

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

% **Order reserved on: 10 May 2023**
Order pronounced on: 23 May 2023

+ **O.M.P.(I) (COMM.) 128/2023**

M/S KSHEERAABD CONSTRUCTION PVT. LTD.

..... Petitioner

Through: **Mr. Vikas Mehta, Ms. Anshula Grover, Advs.**

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. & ANR.

..... Respondents

Through: **Mr Kunal Tandon, Ms. Richa Sharma, Advs. for R-1.**

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

1. This petition under Section 9 of the **Arbitration and Conciliation Act, 1996¹** has been preferred seeking the following reliefs: -

“a. Grant ad interim stay on the effect and operation of the Termination Notice dated 17.04.2023 issued by Respondent No. 1, with respect to the Contract *“Construction of two-lane with hard shoulder of Changtongya- Longleng Road on EPC basis from existing Km.16.530 to Km 29.530 (Design Km. 18,779 to Km. 33.428, Design length 14.649 Kms.) in the State of Nagaland (Pkg - 2) under NH (O) Plan”*;

b. Restrain the Respondent No. 1 from acting in furtherance of the Termination Notice dated 17.04.2023 issued by Respondent No. 1, with respect to the Contract *“Construction of two-lane with hard*

¹ The Act

shoulder of Changtongya - Longleng Road on EPC basis from existing Km. 16.530 to Km 29.530 (Design Km. 18.779 to Km. 33.428, Design length 14.649 Kms.) in the State of Nagaland (Pkg- 2) under NH (O) Plan"

c. Restrain the Respondent No. 1 from taking any coercive steps against the Petitioner under the Contract "***Construction of two-lane with hard shoulder of Changtongya - Longleng Road on EPC basis from existing Km. 16.530 to Km 29.530 (Design Km. 18.779 to Km. 33.428, Design length 14.649 Kms.) in the State of Nagaland (Pkg- 2) under NH (O) Plan"***

d. Restrain the Respondent No. 1 from retendering the balance work in the contract being "***Construction of two-lane with hard shoulder of Changtongya - Longleng Road on EPC basis from existing Km. 16.530 to Km 29.530 (Design Km. 18.779 to Km. 33.428, Design length 14.649 Kms.) in the State of Nagaland (Pkg- 2) under NH (O) Plan"***

e. Direct the Respondent No. 1 to allow the Petitioner to continue with the execution of the balance contract works and allow them to complete the same within 60 dry days and complete the project works in all respects.

f. Direct the Respondent No. 1 to refund the excess amount held by them vis-a-vis the amount equivalent to the amount of bank guarantees issued by Punjab National Bank, by way of recoveries from running bills as well as by way of withholds to enable the Petitioner to expeditiously take up the execution of balance works in the contract and complete the same before the onset of monsoon.

g. Direct the Respondent No.1 to return the bank guarantees issued by Punjab National Bank, Sansad Marg branch to the Petitioner to enable the later to pursue their options against their consultant PNB.

h. Interim and ad-interim reliefs in terms of prayers (a) to (f) above.

i. Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. The dispute emanates between the parties from a contract which was awarded to the petitioner in terms of a Letter of Acceptance dated 11 March 2020 for the following work: -

"Construction two-lane with hard shoulder of Changtongya – Longleng Road on EPC basis from existing Km 16.530 to Km

29.530 (Design Km. 18. 779 to Km. 33.428. Design length 14.649 Kms.) in the State of Nagaland (Pkg - 2) under NH (O) Plan”

3. The aforesaid work was to be accomplished at a contract price of INR 128 crores. As would be evident from the reliefs prayed for in the present petition, interim measures and orders of injunction are sought in respect of a Termination Notice which came to be issued by the **National Highways & Infrastructure Development Corporation Ltd.**² on 17 April 2023. For the purposes of disposal of the present petition, the following essential facts may be noticed.

4. The Contract Agreement is stated to have been executed between the petitioner and the respondents on 01 June 2020. The Appointed Date for the project was stipulated to be 01 July 2020. NHIDCL asserts that consequent to the promulgation of the appointed date, the petitioner was obliged to complete the construction work by 30 June 2022. The record would reflect that as per the request of the petitioner, the time for completion of the contract was extended from 30 June 2022 to 03 February 2023. The time period for completion was extended by an **Extension of Time**³ granted on two separate occasions with the first extending the completion date to 24 September 2022 and the subsequent extension being approved to be valid up to 03 February 2023. As per the respondent, despite the grant of EOT, the petitioner has been able to achieve only 79.12% of the Cumulative Physical Progress targets. It is their assertion that the petitioner failed to make progress as per the revised work programs submitted by it on 05 May 2022 and again on 04 October 2022. In

² NHIDCL

³ EOT

paragraph 9 of the Termination Notice, the respondents assert that despite several Slow Progress Notices which were issued, the petitioner failed to make adequate progress and consequently neither has the project been completed nor the work targets achieved.

5. Faced with the above, the respondent is stated to have issued a Cure Notice to the petitioner. However, it is the case of NHIDCL that petitioner had failed to take the effective steps for timely completion of the project or to achieve Milestone -IV i.e, Scheduled Completion Date and has failed to show any improvement in the physical progress within the sixty days of the Cure Notice period.

6. The Court deems it apposite to extract the following paragraphs from the Termination Notice and which deal with the aspect of physical progress targets having not been achieved: -

“4. **WHEREAS**, as per the Contract Agreement, the construction of the project was to be completed in all aspects within 24 (Twenty-Four) months from the Appointed Date. In the instant case, the Appointed Date was declared as **01.07.2020**, meaning thereby that the EPC Contractor was obliged to complete the construction by **30.06.2022**. However, to say the least, the progress of work has been dismal since the completion of Milestone - III and the EPC Contractor as per the Authority’s Engineer (AE) report, against desired progress of **100%**. This clearly establishes the lackadaisical approach of the EPC Contractor in executing the project.

6. **WHEREAS**, considering the EPC Contractor ‘s request as per Clause 10.5 of Contract Agreement, Authority also granted Extension of Time (EOT-II) for shifting of the Schedule Completion Date from **30.06.2022 to 03.02.2023**. The details of project completion schedule as per Schedule - J of the Contract Agreement as well as extended milestone dates and its achievement are as under:

Project	Schedule	Dater as per	Date as per	Actual date
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Milestones	Date as per Contract Agreement	Approved EOT-I	Approved EOT-II	of Achievement
Milestone-I (10%)	10.02.2021	-	-	15.01.2021
Milestone-II (35%)	11.09.2021	-	-	23.03.2021
Milestone-III (70%)	12.03.2022	-	-	27.02.2022
Scheduled Completion Date (100%)	30.06.2022	24.09.2022	03.02.2023	Not achieved yet

7. **WHEREAS**, the EPC Contractor has promised to complete the project as per original scheduled date of completion i.e., by **30.06.2022**. However, the EPC Contractor has failed to complete the project on schedule completion date due on **30.06.2022**. The Competent Authority of NHIDCL has granted EOT-I for completion of the project upto 24.09.2022, but the EPC Contractor failed to achieve the same. Again, the Competent Authority of NHIDCL has granted EOT-II for completion of the project on or before 03.02.2023. However, the EPC Contractor again failed to complete the project within the revised scheduled time.

8. **WHEREAS**, EPC Contractor failed to make progress as per their own revised work programmes submitted on **05.05.2022 & 04.10.2022**. The targeted physical and Financial Progress as per the EPC Contractor revised work programme and their achievement of the last 12 (Twelve) months are tabulated as under:-

Sl. No.	Month	Cumulative Physical Progress as per Revised Work Programme Dated – 05.05.2022 (%)	Cumulative Physical Progress as per Revised Work Programme dated – 04.10.2022 (%)	Cumulative Physical Progress Achieved (%)	Cumulative Financial Progress Achieved (%)
(i)	Mar-2022	73.94	73.92	73.98	73.10

(ii)	Apr-2022	74.65	74.63	74.34	73.10
(iii)	May-2022	76.31	75.12	74.59	73.10
(iv)	Jun-2022	79.23	75.25	75.300	73.10
(v)	Jul-2022	84.63	75.25	75.53	73.10
(vi)	Aug-2022	92.65	76.15	75.99	73.10
(vii)	Sep-2022	100.00	78.08	77.92	74.96
(viii)	Oct-2022	-	81.37	78.60	77.10
(ix)	Nov-2022	-	87.40	79.02	77.10
(x)	Dec-2022	-	91.83	79.02	77.10
(xi)	Jan-2023	-	98.30	79.12	77.10
(xii)	Feb-2023	-	100.00	79.12	77.10
(xiii)	Mar-2023	-	100.00	79.12	77.10

9. **WHEREAS**, the EPC Contractor has failed to complete the project by due date i.e., 03.02.2023. Several Slow Progress Notices were issued by Authority & Authority's Engineer to EPC Contractor. (Refer Sl. no. 'xi, xiv, xv, xvi, xvii, xx). However, the EPC Contractor has achieved only 77.100% Financial Progress up to 11.04.2023.

17. **WHEREAS**, repeated notices and warnings have been issued to the EPC Contractor by Authority's Engineer and Authority for slow progress but it has proven to be a futile exercise as it could not yield desired results from the EPC Contractor. To this effect, it may be noted that taking cognizance of extremely slow progress of work, the EPC Contractor was served with a Cure Notice under Clause 23.1 (i), (c), (d), (e), (f), (g) & (p) of the Contract Agreement by the Authority vide Cure Notice as Refer Sl. no. (xiv) notifying **M/s Ksheeraabd Construction Pvt. Ltd** that the EPC Contractor should take such steps as was necessary to expedite progress, so as to comply with the timely completion of the project. However, all were in vain, as neither the EPC

Contractor had taken any remedial measures nor replied to the said Cure Period Notice served by the Authority and the EPC Contractor has executed dismal physical progress (i.e. only **0.1%**) within **60 days of Cure Notice period**.

