non-arbitrary even in contractual matters and for this purpose, the appellant has referred to the judgment of this Court in *Pioneer Publicity Corporation v. DTC*, 103 (2003) DLT 442 and that of Supreme Court in *Mahabir Auto Sales* (supra). While there is no denial of the legal principle, per se, laid down in the aforesaid cases, we are unable to accept the applicability of these judgments insofar as the present case is concerned and that too, when we are dealing with the question of interim arrangement and not concerned with the final stage of the proceedings. Specific performance would require day to day supervision. In any event, M/s C&K can be compensated in terms of money if they prove losses due to alleged wrongful treatment. There is a serious dead lock between IRCTC and M/s C&K in relation to the affairs of Joint Venture company cannot be given a go-by.

27. Though our aforesaid observations are only prima facie in nature and we are clear that in arbitration proceedings, the Arbitral Tribunal would decide the same on its own merits without being influenced by our tentative observations, this exercise is undertaken for the purpose of present proceedings under Section 9 of the Act. Once this is the prima facie view we hold, it is difficult to make interim arrangement and pass an order in the nature of mandatory injunction directing continuation of the earlier arrangement which has been terminated by IRCTC. After all, it is to be borne in mind that IRCTC is the absolute owner of the train in question and the said train belongs exclusively to IRCTC. Can, in such circumstances, IRCTC be forced to do what it is not willing to in a matter relating

to commercial contract, which has been terminated? Somewhat similar situation had arisen in the case of Country Development and Management Services Pvt. Ltd. v. Brookside Resorts Pvt. Ltd., 2006 (Supp.) Arb.LR 248 (Delhi). In this Single Bench judgment rendered by one of us (A.K. Sikri, J.), the injunction was refused. Para 14 of the said judgment takes note of the facts which prevailed in that case and in the said para, legal position is stated. In that case also, the Court was dealing with application under Section 9 of the Act. We reproduce herein para 14 and other relevant paragraphs for our purpose:

14. I may state at the outset that the fundamental aspect which is to be borne in mind is that we are dealing with petition under Section 9 of the Arbitration and Conciliation Act, 1996 and, therefore, entire matter has to be looked into from the angle as to what should be the interim arrangement between the parties. The parties entered into agreement dated 2nd June, 2001, namely, TLA and now the disputes have arisen between the parties arising out of the said TLA. The matter will have to be gone into, in depth, in those arbitration proceedings. The admitted position which emerges is that the land in question on which the hotel is built, belongs to the respondent. It is also not disputed that the entire financial arrangement for construction of the said hotel is borne by the respondent either from its own resources or by taking loan from financial institution. Though the petitioner's case is that financial institution has sanctioned the loan because of the petitioner's association with the respondent, fact remains that loan is sanctioned in the name of the respondent and it is the sole responsibility of the respondent to repay the said loan. The construction cost of the project is, according to the respondent, Rs. 11 crores.

Therefore, entire hotel property, namely, land as well as construction thereon exclusively belongs to the respondent. As per the petitioner's averments, it has provided the technical knowhow in the form of drawings, designs/consultancy etc. on the basis of which hotel is built and the hotel which stands now, gives an appearance of of a CIS hotel. This is disputed by the respondent. It, however, cannot be denied that some technical support is obviously provided by the petitioner pursuant to the TLA. However, only because of this reason can it be said that the respondent should not be allowed to run the hotel if the parties have otherwise fallen apart. Case of the petitioner is that the respondent has made structural, architectural and design changes and, therefore, even according to the petitioner the hotel is not made strictly in conformity with the standard on which CIS hotels are constructed. The respondent wants to run the hotel itself. Even if there was no dispute and the hotel was strictly built according to CIS standards and hotel had run under the petitioner's banner, the respondent could always terminate the agreement at any time under the TLA and start operating the hotel of its own. This is because the agreement is determinable in nature. If that could be the position even after the start of hotel as Carlson hotel, I am of the view that if the respondent wants to start the hotel, from the beginning itself, without the association of the petitioner, it can do so. The petitioner, for the alleged services rendered and for the alleged breach of contract on the part of the respondent, can always sue for damages.