18.WHEREAS, M/s Ksheeraabd Construction Pvt. Ltd have failed time and again to achieve the Milestone-IV i.e. Scheduled Completion Date despite submitting revised work programme two times, hence, it clearly shows that **M/s Ksheeraabd Construction Pvt. Ltd**, have no intention to improve the pace of progress to complete the project in time. In spite of issuance of several notices by Authority's Engineer and Authority, there has been no satisfactory progress at site."

7. The Termination Notice apart from being based on the project milestones having not been achieved also raises the issue of certain forged bank guarantees having been submitted. This would be evident from the following extracts of the Termination Notice: -

"24. **WHEREAS**, it has been found that the Bank Guarantees submitted by the EPC Contractor against Performance Security amounting to Rs. 6,40,00,000 /- (BG no -CFPGUR07242020 dated 01.12.2020 and amended on 03.11.2022) and Additional Performance Security amounting to Rs. 3,18,92,000/- (BG No -CFPKSH24072020 dated 25.11.2020 and amended on 03.11.2022) for the project (issued by Punjab National Bank, 5 Sansad Marg, New Delhi) were found to be non-genuine.

25.**WHEREAS**, NHIDCL vide letter no. NHIDCL/HQ/Finance/BG Matter/e-209731/1460 dated 16.12.2022 asked EPC Contractor to prove the genuineness of the BG and the response of the EPC Contractor vide their letter KCPL/HO/NHIDCL/GEN-BG/251/2022-23 dated 20.12.2022 was examined and found to be not satisfactory.

26. **WHEREAS**, vide Letter No. NHIDCL/Finance/2022/ BG/ Invocation/E-209731/Fin-427 dated 05.01.2023, NHIDCL has requested bank for encashment of Bank Guarantees, wherein, Punjab National Bank (PNB) Sansad Marg, New Delhi, vide letter dated 17.01.2023 has stated that "**PNB has neither issued these Bank guarantees nor confirmed these bank guarantees under**

MT60 of SFMS and as such these guarantees have no legal Binding. PNB denies any liabilities under these purported guarantees”

8. On an overall consideration of the aforesaid facts, NHIDCL has proceeded to terminate the Contract Agreement basing its decision on various sub-clauses of Clause 23.1. This is evident from a reading of paragraphs 31 and 32 of the Termination Notice which are reproduced below: -

“31. WHEREAS, on account of submission of Non-Genuine Bank Guarantees, the EPC Contractor has breached the Contract Agreement, inter-alia, with the following defaults in terms of Clause 23.1 (i)(n) & Clause 23.1 (i)(o) of Article 23 of Contact Agreement:

1. **Article 23.1(i)(n):** any representation or warranty of the Contractor herein contained which is, as of the date hereof, found to be false or the Contractor is at any time hereafter found to be in breach or non-compliance thereof;
2. **Article 23.1(i)(o):** the Contractor submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;

32.WHEREAS, the EPC Contractor along with defaults committed above, has also breached the Contract Agreement, inter-alia, with the following defaults as mentioned below in terms of Clause 23.1(i) of Article 23 of Contact Agreement:

1. *Sub-clause (d): the Contractor abandons or manifests intention to abandon the construction or maintenance of the Project Highway without the prior written consent of Authority;*
2. *Sub-clause (e): the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/ or the Maintenance for 30 (thirty) days without reflecting the same in the current programme and such stoppage has not been authorized by the Authority's Engineer;*

3. *Sub-clause (f): the Project Completion Date does not occur within the period specified in Schedule- J for the Schedule Completion Date, or any extension thereof;*
4. *Sub-clause (g): the Contractor fails to rectify any Defect, the non-rectification of which shall have a Material Adverse Effect on the project, within the time specified in this Agreement or as directed by the Authority's Engineer;*
5. *Sub-clause (p): the Contractor has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or*
6. *Sub-clause (q): the Contractor commits a default in complying with any other provision of this agreement if such a default causes a Material Adverse Effect on the project or on the Authority; and..."*

9. Since the arguments which were addressed by and on behalf of respective sides had principally revolved around the provisions of Clause 23.1 of the Contract Agreement, the same is extracted hereunder: -

“23.1 Termination for Contractor Default

- (i) Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Contractor fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Contractor shall be deemed to be in default of this Agreement (the "**Contractor Default**"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:
 - (a) the Contractor fails to provide, extend or replenish, as the case may be, the Performance Security in accordance with this Agreement:
 - (b) after the replenishment or furnishing of fresh Performance Security in accordance with Clause 7.3, the Contractor fails to cure, within a Cure Period of 30 (thirty) days, the Contractor Default for which the whole or part of the Performance Security was appropriated;

- (c) the Contractor does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-J, subject to any Time Extension, and continues to be in default for 45 (forty five) days;
- (d) the Contractor abandons or manifests intention to abandon the construction or Maintenance of the Project Highway without the prior written consent of the Authority;
- (e) the Contractor fails to proceed with the Works in accordance with the provisions of Clause 10.1 or stops Works and/or the Maintenance for 30 (thirty) days without reflecting the same in the current programme and such stoppage has not been authorised by the Authority's Engineer;
- (f) the Project Completion Date does not occur within the period specified in Schedule-J for the Scheduled Completion Date, or any extension thereof;
- (g) the Contractor fails to rectify any Defect, the non-rectification of which shall have a Material Adverse Effect on the Project, within the time specified in this Agreement or as directed by the Authority's Engineer;
- (h) the Contractor subcontracts the Works or any part thereof in violation of this Agreement or assigns any part of the Works or the Maintenance without the prior approval of the Authority;
- (i) the Contractor creates any Encumbrance in breach of this Agreement;
- (j) an execution levied on any of the assets of the Contractor has caused a Material Adverse Effect;
- (k) the Contractor is adjudged bankrupt or insolvent, or if a trustee or receiver is appointed for the Contractor or for the whole or material part of its assets that has a material bearing on the Project;
- (I) the Contractor has been, or is in the process of being liquidated, dissolved, wound-up, amalgamated or reconstituted in a manner that would cause, in the reasonable opinion of the Authority, a Material Adverse Effect;

- (m) a resolution for winding up or insolvency of the Contractor is passed, or any petition for winding up or insolvency of the Contractor is admitted by a court of competent jurisdiction and a provisional liquidator or receiver or interim resolution professional, as the case may be, is appointed and such order has not been set aside within 90 (ninety) days of the date thereof or the Contractor is ordered to be wound up by court except for the purpose of amalgamation or reconstruction; provided that, as part of such amalgamation or reconstruction, the entire property, assets and undertaking of the Contractor are transferred to the amalgamated or reconstructed entity and that the amalgamated or reconstructed entity has unconditionally assumed the obligations of the Contractor under this Agreement; and provided that:
- i. the amalgamated or reconstructed entity has the capability and experience necessary for the performance of its obligations under this Agreement; and
 - ii. the amalgamated or reconstructed entity has the financial standing to perform its obligations under this Agreement and has a credit worthiness at least as good as that of the Contractor as at the Appointed Date;
- (n) any representation or warranty of the Contractor herein contained which is, as of the date hereof, found to be false or the Contractor is at any time hereafter found to be in breach or non-compliance thereof;
- (o) the Contractor submits to the Authority any statement, notice or other document, in written or electronic form, which has a material effect on the Authority's rights, obligations or interests and which is false in material particulars;
- (p) the Contractor has failed to fulfil any obligation, for which failure Termination has been specified in this Agreement; or
- (q) the Contractor commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Project or on the Authority.

(r) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:

- i. for doing or forbearing to do any action in relation to the Contract, or
- ii. for showing or forbearing to show favour or disfavour to any person in relation to the Contract,

or if any of the Contractor's personnel, agents or subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (s). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.

- (ii) Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Contractor Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Contractor; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Contractor of its Intention to issue such Termination Notice and grant 15 (fifteen) days to the Contractor to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice.
- (iii) The following shall apply in respect of cure of any of the defaults and/ or breaches of the Agreement:
 - (a) The Cure Period shall commence from the date of the notice by the Authority to the Contractor asking the latter to cure the breach or default specified in such notice;
 - (b) The Cure Period provided in the Agreement shall not relieve the Contractor from liability for Damages caused by its breach or default;
 - (c) The Cure Period shall not in any way be extended by any period of suspension under the Agreement;
 - (d) If the cure of any breach by the Contractor requires any reasonable action by the Contractor that must be approved by the Authority hereunder the applicable Cure Period (and any liability of the

Contractor for damages incurred) shall be extended by the period taken by the Authority to accord its required approval.

- (iv) After termination of this Agreement for Contractor Default, the Authority may complete the Works and/or arrange for any other entities to do so. The Authority and these entities may then use any Materials, Plant and equipment, Contractor's documents and other design documents made by or on behalf of the Contractor.”

10. To complete the narration of facts, it may also be additionally noted that prior to the issuance of the Termination Notice, NHIDCL had also issued an Intent to Terminate Notice dated 07 March 2023. Aggrieved by the initiation of that action, the petitioner had approached the Court by way of a petition under Section 9 of the Act which was numbered as O.M.P. (I) (COMM) 94/2023. The said petition was disposed of by the Court on 24 March 2023 in the following terms: -

“1. The learned counsel for the petitioner confines his prayer in the present petition to grant of an opportunity of oral hearing to the petitioner, before a decision is taken by the respondent no.1 on its notice dated 07.03.2023. The learned counsel for the respondent no.1, who appears on advance notice, submits that the respondent no.1 shall grant an opportunity of oral hearing to the petitioner before taking a decision on the notice.