15. In view of Sections 14 and 34 of the Specific Relief Act, injunction cannot be granted. These provisions have come up for consideration before

the courts number of times. Some of these judgments are taken note of hereinafter:

(i) Rajasthan Breweries Ltd. The Stroh Brewery Co. (supra):

“13: As the application by the appellant was filed under Section 9 of the Act prior to commencement of the arbitration proceedings, it is not disputed that the Court is empowered to deal with the same and exercise such power for making orders as it has for the purposes of and in relation to any proceedings before it. The closing words of Section 9 of the Act empowering the Court to deal with such applications for interim measures have on the face of it to be dealt with in accordance with the law applicable to any proceedings taken out before such a court. On the ratio of the decision of the Supreme Court in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., AIR 1998 S.C. 825 the application will be governed by the law of India and not by the governing law. However, the principles of equity governing specific performance are almost same in Indian law and English law. The discretion of the Courts of England while enforcing the specific performance of a contract is subject to the same constraints as are applicable in the Courts in India. Under the English law of specific performance of contractual obligation is available only in equity and is subject to various restrictions, which have been explained by G.H. Treitel in his work “The Law of Contracts” 6th Edition pages 764 to 775 as follows:

“(i) Specific performance will not be ordered where damages are adequate remedy.

(ii) If the party applying for relief is guilty of a breach of the contract or is guilty of wrongful conduct.

(iii) If the Contract involves personal service.

(iv) If the contract requires constant supervision.

(v) If the party against whom specific performance is sought is entitled to terminate the contract.”

At page 775, it is stated in the aforementioned work:-

“If the party against whom specific performance is sought is entitled to terminate the contract, the order will be refused as the defendant could render it nugatory by exercising his powers to terminate. This principle applies whether the contract is terminable under its express terms or on account of the conduct of the party seeking specific performance.”

14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section (c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause (c) to sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge

thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law. This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

18. In Indian Oil Corporation Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533, the Supreme Court had an occasion to consider the terms of agreement of distributorship. The agreement could be terminated in accordance with the terms of the agreement as per clauses 27 and 28 thereof. The Arbitrator had also held the distributorship to be revocable in accordance with clauses 27 and 28 of the agreement. The distributorship agreement was held for indefinite period, namely, till the time it was terminated in accordance with the terms contained therein. It was the case of the respondent therein that since the contract had not been terminated in accordance with clause 27 thereof, under which termination had been made, the firm was entitled to continuance of distributorship in the special circumstances of the case, which contention was upheld by the Arbitrator. Supreme Court set aside the award of the arbitrator on the ground that there is error of law apparent on

the face of the record and grant of relief in the award cannot be sustained. It was held:-

“The arbitrator recorded finding on issue No. 1 that termination of distributorship by the appellant Corporation was not validly made under clause 27. Thereafter, he proceeded to record the finding on issue No. 2 relating to grant of relief and held that the plaintiff-respondent 1 was entitled to compensation flowing from the breach of contract till the breach was remedied by restoration of distributorship. Restoration of distributorship was granted in view of the peculiar facts of the case on the basis of which it was treated to be an exceptional case for the reasons given. The reasons given state that the Distributorship Agreement was for an indefinite period till terminated in accordance with the terms of the agreement and, therefore, the plaintiff-respondent No. 1 was entitled to continuance of the distributorship till it was terminated in accordance with the agreed terms. The award further says as under:-

“This award will, however, not fetter the right of the defendant Corporation to terminate the distributorship of the plaintiff in accordance with the terms of the agreement dated April 1, 1976, if and when an occasion arises.”