2. In view of the above, nothing survives in the present petition. The same is disposed of.

3. It is needless to state that, in case, the petitioner is aggrieved of the decision taken by the respondent no.1 on its notice, all remedies of the petitioner, in accordance with law, shall remain open.”

11. One of the principal questions which arose for consideration when the present petition was taken up for consideration was whether

the injunction as sought in respect of the Termination Notice would be legally sustainable bearing in mind Section 14(d) of the **Specific Relief Act, 1963**⁴. Learned counsels appearing for respective parties had addressed elaborate submissions on the question of whether the Contract Agreement could be said to be a determinable contract and as a consequence of which an injunction could not be validly granted in light of the provisions of the SRA. While Mr. Mehta, learned counsel appearing for the petitioner, sought to contend that only those contracts which may be said to be “*inherently determinable*” would fall within the scope of Section 14(d), Mr. Tandon, learned counsel appearing for NHIDCL contended that all contracts which embody provisions for termination, irrespective of whether that power be liable to be exercised on the happening of an event, breaches or default, would fall within the scope of the aforementioned provision of the SRA.

12. Appearing for the petitioner, Mr. Mehta, had placed reliance essentially on the following decisions relating to the question which stands posed and they are noticed hereinafter. Reliance was principally placed upon the decision of the Bombay High Court in **Narendra Hirawat and Co. v. Sholay Media Entertainment Pvt. Ltd.**⁵ [Narendra Hirawat I] where the position with respect to contracts which would fall within the scope of Section 14(d) was explained as under: -

⁴ SRA

⁵ 2020 SCC OnLine Bom 391

“8. The question now is whether the plaintiff deserves any interim protection pending such trial. Dr. Saraf, for defendant No. 1, submits, and he is joined in this by Mr. Andhyarujina, who appears for defendant No. 2, that the suit agreements being in the nature of a licence, and accordingly, by their very nature being determinable, their specific performance cannot prima facie be granted. Learned Counsel rely on the provisions of section 14(d) of the amended Specific Relief Act. (Amended section 14(b) is in *parimateria* with old section 14(1)(c) of the un-amended Specific Relief Act.) The word “licence” used in the suit agreements is not some special term of art so as to give rise to any particular consequence, as a matter of law, so far as revocability or determinability of the agreements is concerned; the consequence would rather depend on the agreements read as a whole. Apropos the agreements and having regard to the particular term of determination thereunder, Dr. Saraf and Mr. Andhyarujina argue that the contract is clearly determinable and if that is so, no specific performance is permissible. Learned Counsel rely on the cases of *Indian Oil Corporation Ltd. v. Amritsar Gas Service*, (1991) 1 SCC 533, *Jindal Steel and Power Limited v. SAP India Pvt. Ltd.*, (2015) 221 DLT 708 and *Spice Digital Ltd. v. Vistass Digital Media Pvt. Ltd.*, 2012 MhLJ Online 105 : (2012) 114 Bom LR 3696. Relying on these cases, it is submitted that since the subject agreements contain a termination clause, they must be treated, as, by their very nature, determinable and accordingly, no specific performance should be granted. Learned Counsel are not right there. When the relevant provision [section 14(d) of the Specific Relief Act] uses the words “a contract which is in its nature determinable”, what it means is that the contract is determinable at the sweet will of a party to it, that is to say, without reference to the other party or without reference to any breach committed by the other party or without reference to any eventuality or circumstance. In other words, it contemplates a unilateral right in a party to a contract to determine the contract without assigning any reason or, for that matter, without having any reason. The contract in the present case is not so determinable; it is determinable only in the event of the other party to the contract committing a breach of the agreement. In other words, its determination depends on an eventuality, which may or may not occur, and if that is so, the contract clearly is not “in its nature determinable”.

9. The cases cited by learned Counsel for the defendants are clearly distinguishable on facts. In *Indian Oil Corporation* (supra), the contract (clause-28 of the distributorship agreement) gave right to either party to determine the agreement by giving 30 days' notice and the only relief that was permissible in such a case was award

of a compensation for the period of notice, that is to say, 30 days. It is in the context of this clause that the Supreme Court held that the respondent before it (original plaintiff) was not entitled to restoration of its distributorship terminated by the appellant (original defendant), but only entitled to compensation for loss of earning for the notice period of 30 days, since such notice was not given by the defendant to the plaintiff. Likewise, in *Jindal Steel and Power Ltd.* (supra), the relevant clause of the contract gave right to the respondent before the Court (original defendant) to terminate the licence after giving 30 days' notice to the petitioner (original plaintiff). In pursuance of this clause, a learned Single Judge of Delhi High Court held that the contract was determinable by its very nature. In *Spice Digital Ltd.* (supra), the relevant contract (clause 6.2 of the agreement before the Court) gave right to either party to the contract to terminate the agreement upon a 30 days' prior written notice to the other party without assigning any reason for such termination. Once again, it is in the context of such unilateral right of termination that the Court came to a conclusion that the contract was, by its very nature, determinable and no specific performance could be claimed. All these cases are clearly distinguishable and do not support the defendants' case here."

13. The judgment in *Narendra Hirawat-I* was assailed in an intra court appeal which came to be allowed. The decision of the Division Bench of that High Court was challenged before the Supreme Court whose decision stands reported as **Narendra Hirawat and Co. v. Sholay Media Entertainment Pvt. Ltd.**⁶ [**Narendra Hirawat II**]. While reversing the decision rendered by the Division Bench of the High Court, the Supreme Court observed as under: -

"16. At this stage, we would not like to give final verdict with regard the interpretation of the various clauses of the Deed of Settlement, including clause 4 relating to issuance of invoices, as the same would be a matter to be considered first in the suit proceedings. However, considering the conduct of the parties, specially the fact that the invoices were issued by the respondent no. 1 before each of the payments were made by the appellant - NHC, and only fraction of the total payment remained to be paid, which also the learned Single Judge, while issuing injunction in

⁶ 2022 SCC OnLine SC 1878

favour of NHC directed them to deposit in court, in pursuance of which Rs. 3.5 crores has already been deposited by NHC in the High Court and also considering the other attending factors and circumstances, we are of the opinion that the injunction order granted by the Trial Court in favour of the appellant cannot be faulted.

17. Even otherwise, we are of the opinion that interference by the Division Bench of the High Court in appeal against the order of the learned Single Judge granting the injunction was not justified specially when the injunction order passed could not, in our opinion, be said to be perverse or unjustified in law. Several authorities were cited on behalf of the learned counsel for the parties outlining the principles for granting interim injunction. In *Wander Ltd. v. Antox India P. Ltd.* [1990 Supp SCC 727], it had been held:—

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. In *Printers (Mysore) Private Ltd. v. Pothan Joseph* [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Jhanaton* [[1942] A.C. 130] ‘...the law as to the reversal by a court of appeal of an

order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

18. In the case of *Shah Babulal Khimji v. Jayaben D. Kania* [(1981) 4 SCC 8], a three Judge Bench of this Court had opined that Section 104 read with Order 43 Rule 1 of the Civil Procedure Code, 1908 applied to a Letters Patent appeal as well. In *Dorab Cawasji Warden v. Coomi Sorab Warden* [(1990) 2 SCC 117] grant of mandatory injunction at the interim stage has been left to the sound judicial discretion of the Court. *Metro Marins v. Bonus Watch Co. (P) Ltd.* [(2004) 7 SCC 478] also follows the principles laid down in the case of *Dorab Cawasji Warden* (supra). But these two authorities dealt with the question of grant of interim injunction in relation to disputes arising out of transfer of immovable property. Applicability of Rules 1 and 2 of Order 39 of the Code on the question of granting interim injunction has been reconfirmed by a Coordinate Bench of this Court in *Best Seller Retail (India) Private Ltd. v. Aditya Birla Nuvo Ltd.* [(2012) 6 SCC 792]. In *Colgate Palmolive (India) Ltd. v. Hindustan Lever Ltd.* [(1999) 7 SCC 1], the principles guiding grant of interim injunction have been summarized as:—

“24. We, however, think it fit to note herein below certain specific considerations in the matter of grant of interlocutory injunction, the basic being non-expression of opinion as to the merits of the matter by the court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. The other considerations which ought to weigh with the court hearing the application or petition for the grant of injunctions are as below:

- (i) extent of damages being an adequate remedy;
- (ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;
- (iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;
- (iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case — the relief being kept flexible;

(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.”

21. Accordingly, as we are of the firm view that the appellant has made out a prima facie case for grant of injunction and also that the balance of convenience is in favour of the appellant - NHC, hence we allow these appeals. The Single Judge's order was founded on sound reasoning and we find no fault in exercise of discretion by the Single Judge in granting the order of injunction. We, thus, set aside the order passed by the Division Bench of the High Court and restore the order of the learned Single Judge. The learned Single Judge, however, is requested to expedite the hearing of the suit and decide the same as expeditiously as possible, preferably within one year, in accordance with law and without being influenced by any observations made by the Single Judge while granting the injunction order or by the Division Bench of the High Court passed in appeal, as well as by this Court. The parties shall not seek any unnecessary adjournment in the High Court.”