This finding read along with the reasons given in the award clearly accepts that the distributorship could be terminated in accordance with the terms of the

agreement dated April 1, 1976, which contains the aforesaid clauses 27 and 28. Having aid so in the award itself, it is obvious that the arbitrator held the distributorship to be revokable in accordance with clauses 27 and 28 of the agreement. It is in this sense that the award describes the Distributorship Agreement as one for an indefinite period, that is, till terminated in accordance with clauses 27 and 28. The finding in the award being that the Distributorship Agreement was revokable and the same being admittedly for rendering personal service, the relevant provisions of the Specific Relief Act were automatically attracted. Sub-section (1) of Section 14 of the Specific Relief Act specifies the contracts which cannot be specifically enforced, one of which is a contract which is in its nature determinable. In the present case, it is not necessary to refer to the other clauses of subsection (1) of Section 14, which also may be attracted in the present case since clause (c) clearly applies on the finding read with reasons given in the award itself that the contract by its nature is determinable. This being so granting the relief of restoration of the distributorship even on the finding that the breach was committed by the appellant-Corporation is contrary to the mandate in Section 14(1) of the Specific Relief Act and there is no error of law apparent on the face of the award which is stated to be made according to the law governing such cases. The grant of this relief in the award cannot, therefore, be sustained.

The facts of the present case are identical to those in aforementioned decision of the Supreme Court in as much as the agreements in the instant case are also terminable by the respondent on happening of certain events. In Indian Oil Corporation's case (supra) also agreement was terminable on happening of certain events. Question that whether termination is wrongful or not; the events have happened or not; the respondent is or is not justified in terminating the agreements are yet to be decided. There is no manner of doubt that the contracts by their nature determinable.

In Classic Motors Ltd. v. Maruti Udyog Ltd., 1997 I AD (DELHI) 190 : (1997) 65 D.L.T. 166 relying upon number of decisions, learned Single Judge of this court rightly observed:-

“In view of long catena of decisions and consistent view of the Supreme Court, I hold that in private commercial transaction the parties could terminate a contract even without assigning any reasons with a reasonable period of notice in terms of such a Clause in the agreement. The submission that there could be no termination of an agreement even in the realm of private law without there being a cause or the said cause has to be valid strong cause going to the root of the matter, therefore, is apparently fallacious and is accordingly, rejected.”

(ii) *Crompton Greaves Ltd. v. Hyundai Electronics Industries Co. Limited*, 76 (1998) DLT 733.

(iii) *National Auto Impex v. Autocop (India) Pvt. Ltd.*, 2001 VI AD (DELHI) 490

(iv) *Indian Oil Corporation Ltd. v. Amritsar Gas Service*, (1991) 1 SCC 533.

(v) *Alfa Laval (India) Ltd. v. J.K. Corp. Ltd.*, 2000 I AD (DELHI) 974.

16. The effect of the stay order would be that the hotel is not allowed to start its operation. If ultimately the respondent succeeds then the respondent would be put to unnecessary loss and the time gone by would be wasted without putting the clock back. On the other hand, it is ultimately held that the petitioner had right to run the management of hotel for specified period such an award can be passed in favour of the petitioner or the petitioner can be compensated for depriving it from doing so.

17. Learned senior counsel for the respondent, in these circumstances, is right in his submission that the petitioner cannot invoke the provisions of Section 42 of the Specific Relief Act. There is a dispute as to whether the contract is still in existence or it has come to an end by efflux of time. The respondents submission that once the opening date is not extended by the petitioner under clause 1.5 of the agreement there is no obligation on the part of the petitioner to comply with the agreement. The circumstance of the case, therefore, do not warrant exercise of any discretionary jurisdiction in favour of the petitioner. The principle laid down by the Supreme Court in *Gujrat Bottling Company Ltd. (supra)* is that relief by way of interlocutory injunction, is granted to mitigate the risk or injustice to the

petitioner during the period before that uncertainty could be resolved. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need to the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated.”

28. *In the present case, when the adhoc arrangement or even the so-called lease has been terminated, we agree with the learned Additional Solicitor General that passing of mandatory injunction would amount to:*

(i) First, create an agreement between Joint Venture company and IRCTC in relation to the train;

(ii) Second, enforce such agreement even though JV company was not a petitioner; and

(iii) Third, allow M/s C&K to take advantage of such agreement when, admittedly, even the ‘Lease Agreement’ as per the terms of the Joint Venture Agreement was to be between JV company and IRCTC.”

42. In the case of **Anukampa (supra)**, a Coordinate Bench of this Court in a petition under Section 9 of the Act held as under:

“9. xxx xxx xxx
(iv) *I am of the opinion that once a licensee, always a licensee. This principle has been clearly laid down in a Full Bench decision of this court reported as Chandu Lal vs. MCD AIR 1978 Del 174. In fact, the Full Bench of this*

Court in this judgment has laid down that a licensee after his licence is terminated is not entitled to any interim injunction and in fact the licensor is entitled to use reasonable force to throw out the licensee from the licenced premises. I may also note at this stage that a Division Bench Judgement of this court in the judgment reported as DTTDC Vs. D.R.Mehra & sons 62(1996) DLT 234 declined an injunction which was prayed for by a licensee by stating that a licensee after termination of the licence is not entitled to injunction and even if he is in possession such a relief cannot be granted to him and the Division Bench clearly stated that a licensee should not be allowed to urge the argument of due process of law because such issue will not arise if the licensee himself acts fairly and vacates the premises.

10. The issue of balance of convenience and irreparable injury in a case like this has necessarily to be seen from the perspective of the legal bar with respect to the grant of injunction because of Sections 14 (1),(a),(b) & (c) read with Section 41(e) of the Specific Relief Act. If the law itself disentitles any injunction, then equities cannot have any say. That being the position and in view especially of the law with relation to termination of license, the balance of convenience is not in favour of the petitioner but in favour of the respondents as the petitioner will be compensated suitably by damages in case the respondent is found guilty of committing breach of contract. I may finally note that by looking at facts to arrive at a decision on an application for injunction under Section 9, it cannot be said that a Court conducts a mini trial. This Court is mandated to see the strength of the cases of the respective parties to arrive at a decision by virtue of Colgate Palmolive vs. Hindustan Liver Ltd. (1999) 7 SCC 1. Mini trial would only be when highly disputed questions of facts are decided while deciding an application under Order XXXIX CPC, and which is not so in the present case in view of the basic facts as stated above being admitted or

become apparent from the record. The contention of the petitioner of “mini trial” is thus not well founded.”

43. Reading of the judgments referred to above leads this Court to only one conclusion that a Contract which in its nature is determinable, cannot be specifically enforced in view of the clear legal bar under Section 14(1)(c) of the Specific Relief Act, 1963. Once a Contract is not enforceable, Section 41(e) Specific Relief Act, 1963, occupies the field and provides that an injunction cannot be granted to prevent the breach of a Contract, the performance of which would not be specifically enforced. Section 41(e) of the Specific Relief Act, 1963, is as under:

“41. Injunction when refused.—An injunction cannot be granted—

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(e) to prevent the breach of a contract the performance of which would not be specifically enforced”

44. The next question that arises is whether under Section 9 of the Act, the principles of the Specific Relief Act, 1963 have to be applied or not. This question also stands answered in the judgments referred to above. However, another judgment needs to be alluded to in this regard. In the case of ***RPS Educational Society (Regd.) vs. DDA, OMP 538/2008, decided on 02.09.2009***, the Court while dealing with the principles to be followed by the Court under Section 9 of the Act held as under:

“5. It is apparent that in terms of license deed, the respondent had authority to cancel the license. Under Section 9 of the Arbitration and Conciliation Act, the Court can pass an interim order to preserve such subject matter of dispute which it considered was necessary to be preserved for adjudication of the dispute. However, an order under

Section 9 of the Arbitration and Conciliation act cannot be passed by the Court directing specific performance of the contract, the breach of which is alleged by the petitioner. This Court in Excel Generators Pvt. Ltd. Vs. IJ M Corporation Berhad OMP No. 241/09 (decided on 13th May, 2009) had observed that where a contract is terminable contract and it can be foreclosed, the interim relief under Section 9 of the Arbitration and Conciliation Act cannot be granted for specific performance of the contract. In all those cases where monetary damages can compensate the breach of contract, the Court cannot insist upon the parties that the contract should be specifically performed.”