14. Mr. Mehta then invited our attention to the decision of the Kerala High Court in **T.O Abraham v. Jose Thomas**⁷, a decision which had been noticed with approval in *Narendra Hirawat I*. The said High Court explained the scope of Section 14(d) in the following terms: -

“18. The question thus before us is whether this contract is determinable. Before we answer this, we deem it necessary to understand clearly what is meant by determinable contracts. In the now repealed Specific Performance Act, 1877, section 21(d) stipulated that a contract, which in its nature is revokable, cannot be enforced to unenforceable contracts. The provision of the old Act corresponds to section 14(1)(c) of the Specific Relief Act, 1963 (which will, hereinafter be referred to as the “Act” for

⁷ (2018) 1 KLJ 128

convenience), the only difference between the two being that the word ‘revokable’ has been substituted with the word ‘determinable’. This was done because the word ‘revokable’ was inaccurate and it was felt that a more accurate word for it be substituted. Therefore, it is indubitable that a contract which in its nature is revokable or determinable, as described in the provisions of the sections afore referred, is definitely not enforceable through specific performance. For a contract to become determinable, it has to be first shown by the defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason. The words used in section 14(1)(c) is “inherently determinable”. The effect of the use of the word “inherently” in the section is to make it unambiguously clear that a contract which can be terminated by either of the parties on their own will without any further reason and without having to show any cause, would ones are inherently determinable. However, if an agreement is shown to be determinable at the happening of an event or on the occurrence of a certain exigency, then it is ineluctable that on such event or exigency happening or occurring alone that the contract would stand determined. In order to see if a particular contract is inherently determinable or otherwise, we have to first see whether the parties to the said contract have the right to determine it or to terminate it on their own without the junction of any other party and without assigning any reason. This is akin to a partnership at will, where one of the partners can notify the others of his intention not to continue in the said firm and the partnership itself then dissolves. The analogy we think is appropriate because a contract, to be inherently determinable, will have to specifically provide competence to the parties to it to terminate it without assigning any reason and merely by indicating that he does not intend to comply with the same.

19. That being said, we will have to examine whether Ext.A1 agreement would be in the nature of a determinable contract. The learned Senior counsel, Sri. R.D. Shenoy garners strength to his submissions by pointing to Clause 13 of the said agreement. Since our examination on this issue would certainly be within the four corners of this particular clause, we think it will be necessary to extract it for full reading and we do so as under :

“13. It is also agreed by the Vendors/shares that of for any reason (not expected in the normal cause) this agreement could not be completed due to any of the reasons breach or default of the Vendors they shall repay the advance paid amount of Rs. 1,50,00,000/- (Rupees One Crores Fifty Lakhs

only) with 12% interest per annum less the value of Rubber Trees sold by the vendee and in failure the vendee will be free to realize such amounts from the assets of the company mainly from the schedule property.”

20. It is obvious from a reading of clause 13 of the agreement that the vendors namely the appellant and respondents 2 to 5 herein have agreed that if, for any reason, which is not expected in the normal course, the agreement cannot be completed due to reasons of breach or default on their side, they will repay the advance amount of Rs. 1,50,00,000/- with 12% interest, less the value of the rubber trees sold by the first respondent herein.

21. Can we say, we asked ourselves whether this would be in the nature of a determinable contract. It is obvious from a reading of the clause that this does not give any of the parties a right to determine the contract on their own without assigning reasons. On the contrary, the clause is worded in such a manner that if there is any breach on the side of the vendors, then alone the contract will stand determined and too on them making payment of the advance amount with 12% interest.

22. We fail to understand how this clause would make Ext.A1 agreement a determinable contract and we are of the view that contrario sensu, this clause operates almost like an In Terrorem clause which is intended to ensure that the vendors do not renege for their part of the obligations in the contract. This becomes further clear because of the words “not expected in normal course” shown in the bracket in the said clause. This luculently would demonstrate that the vendors had no intention of resiling from the contract in normal clause but that if at all they were forced to cause any breach or violation of the condition, on account of reasons not attributable to them, even then their obligation would only be confined to pay Rs. 1,50,00,000/- along with interest. This is evidently intended to ensure that the vendors perform their obligations within time and in the manner shown in the agreement and we, therefore, cannot find even for a moment that this would make the agreement itself determinable. We find otherwise and we are of the view that clause 13 not only in the agreement not determinable but it imposes an obligation on the vendors to ensure that the agreement is not violated for reasons that are normally available to them.”

15. Mr. Mehta then submitted that the grant of injunction must also be considered bearing in mind the public law element which stands

attracted by virtue of NHIDCL being an organ of the State and thus bound by fairness obligations which would otherwise be inapplicable to a contract entered into by a purely private entity. This distinction and its significance in cases of termination of contracts, according to Mr. Mehta, was lucidly explained by a learned Judge of this Court in **KSL and Industries Ltd. vs. National Textiles Corporation Ltd.**⁸

Reliance was laid on the following passages from that decision: -

“88. The concept that a fight between citizen and the government is not to be viewed as ordinary litigation was recognized by this Court in Old World Hospitality Pvt. Ltd. (supra), wherein it was observed:

“In a matter like this, when the citizens are to fight against the Government, the Court has to interdict and dispense justice as far as possible. From the conduct of the plaintiff, that could be seen from the materials placed before me, the defendant has not said anything which could persuade me to say that the continuance of the plaintiff in the Complex would affect the rendering of service to the persons coming to the Complex. Of course, in fiscal matters one has to be careful and in particular when one has to handle public money but that is no reason to deprive a citizen of his legitimate rights. The plaintiff had accepted the decision by the defendant that the income from the Fitness Centre should go to the defendant and as a matter of fact that plaintiff had not objected to anything that is directed to be done by the defendant. Having entered in to a contract and having lulled the plaintiff into a sense of security and the guarantee of continuance of the contract and having stopped the work for nearly five months and having asked the plaintiff to resume work pursuant to the decision of the Governing Council on 10th of November, 1994 it is not open to the defendant to say "I do not want you. I will be incurring loss even though my Auditors or my lawyers may have different opinion. I go by my Malhotra Committee's Report". In my view, this can never be accepted. It is against all canons of principles of law besides being contrary to the principles of natural justice. It is also against the principles of fairness. Therefore, I find no

⁸ MANU/DE/3872/2012

difficulty in coming to the conclusion that the plaintiff has made out a, prima facie, strong case for the grant of injunction.”

89. The principle was again reiterated by another learned Single Judge of this Hon'ble Court (as his Lordship then were) in Pioneer Publicity Corporation (supra), in the following words:

“I have given due thought to the contentions of the rival parties. The freedom which exists under the realm of private contract in respect of the performance of contractual obligation does not apply in the same measure where the Government is a party. Every action of the Government has to pass the rigorous inquisition of fair play, lack of arbitrariness, and its being founded on good and sound reasons. Government's freedom to contract as well as freedom to break free from the obligations of a contract is now rightly restricted in diverse manners. While the Government may enjoy the role of distribution of largesse, it may also suffer from the vulnerability of committing errors or perpetrating an inequitable or unjust implementation of its policies through its faceless and unidentifiable officers and agents. It, therefore, behoves the Court to treat Government contracts in a manner altogether different to that of the compact between private parties. Reliance of Ms. Jyoti Singh on the decisions mentioned above is of no avail as the learned authors of the judgements have taken care to highlight the fact that they had to pronounce upon contracts between private parties. The Hon'ble Supreme Court has opined that even where the State is empowered by a particular clause in a contract to terminate it by a notice simpliciter, the only possible construction that can be given to such a clause is that the reasons which prevailed upon it for justifying the termination need not be conveyed to the adversary. The Apex Court has clarified that such a clause does not permit the taking of arbitrary, biased, unreasonable or an ill-informed decisions.”

90. The decision in Pioneer Public (supra) was noticed and followed by another learned Single Judge of this Court in Atlas Interactive (supra) in the following words:

“12..... It is true that the contracts which are determinable in nature cannot be specifically enforced and injunctions cannot be granted to prevent breach of such contracts but this principle primarily applies to private commercial contracts as

held in the case of 'Rajasthan Breweries'. The case of BSM Contractors was regarding construction of a building. In the case of Vidya Securities, the agreement was for running a restaurant which included catering of food even. Therefore, all these judgments are not squarely applicable to the facts of the present case. Learned Counsel for the petitioner on the other hand relies upon the judgments in Mahabir Auto v. Indian Oil Corporation, MANU/SC/0191/1990 : (1990) 3 SCC 752 : AIR 1990 SC 1031 and Pioneer Publicity v. Delhi Transport Corporation, MANU/DE/0076/2003 : 103 (2003) DLT 442. He argues that the contract may be determinable in nature but since it was for setting up a unique project for which petitioner had procured tailor-made equipment, which could not be utilized anywhere else, specific performance may be ordered. It is argued that in case the petitioner is left to pursue the remedy of damages only it would result in its ruination, as it has already pumped in over Rs. 115 crores in the project. He further argues that there may be a discretion with respondent No. 1 to terminate or not the contract but this discretion should not be exercised arbitrarily without there being goods grounds for terminating the contract. It is submitted that respondent No. 1 is an instrumentality of the State and must act in a fair, just and equitable manner.

13. It is true that the Franchisee Agreement between the parties could be terminated by giving one month's notice or could be determined even after commissioning of the project but considering the fact that the petitioner has invested fairly large amount in the project which is unique and the respondent No. 1 is an instrumentality of the State which remains under an obligation to act in a just and fair manner, it has to be seen as to whether the decision of respondent No. 1 to terminate the Franchisee Agreement is prima facie sustainable or not. In the realm of private contracts, the freedom, which is available to a private party, in respect of the performance of contractual obligations, is not available to the State or its instrumentalities in the same measure because every action of the State has to be just, fair and devoid of arbitrariness. The State or its instrumentalities cannot conduct themselves like ordinary businessmen playing games with others for monetary gains. State cannot behave like a man in the street and indulge in arm-twisting tactics. Its conduct and actions have to be exemplary and decisions have to be free from arbitrariness, bias and unreasonableness. The reputation of the country and its credibility in business world are far

more important than certain economic gains which appear to be unfair and unjust.