45. In the case of **Adhunik Steels (supra)**, the Supreme Court held as under:

“10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of “just and convenient” while speaking of passing any interim measure of protection. The concluding words of the section, “and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it” also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an

ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

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13. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be “an Act to define and amend the law relating to certain kinds of specific reliefs”. Specific relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his Tagore Law Lectures on Specific Relief, the remedy for the non-performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in Part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the

discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

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18. 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.”

Having examined the nature of the Contract and the relief sought, the Supreme Court finally observed as under:

“20. 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.”

46. Recently this Court in ***M/s Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperatieve Vennootschap Met Beperkte Anasprakelijkheid***, being O.M.P. (I) (COMM.) 273/2019, decided on 13.01.2020, while dealing with a determinable contract had declined to grant a relief under Section 9 of the Act as the same would have amounted to granting Specific Performance of the Contract. Relevant paras of the judgment are as follows:

“29. Once a contract is determinable in nature and has been terminated by one party to the contract, the same cannot be revived or restored by a Court and specific performance of the same cannot be sought by the defaulting party. This has been clearly held by the Court in the case of RPS Educational Society (Regd.) vs. DDA, OMP 538/2008, decided on 02.09.2009. In the case of RPS Educational Society (Regd.) (supra), the Court was dealing with the principle to be followed by the Court while dealing with a matter under Section 9 of the Act. The Court held as under:

“5. It is apparent that in terms of license deed, the respondent had authority to cancel the license. Under Section 9 of the Arbitration and Conciliation Act, the Court can pass an interim order to preserve such subject matter

of dispute which it considered was necessary to be preserved for adjudication of the dispute. However, an order under Section 9 of the Arbitration and Conciliation act cannot be passed by the Court directing specific performance of the contract, the breach of which is alleged by the petitioner. This Court in Excel Generators Pvt. Ltd. Vs. IJ M Corporation Berhad OM P No. 241/09 (decided on 13th May, 2009) had observed that where a contract is terminable contract and it can be foreclosed, the interim relief under Section 9 of the Arbitration and Conciliation Act cannot be granted for specific performance of the contract. In all those cases where monetary damages can compensate the breach of contract, the Court cannot insist upon the parties that the contract should be specifically performed.”

30. *In the case of Cotton Corporation Ltd. vs. United Industrial Bank Ltd. and Ors., (1983) 4 SCC 625, the Supreme Court discussed the relevance of Section 41(b) and other provisions of Specific Relief Act with reference to grant of interim injunction and observed as under :-*

“9. Mr. Sen, learned counsel for the respondent-Bank, contended that sec. 41(b) is not at all attracted because it deals with perpetual injunction and the temporary or interim injunction is regulated by the Code of Civil Procedure specially so provided in Sec. 37 of the Act. Expression 'injunction' in sec. 41(b) is not qualified by an adjective and therefore, it would comprehend both interim and perpetual injunction. It is, however, true that Sec. 37 specifically provides that temporary injunctions which have to continue until a specified time or until further order of

the court are regulated by the Code of Civil Procedure. But if a dichotomy is introduced by confining Sec. 41 to perpetual injunction only and Sec. 37 read with O. 39 of the Code of Civil Procedure being confined to temporary injunction, an unnecessary grey area will develop. It is indisputable that temporary injunction is granted during the pendency of the proceeding so that while granting final relief the court is not faced with a situation that the relief becomes infructuous or that during the pendency of the proceeding an unfair advantage is not taken by the party in default or against whom temporary injunction is sought. But power to grant temporary injunction was conferred in aid or as auxiliary to the final relief that may be granted. If the final relief cannot be granted in terms as prayed for, temporary relief in the same terms can hardly if ever be granted.

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35. In the case of *Planet M. Retail Ltd. vs. Select Infrastructure Pvt. Ltd.*, 2014 (145) DRJ 654, a Co-ordinate Bench of this Court was examining the question as to whether the petitioner therein could be allowed to run the business in a shop under a license deed which stood determined, in a petition filed under Section 9 of the Act. It was argued by the petitioner therein that the Court had powers under Section 9 of the Act, akin to the powers of a Civil Court under Order 39 Rules 1 & 2 CPC, for grant of interim injunction and that Section 41 of the Specific Relief Act was not applicable to proceedings under Section 9 of the Act. The Court after examining the various judgments on the issue came to a conclusion as under:-

“26. ...the question whether the licence was by its nature determinable or not is a question

which is a subject matter of arbitration proceedings. However, it is an undisputed fact that with effect from 31.05.2013, the licence agreement between the parties to run a trade in the said shop stands determined. Whether such determination is contrary to the terms of the agreement and thus illegal is again the subject matter of arbitral proceedings. This Court, at this stage, cannot enter into this question. The consequences of such determination are relevant factors to judge if the relief claimed by petitioner can be granted to him. Grant of relief to petitioner would mean allowing him to run his trade in the licensed premises without a licence... ”.

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37. Reference is also required to be made to another decision of a Division Bench of this Court in Bharat Catering Corporation vs. Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) & Ors., 164 (2009) DLT 530 wherein the Division Bench was called upon to decide the correctness of a judgment passed by a learned Single Judge of this Court dismissing a petition under Section 9 of the Act. A contract was entered into between the parties which was ultimately cancelled due to certain disputes between the parties and this led to the filing of the petition under Section 9 of the Act wherein ex-parte order of injunction was sought staying the operation of the letter dated 06.05.2009 whereby the contract was cancelled. The learned Single Judge while dismissing the petition held as under:-

“5 the scope and ambit of Section 9 is not to restore the contract which has already been terminated. The contract between the respondent and the petitioner created a commercial relationship between the parties.

The termination of contract is one of the facets of the contract and as per contract entered into between the parties, the contract could be terminated by respondent for various reasons given therein. If the petitioner is aggrieved by the act of the termination of the contract by respondent and considers that the termination was bad or illegal, the petitioner is at liberty to invoke the arbitration clause and claim damages, if any, suffered by the petitioner. The contract cannot be restored by the Court under Section 9 nor is it a case where the Court should interfere. In my view prima facie there is no case made out in favour of petitioners. The petitioners' conduct, as reflected from the impugned letter of termination justifies termination of the contract."

38. Upholding the order of the learned Single Judge, the Division Bench held as under:-

"17. Apart from merits, even otherwise, in our view, the scope and ambit of Section 9 do not envisage the restoration of a contract which has been terminated. The learned Single Judge, in our view, rightly held that if the petitioner is aggrieved by the letter of termination of the contract and is advised to challenge the validity thereof, the petitioner can always' invoke the arbitration 'clause to claim damages, if any, suffered by the petitioner. It is not open to this Court to restore the contract under Section 9, which is meant only for the sole purpose of preserving and maintaining the property in dispute and cannot be used to enforce specific performance of a contract as such. A bare glance at the said Section will suffice to show that pending arbitration proceedings, the Court and the

Arbitral Tribunal have been vested with the power to ensure that the subject matter of the arbitration is not alienated or frittered away...”

47. In Appeal against the said judgement, in *M/S Inter Ads (supra)*, the Division Bench of this Court in FAO (OS) (COMM) 23/2020 decided on 01.05.2020, held as under:

“14. The learned Single Judge has rightly relied on a decision of this court in MIC Electronics Ltd. and Ors. vs. Municipal Corporation of Delhi and Ors., 2011 II AD (DEL) 625, to hold that legality of the termination and the justification of the appellant of not paying the balance due to the respondent, would have to be examined by the learned Arbitrator. Reliance was rightly placed on the following observations made in the captioned case:-

“12..... Therefore, the licence stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the licence fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's refusal to decrease the number of 20 of LED screens in terms of clause 6 of the agreement, would also be considered by the Arbitral Tribunal. In this behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In

other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the parties themselves.” (emphasis added)

15. Since the contract in the present case was terminable and as the issue of the legality of the action of termination has yet to be determined and further, since wrongful termination can be restituted by awarding of damages, in the event the appellant is able to establish that the said termination was illegal and invalid, the learned Single Judge has rightly declined the reliefs prayed for by the appellant in the Section 9 petition. We do not find any reason to interfere with the view taken in the impugned judgment.”