(Emphasis supplied)

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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.

(Emphasis supplied)

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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.

(Emphasis supplied)

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91. Once again in *Ramjee Power Construction Ltd.* (supra) the aforesaid principle was reiterated. Although the writ petition came to be dismissed in the said case as the petitioner raised a plea of fraud by his own Chartered Accountant, which became a factual dispute, the legal proposition was once again reiterated. The relief in that case was declined holding the petitioner's conduct as unethical and not on grounds of want of jurisdiction.

92. In *ABL International* (supra), the Hon'ble Supreme Court examined its earlier pronouncements on this very aspect. The Hon'ble Supreme Court dealt with the ratio of a decision of another bench of the same Court in *LIC Vs. Escorts* (supra), which has been relied upon by the counsel for the respondents. In para 13 of the decision in *ABL International* (supra), the Hon'ble Supreme Court observed and quote:

13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of *LIC of India* [MANU/SC/0015/1985 : (1986) 1 SCC

264] proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available. The learned counsel then relied on another judgment of this Court in the case of *State of U.P. v. Bridge & Roof Co. (India) Ltd.* [MANU/SC/0969/1996 : (1996) 6 SCC 22] wherein this Court held: (SCC p. 31, para 21)

Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy - in this case, provided in the contract itself - is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.

(Emphasis supplied).

93. The above highlighted extract clearly shows that the nature of remedy i.e. whether it is a civil proceeding or an arbitration or a writ proceeding, does not have a bearing on the scope of examination of the issues raised by the petitioner/plaintiff/claimant, and the forum, whichever it be, is competent to deal with all issues of arbitrariness or irrationality in action of the State or its instrumentality, in contractual matters. Such a scrutiny is not confined to only a writ proceeding. It is precisely for this reason that the availability of the right to involve arbitration is considered as an "alternative efficacious remedy", and the writ Court normally does not exercise jurisdiction in such cases.

94. The Court further examined what could be meant by public function or discharge of public function or public law domain, as the effect of decision in *LIC Vs. Escorts* (supra) is to restrict interference under writ jurisdiction on contractual matters to actions that pertain to public law domain. The Apex Court observed in para 23 and 24 of the decision in *ABL* (supra):

22. We do not think the above judgment in VST Industries Ltd. [MANU/SC/0760/2000 : (2001) 1 SCC 298 : 2001 SCC (L&S) 227] supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd. [MANU/SC/0760/2000 : (2001) 1 SCC 298 : 2001 SCC (L&S) 227] against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions; failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty, if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was the first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Kumari Shrilekha Vidyarthi v. State of U.P. MANU/SC/0504/1991 : [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] wherein this Court held: (SCC pp. 236-37, paras 22 & 24)

The impact of every State action is also on public interest. ... It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters.

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no

hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2, 50, 000 shares out of which 2, 49, 998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 read:

To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export.

Para 11 of the said object reads thus:

To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest.

24. It is clear from the above two objects of the Company that apart from the fact that the Company is wholly a Government-owned company, it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail.

(Emphasis supplied).

Thus, even in the present case, it cannot be doubted that the actions of the respondent do have a touch of public function, particularly in

view of the background furnished by the petitioner of the manner in which the sick textile mills were sought to be rehabilitated by the government through the instrumentality of the respondent.

96. The principle that even in the realm of contract the State action cannot be arbitrary was once again recognized in *Manubhai Dharam Singh Bhai* (supra), in para 55 -56:

55. Section 24-A, introduced in the 1972 Act, has invited a comment by the learned Solicitor General that the situation has completely changed. The High Court might have made a broad statement that by reason thereof, State within the meaning of Article 12 of the Constitution of India, does not cease to be one, but in our opinion, that is not the point. The point is what would be the effect. Would it mean that two concepts, namely, Article 12 of the Constitution and Section 24-A of the 1972 Act are different? If they are not, in a given case, it may be possible to hold that even while the State shall have more liberty to enter into a contract or fix the terms and conditions thereof having regard to the field of competition opened by reason of taking away of its monopoly status, but there exists a distinction between the acts of a private player and the State. We, however, do not mean to say that even in the field of contract qua contract, the State is not free to negotiate its terms; what we mean to say is that its action cannot be arbitrary. Role of both are different. A private player, as the law stands now, may not be bound to comply with the constitutional requirements of the equality clause but the appellants are.

56. There exists a distinction between a private player in the field and a public sector insurance company. Whereas a private player in the field is only bound by the statutory regulations operating in the field, the public sector insurance companies are also bound by the directions issued by General Insurance Corporation as also the Central Government. They cannot be ignored. The said directions are not said to be in derogation of the statutory provisions. Their validity is not under challenge.

97. The fact that some of the aforesaid decisions were rendered in writ proceedings under Article 226 of the Constitution of India challenging the decision of the State has been arbitrary, though arising out of contractual matters between the State and the citizen makes no difference. As aforesaid, even the Civil Court or an Arbitrator is competent to undertake the examination of the issue

whether the action of the State is arbitrary. Therefore, a challenge to the termination of the MOU on the ground of it being arbitrary can be raised by the petitioner in the present proceedings as well.”

16. Learned counsel for the petitioner contended that a careful reading of Clause 23.1 of the Contract Agreement would clearly establish that it was not one which was by its nature determinable. The submission essentially was that Clause 23.1 enables NHIDCL to terminate the Contract Agreement only upon the occurrence of the eventualities enumerated therein or based on asserted breaches of the Contract Agreement or defaults on the part of the Contractor. It was submitted that the act of termination was thus dependent upon a breach or a default as distinguished from a power that may have vested in NHIDCL to determine the Contract Agreement for any reason whatsoever or for that matter without assigning any reason at all. It was in the aforesaid context that reliance had been placed on the decision in *Narendra Hirawat-I*.

17. It may be recalled that the Bombay High Court while rendering judgment in *Narendra Hirawat-I* had also noticed and approved the principles enunciated by the Kerala High Court in *T.O Abraham*. *T.O Abraham* too was dealing with the interpretation to be accorded to the unamended Section 14 and as it stood prior to the passing of The Specific Relief (Amendment) Act, 2018⁹. *T.O. Abraham* attempts to enunciate the legal position to be that Section 14(d) of the SRA would only apply to contracts which may be determined by either of the parties without assigning any reason. It seeks to expound the scope of

⁹ Act No. 18 of 2018

Section 14(d) to be restricted to contracts where the power of termination is not hinged to a breach or any contemplated event or occurrence.

18. Learned counsel also drew the attention of the Court to the judgment rendered by the Supreme Court in *Narendra Hirawat-II* which had reversed the decision of the Division Bench of the Bombay High Court and upheld *Narendra Hirawat-I*. Mr. Mehta, learned counsel appearing for the petitioner, in view of the above submitted that the Contract Agreement was clearly one which was determinable upon the happening of various contingencies enumerated in Clause 23.1 and thus could not be said to be a contract which would fall within the ambit of the expression “*in its nature determinable*”.

19. Taking the Court through the decisions which were rendered in *Narendra Hirawat-I* and *T.O Abraham*, it was submitted that Section 14(d) has been clearly explained to be a provision which would only be applicable to contracts which are “*inherently determinable*”. Learned counsel contended that where the act of termination was linked to a contingency of default or breach, it would clearly fall outside the scope of Section 14(d). It was in that background that it was submitted that the restriction as placed in Section 14(d) would have no application.

20. It was then urged that this Court must also take due notice of the salient principles which were laid down in *KSL and Industries* and which while recognising the special position of a statutory authority and its actions being liable to be tested on the anvil of Article 14 of

the Constitution, had proceeded to hold that the principles of fairness in action as propounded by our courts would be equally applicable to arbitration proceedings. Mr. Mehta further submitted that bearing in mind the fact that the petitioner had already completed almost 89% of the Total Project Work, the action of NHIDCL was wholly arbitrary and would, in any case, not subserve public interest. It was thus urged that the Court may consider according the petitioner an opportunity to complete the project work within a period of two to three months.

21. Insofar as the issue of forged bank guarantees is concerned, Mr. Mehta submitted that no fault could be attributed to the petitioner since it had relied upon a Financial Consultant who had obtained the bank guarantees which were ultimately submitted to NHIDCL. It was contended that the petitioner who had been awarded a contract valued at INR 128 crores would have had no intention to jeopardise the award of contract by submitting forged bank guarantees. It was also contended that the bank guarantees themselves had borne the signatures of the officers of the Punjab National Bank and had been duly routed through the computerised system maintained by that financial institution. In light of the aforesaid facts, it was urged that the findings to the contrary as recorded in the Termination Notice, cannot be sustained.

22. Controverting those submissions, Mr. Tandon, learned counsel appearing for the respondent no.1, submitted that an ex-facie examination of the various provisions of the Contract Agreement would irrefutably establish that it was a determinable contract. Mr.

Tandon contended that merely because the power to terminate was hedged or dependent upon the happening of various enumerated eventualities, the same would not detract from the contract being recognised as inherently determinable. It was the submission of Mr. Tandon that the law as propounded in *T.O Abraham and Narendra Hirawat-I* would clearly be contrary to the succinct exposition of the ambit of Section 14 of the SRA as appearing in the decision of the Supreme Court in **Indian Oil Corporation Ltd. v. Amritsar Gas Service**¹⁰. Mr. Tandon referred to the following passages from that decision: -

“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 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

¹⁰ (1991) 1 SCC 533

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 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.”