48. The License Agreements between the parties in the present case, in my opinion, are by their very nature determinable. Clause 12.1 of the License Agreements gives a right to the Petitioner to surrender or terminate the Agreement and Clause 12.3 gives the same right to the Respondent. Thus, in view of Section 14(1)(c) read with Section 41(e) of the Specific Relief Act, 1963 and the judgments on the subject, some of which have been alluded to above, the grant of injunction as sought by the Petitioner is statutorily prohibited.

49. One of the contentions raised by the Petitioner is that in the present case, the Agreements are valid and subsisting and thus, the judgements in cases where agreements stood terminated, would not apply to the present petitions. In my opinion, this distinction is of no consequence and does

not help the petitioner. In the case of *Adhunik Steels (supra)* the contract was subsisting and the relief sought was an injunction order against termination of the contract. The argument raised by the Appellant therein was that it had mobilized huge resources for carrying on the excavation and extraction of minerals and termination would cause huge losses. The Supreme Court, however, declined to grant the relief restraining the respondent from terminating the contract and observed that in case the claim of the appellant is upheld by the Arbitrator, it would be in a position to assess the compensation. Relevant paras of the judgement have been highlighted above. It would be significant to note that in the present case, the petitioner has not even set up a case that compensation/damages cannot be assessed if the License Agreements are terminated or that money would not be an adequate measure of compensation if the petitioner succeeds in Arbitration.

50. In the case of *Jindal Steels (supra)*, a Co-ordinate Bench of this Court, relying on the entire case law on the subject of determinable contracts and their enforcement under Section 9 of the Act declined the relief of Specific Performance and distinguished the judgement in *KSL (supra)* which is being relied herein by the petitioner.

51. Another judgment which needs to be referred to is in the case of *Anukampa (supra)*. A petition under Section 9 was filed praying for a relief that the respondents be restrained from interfering with the operations of running a Food Plaza. After noting that the relationship between the parties was of a Licensor and Licensee and that the contract was determinable, the Court in paragraphs 9 and 10, as extracted in the earlier part of this judgment, held that since the law itself disentitles any

injunction from being granted, equities cannot have any say and refused to grant injunction.

52. The relief of injunction from raising invoices would also indirectly amount to enforcement of the Agreements as well as grant of injunction which cannot be granted for the reasons stated above. The judgements relied upon by the petitioner cannot enure to its advantage. In ***Ascot Hotels (supra)*** the Court under Section 37 of the Act, while examining an interim order passed by the Arbitral Tribunal on an application under Section 17 of the Act did not interfere at that stage in the discretion exercised by the Tribunal, as observed in Para 18 of the judgement. Secondly, the contract in question therein permitted termination only on three consecutive defaults in payment of License Fee by the Licensee and the Court in the facts of that case observed prima facie that the contract was not by its nature determinable, which is not so in the present case.

53. Petitioner has also relied on the judgement in the case of ***Atlas Interactive (supra)***. The facts and circumstances of the said case were clearly different and the reasons which weighed with the Court cannot even be remotely applied to the present case and are as under :

“15. It is not shown that the respondent No. 1 is in a position to launch the project on its own very soon. If the respondent No. 1 still needs time to start the project on its own, why it cannot give some time to petitioner also for completing the project. It is not at all alleged by respondent No. 1 that the petitioner had committed any other breach or default except delay in the commissioning of the project. It is also not understandable as to why the respondent No. 1 should run the risk of paying damages to the petitioner for breach of contract which the situation can be saved by permitting the petitioner to continue with the project in

which petitioner has no exclusivity. Had the respondent No. 1 been a private party, it would have thought hundred times before raising such a plea as the damages, if awarded, may be enormous. The petitioner is pleading that it has already spent over 22 million dollars on the project. In case the Arbitrator holds that termination of contract was not lawful, the respondent No. 1 may have to pay this amount as damages. Since the respondent No. 1 is an instrumentality of the State and the damages are not to go from the pockets of its officers, a plea is easily raised that the petitioner should seek damages. The respondent No. 1 and its officers dealing with the Franchisee Agreement should appreciate that risk of paying such heavy damages should not be taken lightly. Public money has to be protected with utmost care and concern. Hazardous and adventurous pleas should not be taken when public money is at stake.