23. It was further argued that the challenge to the Termination Notice on grounds of arbitrariness and founded on Article 14 of the Constitution would clearly not be issues germane for the purposes of considering the prayers as sought in the present petition under Section 9 of the Act. Mr. Tandon drew the attention of the Court to the decision rendered by the Division Bench of the Court in **Rajasthan Breweries Ltd. vs. The Stroh Brewery Company**¹¹ which had held that issues relating to the validity or otherwise of termination of the contract must be left for determination by the Arbitral Tribunal. Reliance was placed on the following observations as entered by the Division Bench in *Rajasthan Breweries Ltd.*: -

“The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined

¹¹ 2000 SCC OnLine Del 481

in Section 16(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.

Learned Single Judge considered various covenants of the agreement and referred to clause 8 to the Technical Assistance Agreement regarding termination saving that similar provision is incorporated in the Technical know-how Agreement and both agreements provide that the same could be terminated even by the appellant at its option at the occurrence of any of the events, which are specifically mentioned in the agreement. Learned Single Judge extracted clauses relating to Technical Assistance Agreement under which the respondent could terminate the contract and as the termination had to take place at the instance of the respondent, therefore, events under which the appellant could terminate are not extracted. We were taken through various clauses and it is not disputed and has also rightly been pointed out by learned Single Judge that there is no negative covenant in the agreements in question. As there was no negative covenant, it was observed by learned Single Judge that agreements could be terminated by the respondent on the happening of any of the events mentioned in clause 8 of the Technical Assistance Agreement and under similar corresponding clause in Technical Know-how Agreement. Accordingly, learned Single Judge held that since agreement was determinable at the behest of respondent, therefore, the same was determinable in nature and is revocable at the option of both the parties at the happening of any of the events mentioned therein.

Learned counsel for the appellant contended that the word “determinable” used in clause (c) to sub-section (1) of Section 14 means that which can be put an end to. Determination is putting of a thing to an end. The clause enacts that a contract cannot be

specifically enforced if it is, in its nature, determinable not by the parties but only by the defendant. Although clause does not add the word “by the parties or by the defendant” yet that is the sense in which it ought to be understood. Therefore, all revocable deeds and voidable contracts may fall within “determinable” contracts and the principle on which specific performance of such an agreement would not be granted is that the Court will not go through the idle ceremony of ordering the execution of a deed or instrument, which is revocable at the will of the executant. Specific performance cannot be granted of a terminable contract.

We are unable to persuade ourselves to accept the submissions put forth on behalf of the appellant that when a contract is determinable by the parties, the same cannot be treated as such a contract as is referred to in clause (c) to sub-section (1) of Section 14 is a contract, which in its nature is determinable.

xxx

In *Classic Motors Ltd. v. M/s. Maruti Udyog Ltd.*, (1997) 65 DLT 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 reason 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.”

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.”

24. Insofar as the imputation of public law principles by virtue of NHIDCL being State within the meaning of Article 12 of the Constitution is concerned, Mr. Tandon contended that those would clearly have no application bearing in mind the nature of the jurisdiction which the Court is called upon to exercise while considering the present petition. According to Mr. Tandon, while dealing with an application under Section 9 of the Act, it would be wholly impermissible for the Court to test the action of termination based on principles underlying Article 14 of the Constitution. Mr. Tandon submitted that more importantly, even it were to be found that the action of NHIDCL were arbitrary, the same cannot possibly be read as empowering the Court to ignore the prohibitions as embodied in Section 14(d) of the SRA.

25. Mr. Tandon then submitted that the aspect of Article 14 principles not being applicable to disputes of the present character was highlighted by a Division Bench of the Court in **MIC Electronics Ltd. v. Municipal Corporation of Delhi & Anr.**¹². This submission was sought to be buttressed from the observations as appearing in the following paragraphs: -

“9. Coming to the submissions made on behalf of the parties, the principal contention of the Appellant is that the relationship between the parties would be governed by public law principles

¹² 2011 SCC OnLine Del 766

and not by the private law principles governing contractual matters. In this behalf, it is observed that in *ABL International Ltd.* (supra), whilst relying on the law laid down in *Shrilekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212, the Supreme Court held that the requirements of Article 14 extends even in the sphere of contractual matters and the claim of the parties to be governed therein does not undergo a radical change merely because some contractual rights accrue to the other party in addition. Therefore, in other words, it was held that total exclusion of Article 14 - non-arbitrariness which is basic rule of law - from State actions in contractual field is not justified. Thus, the Supreme Court held that the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. However, it is observed that the decision of the Supreme Court in *ABL International Ltd.* (supra) is not an authority for the proposition that the mutual rights and liabilities of the parties where the contracts are freely entered into with the State are exclusively governed by public law principles and not by the terms and conditions of the contracts and the laws relating to contracts.

10. Further, in *Assistant Excise Commissioner v. Issac Peter* reported as (1994) 4 SCC 104, the Supreme Court held : -

“26. Learned Counsel for Respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory - at least to the extent of previous year's supplies - by applying the said doctrine. It is submitted that if this is not done, the licencees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness of the duty to

act fairly and reasonably is a doctrine developed in the administrative law field to ensure the Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language. But this is not what the licencees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licencees to lift all that stocks. The licencees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned, counsel for the licencees do not support their proposition. In *Dwarkanadas Marfatia v. Board of Trustees of the Port of Bombay*, (1989) 3 SCC 293, it was held that where a public authority is exempted from the operation of a Statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. *Shrilekha Vidyarthi v. State of U.P.*, (1991) 1 SCC 212, was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned Counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for

the purpose of altering or adding to the terms conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does no guarantee profit to the licencees in such contracts. There is no warranty against incurring losses. It is a businesses for the licencees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the Contract. It is not as if the licencees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.”

11. The decision in *Issac Peter* (supra) was re-stated with approval and affirmed by the Supreme Court in *S.K. Jain v. State of Haryana* reported as (2009) 4 SCC 357. These decisions of the Supreme Court therefore affirm the view that in case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms of the contracts, merely because it happens to be the State. In such cases the mutual rights and liabilities of the parties are governed by the terms of the contracts and the law relating to contracts. It is seen that the contract in the present case was entered into pursuant to floating of tender and there was no compulsion on anyone to enter into the contract. Therefore, there can be no question of State power being involved in such a voluntary contract. Therefore, there is no force in the submission made on behalf of the Appellant that only public law principles would exclusively apply to the relationship between the parties and that private law principles flowing from the terms of the contract would have no application to the subject contract. Even otherwise it is noted that the

cancellation of the licence had taken place after issuance of a show cause notice and calling for the reply of the Appellant.

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

13. In *Rajasthan Breweries Ltd.* (supra), a Division Bench of this Court observed that, at the most, in case ultimately it is found that termination is bad in law or contrary to the terms of agreement or of any understanding between the parties or for any other reason, the remedy of the Appellant was to seek compensation for wrongful termination and not a claim for specific performance of the agreement. Further, in this view of the matter, there was every reason to come to the conclusion that the relief sought by the Appellant in terms of an injunction seeking to specifically enforce the agreement, by permitting the Appellant to continue to operate the 9 LED screens installed them, was statutorily prohibited with respect to a contract which is determinable in nature.”

26. Mr. Tandon further submitted that once the termination notice has come into effect, the Court would clearly not be justified in

framing a mandatory injunction and restoring the status quo ante. According to Mr. Tandon, there exists no justification in law for the Court to frame an injunction which would amount to restoration of a terminated contract and that too when it was clearly determinable. Mr. Tandon submitted that the grant of interim measures on lines as sought by the petitioner would clearly fall foul of the principles underlying Section 14 and would thus be impermissible in law. Reliance in this respect was placed on the following passages from the decision rendered by a learned Judge in **Overnite Express Ltd. v. DMRC**¹³: -

“38. 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

¹³ 2020 SCC OnLine Del 2093

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.”

39. Following this judgment, this Court in *Rajasthan Breweries Ltd. v. 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.”

40. In the case of *V.F. Services (UK) Ltd. v. Union of India*, 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....”

41. 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”

27. Mr. Tandon submitted that the injunct against the relief of restoration post an order of termination coming into effect was also highlighted by the Court in **Indian Railways Catering and Tourism Corp. Ltd. V. Cox and Kings India Ltd.**¹⁴ The Division Bench judgement had thereafter been upheld by the Supreme Court in **Cox & Kings India Ltd. v. Indian Railways Catering & Tourism Corpn. Ltd**¹⁵. This Court in *Indian Railways* had observed as follows: -

“23. The position that prevails today is that the Joint Venture Agreement stands terminated insofar as M/s C&K and IRCTC are concerned. Likewise, the arrangement between IRCTC and Joint Venture company, whether adhoc or otherwise, stands terminated. Whether termination of Joint Venture Agreement is bad in law or it was justified can be resolved by means of arbitration to be decided by the arbitral tribunal. Whether arrangement for running the train which was between IRCTC and Joint Venture company is terminated validly or not is again an issue which can be decided by the arbitral tribunal in the arbitration proceedings whether between IRCTC and Joint Venture company or in tripartite arbitration, if such tripartite arbitration is permissible in law. (We may clarify that we are not suggesting as to which proceedings would be appropriate). At this stage, we only commend that learned Single Judge is right in observing that the Court, while dealing with application under Section 9 of the Act, would not go into the contentions of the parties and decide as to whether termination of agreement is valid or not. That is the issue which has to be settled in the main arbitral proceedings. The learned Single Judge is also right in observing that in these proceedings, Court cannot restore the Joint Venture Agreement which has been terminated/rescinded. No doubt, Mr. Desai, learned senior counsel for M/s C&K has filed the counter objections to the impugned judgment assailing the

¹⁴ 2012 SCC OnLine Del 113

¹⁵ (2012) 7 SCC 587

aforesaid part of the judgment. The appellants had objected to the maintainability of such objections. However, it is not necessary to go into the same inasmuch as on merits, we feel that the learned Single Judge has rightly held that it is not within the scope of Section 9 to deal with these contentions which would be the subject matter of main arbitration proceedings and the jurisdiction lies entirely with the arbitral tribunal to decide these substantial issues touching the merits of the dispute. Para 17 of the Division Bench judgment of this Court in the case of *Bharat Catering Corporation v. Indian Railway Catering and Tourism Corporation*, 164 (2009) DLT 530 (DB) is a complete answer wherein it was held:

“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. The provisions of Section 9, for the sake of convenience, are FAO(OS) 226/2009 Page No. 15 of 20 extracted below : -

“9. Interim measures, etc. by Court.-A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

- (i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or
- (ii) for an interim measure of protection in respect of any of the following matters, namely : -
 - (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

- (b) securing the amount in dispute in the arbitration;
- (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;
- (d) interim injunction or the appointment of a receiver;
- (e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

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.

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 when, admittedly, even the 'Lease Agreement' as per the terms of the Joint Venture Agreement was to be between JV company and IRCTC."

28. While upholding the judgment handed down by the Division Bench of our Court, the Supreme Court in *Cox & Kings* held as under:-

"25. It is evident from the submissions made on behalf of the respective parties that the arrangement between Respondent 1 Irctc, was with the petitioner Company and, although, it was the intention of the parties by virtue of the joint venture agreement that the luxury train, belonging to Respondent 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 Respondent 1 in favour of the joint venture company. As pointed out by the Division Bench of the High Court, the petitioner 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 petitioner 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 petitioner to operate the luxury train indefinitely, till a decision was arrived at in the Section 9 application.

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

any of the terms and conditions of the joint venture agreement and the memorandum of understanding.”

29. Having noticed the submissions addressed, the Court notes that Section 14 of the SRA specifies contracts which are not specifically enforceable. Clause (d) of Section 14 stipulates that a contract which is in its nature determinable cannot be specifically enforced. Resultantly, the grant of an injunction in respect of such a contract stands prohibited in light of Section 41(e) of the SRA and which prescribes that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. The first issue which therefore arises for consideration is whether the Contract Agreement in the present case is one which would fall within the parameters of Section 14(d) of the SRA.

30. The Court notes that a learned Judge of this Court in **M/S Turnaround Logistics P. LTD. vs. M S Jet Airways India LTD. & Ors.**¹⁶ while dealing with the scope and ambit of Section 14(d) had interpreted the word “*determinable*” to mean any contract which could be put to an end. It had observed that all revocable contracts would thus fall within the breadth of the expression “*determinable contracts*”. The learned Judge went further to pertinently observe that Section 14(d) would thus extend not only to voidable contracts but also to those which stipulated or envisaged termination on the happening of a particular event. The provisions of Section 14 of the SRA were explained in *M/S Turnaround Logistics* in the following terms: -

¹⁶ LNIND 2006 Del 772

“24. Perusal of these sections reflect that a contract cannot be specifically enforced which in its nature is determinable and injunctions are not to be granted on breach of contract, non-performance of which could not be specifically enforced and/or when a party has an equally efficacious remedy available to him. Under section 14 (1) (a) of the Specific Relief Act, the specific performance of an agreement cannot be granted, breach of which can be compensated by money. The plaintiff has impugned the action of the defendant no.1 in terminating the contract before the expiry of the period of contract. Prima facie, the inference drawn is that the agreement/business carried by the plaintiff and defendant no. 1 could be terminated and has been validly terminated. Even if the inference is that the agreement between the parties was not terminated validly and could not be terminated, then the plaintiff shall only be entitled for damages which will be adequate relief in the facts and circumstances.

25. Section 14 (1) (c) of the Specific Relief Act also prohibits specific performance of an agreement which by its nature is determinable. Under section 41 no injunction can be granted to prevent the breach of contract performance of which cannot be specifically enforced. For this proposition reliance can be placed on the decision of Apex Court in Indian Oil Corp. Ltd. v. Amritsar Gas Service, (1991) 1 SCC 533 in which case distributorship agreement made between Indian oil Corporation and Amritsar Gas Service as distributor of the Corporation for sale of Corporation & liquefied petroleum gas was determined under clause 27 of the agreement which provided for termination of the agreement of the Corporation forthwith on happening of the specific events while clause 28 provided that without prejudice to the other provisions of the agreement, it could be terminated by giving 30 days notice to the other party without assigning any reasons. The Supreme Court while looking into the said clauses and section 14 and section 41 of the Specific Relief Act had held: 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 revocable 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 revocable 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 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.

27. The plaintiff is not entitled for any relief in respect of an agreement/business dealing which is determinable and which has been determined. Even if the determination is not in accordance with the terms and conditions, it will only entitle a party for damages and not specific performance of the agreement. What is to be seen in the facts and circumstances is whether the contract was determinable or not. The word determinable used in clause (c) to Sub-Section (1) of Sub-Section 14 means a contract which can be put to an end. The said provision contemplates that a contract cannot be specifically enforced if by its nature it will be determinable. Thus all revocable deeds and voidable contracts will fall within determinable contracts and the principle on which a specific performance of an agreement would not be granted is that the Court shall not go through the ideal ceremony of ordering the execution of deed or instrument which is revocable and ultimately can not be enforced as specific performance cannot be granted of a determinable contract. What emerges unequivocally is that it is not only voidable contracts but where the contract provides that it is terminable on a particular event, even then it must be taken in

terms of Section 14 (1)(c) of the Specific Relief Act that the contract would be determinable and in such an event Section 14(1) (c) read with, Section 41 (e) of the Specific Relief Act , an injunction as such will not be granted. Relying on *Stafford shire Area Health Authority Vs South Staffordshire Waterworks Co*, [1978] 3 All E R 769 it was contended that even those agreements which contains no provision for determination can be terminated. Lord Denning MR had held as under:

“We were taken through six cases which considered contracts which contained no provision for determination. On going through them, they seem to show that, when a person agrees to supply goods or services continuously over an unlimited period of time in return for a fixed monthly or yearly payment, the Courts shrink from holding it to be an agreement in perpetuity. The reason is because it is so unequal. The cost of supply of goods and services goes up with inflation through the rooftops: and the fixed payment goes down to the bottom of the well so that it is worth little or nothing. Rather than tolerate such inequalities, the Courts will construe the contract so as to hold that it is determinable by reasonable notice. They do this by reference to the modern rule of construction. They say that in the circumstances as they have developed, which the parties never had in mind, the contract ceases to bind the parties forever. It can be determined on reasonable notice.”

31. In **National Highways Authority of India v. Panipat Jalandhar NH-I Tollway Pvt. Ltd.**¹⁷, a Division Bench of our Court was called upon to answer an identical question, namely, the scope and ambit of Section 14(d). The said decision assumes significance since the Court was dealing with a highway construction project contract and which embodied identical clauses relating to termination, cure period and other like provisions. In *National Highways Authority of India*, one of the arguments which was addressed was that since the contract was terminable, albeit on the occurrence of a breach or

¹⁷ 2021 SCC OnLine Del 2632

default, it was liable to be viewed as one falling within the scope of Section 14(d) and therefore the grant of an injunction being impermissible in law. *National Highways Authority of India* assumes additional significance since the Division Bench there had an occasion to notice *Narendra Hirawat-I* also. While ruling on the aforesaid issue, the Division Bench had observed as follows: -

“20. Relying on several judgments, including *Indian Oil Corporation Ltd. v. Amritsar Gas Service*, (1991) 1 SCC 533; *Jindal Steel and Power Limited v. SAP India Pvt. Ltd.*, 2015 SCC OnLine Del 10067 and *Inter Ads Exhibition Pvt. Ltd. v. Busworld International Cooperatieve Vennootschap Met Beperkte Ansprakelijkheid*, judgment dated 1st May, 2020 in FAO(OS)(COMM) 23/2020, the contention on behalf of the appellant was that when the contract was determinable, no injunction against termination and enforcement of the contract could have been issued, as has been done by the learned Single Judge. Much reliance has been placed by the respondent/PJT on two cases, namely, *Narendra Hirawat* (supra) and *Jumbo World Holdings* (supra), the argument being that the CA was not in its nature “determinable” and therefore, Section 14(1)(c) and Section 41 of the Specific Relief Act, 1963 (“SRA”, for short) have no application in the present case. While the facts in both the cases were vastly different from that prevailing in the instant case, these two judgments, even otherwise, are not applicable to the instant case. A perusal of these judgments reveals that the learned Single Judges in both the cases have themselves distinguished these cases from *Indian Oil Corporation Ltd.* (supra) and *Jindal Steel* (supra). In *Narendra Hirawat* (supra), for instance, the court observed as under:—

“9. The cases cited by learned Counsel for the defendants are clearly distinguishable on facts. In *Indian Oil Corporation* (supra), the contract (clause-28 of the distributorship agreement) gave right to either party to determine the agreement by giving 30 days' notice and the only relief that was permissible in such a case was award of a compensation for the period of notice, that is to say, 30 days. It is in the context of this clause that the Supreme Court held that the respondent before it (original plaintiff) was not entitled to restoration of its distributorship terminated by the appellant (original defendant), but only entitled to compensation for

loss of earning for the notice period of 30 days, since such notice was not given by the defendant to the plaintiff. Likewise, in Jindal Steel and Power Ltd. (supra), the relevant clause of the contract gave right to the respondent before the Court (original defendant) to terminate the licence after giving 30 days' notice to the petitioner (original plaintiff). In pursuance of this clause, a learned Single Judge of Delhi High Court held that the contract was determinable by its very nature. In Spice Digital Ltd. (supra), the relevant contract (clause 6.2 of the agreement before the Court) gave right to either party to the contract to terminate the agreement upon a 30 days' prior written notice to the other party without assigning any reason for such termination. Once again, it is in the context of such unilateral right of termination that the Court came to a conclusion that the contract was, by its very nature, determinable and no specific performance could be claimed. All these cases are clearly distinguishable and do not support the defendants' case here."