16. The plea of learned Counsel for respondent No. 1 that Section 14 of the Specific Relief Act prohibits grant of injunctions in respect of the contracts mentioned therein and in this case all the clauses of Section 14 are attracted. Learned Counsel for the petitioner has opposed this submission by referring to Section 10(ii)(a) of the said Act and submits that since the project under the agreement is unique and the equipment created tailor made for respondent No. 1 and since the respondent No. 1 is an instrumentality of the State, it has no right to act arbitrarily and unreasonably. It is submitted that Section 14 of the Specific Relief Act does not stand in the way of petitioner.

17. After considering the submissions made by learned Counsel for the parties and considering the facts and circumstances of this case and as discussed hereinbefore also, this Court is of the considered view that Section 14 of the Specific Relief Act does not stand in the way of the Court to grant the relief as prayed in as much as by the impugned act of respondent No. 1 the petitioner may be

unreasonably ousted from Indian market and, therefore, compensation in terms of money may not be adequate relief. The contract may be determinable in nature but the instrumentality of the State has to act in a fair and just manner and not arbitrarily. This principle may hold good between private parties but not in those cases where the highhandedness appears to be on the part of the State or its instrumentality. It also cannot be said that the contract between the parties runs into minute details or the Court cannot enforce specific performance of its material terms nor it can be said that the contract involves performance of continuous duty, which the Court cannot supervise. The Franchisee Agreement between the parties is a detailed agreement containing duties and obligations of both the parties. Respondent No. 1 has to provide its cable network and the rest of the performance is to be by the petitioner. The agreement between the parties is non-exclusive and on revenue sharing basis under which the respondent No. 1 has to gain only. The nonperformance or the failure of the petitioner would not cause any financial loss to respondent No. 1 inasmuch as under the agreement itself, the respondent No. 1 can involve itself or others also for providing the same services. The plea of respondent No. 1 that the petitioner may utilize its equipment in other areas and through other service providers is also no answer to the claim of the petitioner that it is being ousted arbitrarily and without any good and sufficient cause.”

54. In so far as reliance on the judgements in ***Pioneer Publicity (supra)*** and ***Old World Hospitality (supra)*** is concerned, suffice would it be to note that in the two cases, the issue of determinable contracts and the Statutory bar under Section 14(1)(c) of the Specific Relief Act was neither raised nor considered.

55. In the case of ***KSL (supra)***, relied upon by the petitioner substratum of the dispute between the parties was such that the Court was

of the view that irreparable loss would be caused to the Petitioner as, with the alienation of the Textile Mills, the Agreements would lose their meaning. It also needs to be noticed that in this case the issue of bar of Section 14(1)(c) was not an issue for consideration before the Court, which is directly covered against the Petitioner in the various judgements referred to above.

56. In view of the Statutory bar of the Specific Relief Act, 1963 and the law as crystallized in several judgements, petitioner is not entitled to the reliefs sought for.

57. The contentions of parties touching upon the merits of the claims including alleged breaches and invoices towards License Fee, as well as the interpretation of the Term 'as is where is basis' will be decided by the Arbitral Tribunal as and when constituted.

58. It is made clear that the Court has not expressed any opinion on the merits of the disputes and the narration is only for the purpose of deciding the issue of interim relief.

59. Petitions are accordingly dismissed and interim order dated 06.09.2019 is hereby vacated. Pending applications also stand dismissed.

JYOTI SINGH, J.

JUNE 12th, 2020

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