21. Likewise, in *Jumbo World Holdings Ltd.* (supra), while the learned Single Judge has set out five categories of contracts that are determinable for the purposes of Section 14(1)(c) of the SRA, but also observed as under:-

"In my view, although the Indian Oil case referred to clause 27 thereof, which provided for termination forthwith "for cause", the decision turned on clause 28 thereof, which provided for "no fault" termination, as discussed earlier."

22. In *Indian Oil Corporation Ltd.* (supra), the court was dealing with the question of validity of termination of Distributorship Agreement. The learned Arbitrator had concluded that the termination was not in accordance with the Clause 27 of the Distributorship Agreement but went on to hold that the Award would not fetter the rights of the defendant/Corporation to terminate the distributorship of the plaintiff in accordance with the said Agreement, if such an occasion arises. In this context, the Supreme Court observed as below:—

"12. 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 'a contract 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."

23. A similar conclusion was drawn by the learned Single Judge of this court in *Jindal Steel* (supra) and by the Division Bench of this court in *Inter Ads Exhibition* (supra). Relevant observations in *Inter Ads Exhibition* (supra) are as under:—

"13. Whether the termination notice dated 15.03.2019, met the requirements of Article 12.4 or not and thus, whether the termination was a valid termination or not, would be questions that have to be examined and adjudicated upon by the learned Arbitrator, to be appointed by the parties to resolve their disputes. It would also be for the learned Arbitrator to reconcile Article 7.1 with the recitals in the JVA-II dated 25.10.2011, as reproduced hereinabove, limiting the agreement to four editions. Under Article 7, termination can be either mutually agreed to under Article 7.2 or at the option of either party, on the occurrence of certain events, as listed under Article 7.3, which contemplates a termination with penalty. Again, the question whether the respondent had given 30 days' time to the appellant to make good the default, duly specified in reasonable detail in the communications exchanged

between the parties, is not for this court to inquire into. Suffice it is to state that in either event, the agreement was terminable and therefore, the conclusion arrived at by the learned Single Judge that specific performance of the contract could not be granted and nor could any injunction be issued restraining the respondent from giving effect to the notice dated 15.03.2019, as that would in effect amount to enforcement of the contract beyond the said date i.e. 15.03.2019, cannot be faulted.

14. The learned Single Judge has rightly relied on a decision of this court in MIC Electronics Ltd. v. Municipal Corporation of Delhi, 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.”

24. To our mind, therefore, the decisions in *Narendra Hirawat* (supra) and *Jumbo World Holdings Ltd.* (supra) will not come to the aid and assistance of the respondent/PJT.

25. The Articles and Clauses of the CA leave no manner of doubt that the CA is determinable. Just as in *Indian Oil Corporation Ltd.* (supra), both parties have been given a right to seek termination of the CA by issuing a notice under Article 37 and specifically, Clause 37.1.2. (NHAI's right) and Clause 37.2.2 (Concessionaire's right). Termination under Article 37 would be on account of the various concessionaire's defaults or Authority default. Various time periods ranging from 15 days to 90 days have been provided under Clause 37.1.1 and Clause 37.2 for removal of defaults by the defaulting party, and the failure to remove such defaults within the time specified would give the other party a right to issue a termination notice of 15 days.

26. If the NHAI issues the termination notice, then they have to send a copy of the same to the Senior Lenders under Clause 37.1.3 so that they could either make a representation disclosing their intention to substitute the concessionaire or procure that the default specified in the notice would be cured within a period of 180 days so that after the defaults were cured, the Authority could withdraw the notice of termination and restore all rights to the concessionaire.

27. It is also necessary to note that there is also a termination provided under Article 36. When suspension is not revoked within 180 days, then automatically there would be a “deemed termination by mutual agreement”. Thus, if the NHAI suspends the right of the concessionaire and neither the concessionaire, i.e. the respondent/PJT, removes the defects within 90 days, nor the NHAI revokes the suspension within a period of 180 days, then, without anything being done by either side, i.e. curing of the defaults (Clause 36.3.2) within 90 days and revocation of suspension (Clause 36.5.2) within 180 days, the CA is automatically terminated.”

32. In *Narendra Hirawat-I*, the learned Judge of the Bombay High Court had explained the provisions of Section 14(d) to be restricted to only such contracts which may be determinable at the option of either of the parties to the contract and unconnected with an allegation of breach on account of an eventuality or circumstance. *Narendra Hirawat-I* explains Section 14(d) to be relevant and applicable only to such contracts where unilateral rights are conferred for termination

without assigning any reason for such acts of termination. It proceeded further to hold that where a contract is determinable only in the eventuality of an allegation of breach, it would undoubtedly not be a contract which is in its nature determinable. *Narendra Hirawat-I* thus appears to follow a line of reasoning which was propounded by the Kerala High Court in *T.O Abraham*.

33. In *T.O Abraham* the Kerala High Court held that Section 14(1)(c) of the unamended SRA would be confined to contracts which are “*inherently determinable*”. It was in *T.O Abraham* that it had been observed that an agreement which is shown to be determinable on the occurrence of an event or exigency cannot possibly fall within the specie of an inherently determinable contract. It becomes pertinent to note that *Narendra Hirawat-I* was essentially a decision which dealt with the question of whether an injunction was liable to be granted consequent to disputes arising out of a film license agreement which had been executed between the parties and which was followed by a deed of settlement envisaging payments being made in instalments. The defendants before the Bombay High Court had proceeded to terminate the film license agreement on a purported default to deposit the installments. While dealing with the terms of those agreements, the Bombay High Court had found that payments in tranches had, in fact, been made. It also took note of the fact that in certain instances, the allegations of default related to instalments due and payable prior to the receipt of payments subsequently. It was while answering the question of whether an injunction should be granted at that stage and was merited that certain observations came to be rendered with respect

to the ambit of Section 14(d). What needs to be emphasized is that in *Narendra Hirawat-I*, the High Court on a due consideration of the terms of the contract came to conclude that parties had contemplated the same being capable of being specifically enforced. It may also be noted, at this juncture itself, that in *Narendra Hirawat-II*, the Supreme Court does not appear to have affirmed the enunciation of the legal position relating to Section 14(d) as appearing in the decision of the learned Single Judge of the Bombay High Court. As would be evident from a reading of *Narendra Hirawat-II*, what ultimately appears to have weighed upon the Supreme Court was whether the Division Bench of the Bombay High Court was justified in interfering with the grant of injunction by the learned Single Judge. This becomes palpably clear from the following passages as appearing in *Narendra Hirawat-II*: -

“17. Even otherwise, we are of the opinion that interference by the Division Bench of the High Court in appeal against the order of the learned Single Judge granting the injunction was not justified specially when the injunction order passed could not, in our opinion, be said to be perverse or unjustified in law. Several authorities were cited on behalf of the learned counsel for the parties outlining the principles for granting interim injunction. In *Wander Ltd. v. Antox India P. Ltd.* [1990 Supp SCC 727], it had been held:—

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a

conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. In *Printers (Mysore) Private Ltd. v. Pothan Joseph* [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseinton & Co. v. Jhanaton* [[1942] A.C. 130] ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

21. Accordingly, as we are of the firm view that the appellant has made out a prima facie case for grant of injunction and also that the balance of convenience is in favour of the appellant - NHC, hence we allow these appeals. The Single Judge's order was founded on sound reasoning and we find no fault in exercise of discretion by the Single Judge in granting the order of injunction. We, thus, set aside the order passed by the Division Bench of the High Court and restore the order of the learned Single Judge. The learned Single Judge, however, is requested to expedite the hearing of the suit and decide the same as expeditiously as possible, preferably within one year, in accordance with law and without being influenced by any observations made by the Single Judge while granting the injunction order or by the Division Bench of the High Court passed in appeal, as well as by this Court. The parties shall not seek any unnecessary adjournment in the High Court.”

While it is true that the Supreme Court while allowing the appeal had observed that the Single Judge's order was founded on sound reasoning, the same cannot possibly be understood as being an

affirmation of the meaning of a determinable contract as propounded by the Single Judge of the Bombay High Court.

34. As was noticed hereinabove *Narendra Hirawat-I* had adopted the principles enunciated by the Kerala High Court in *T.O Abraham*. It would be pertinent to note that *T.O Abraham* was rendered in the context of Clause 13 of the contract agreement which formed the subject matter of consideration. A reading of Clause 13 of the contract establishes that parties had agreed for a refund of advance monies paid “if for any reason (not expected in the normal course) this agreement could not be completed”. Clause 13 was worded as under: -

“13. It is also agreed by the Vendors/shares that of for any reason (not expected in the normal cause) this agreement could not be completed due to any of the reasons breach or default of the Vendors they shall repay the advance paid amount of Rs. 1,50,00,000/- (Rupees One Crores Fifty Lakhs only) with 12% interest per annum less the value of Rubber Trees sold by the vendee and in failure the vendee will be free to realize such amounts from the assets of the company mainly from the schedule property.”

35. It was in the aforesaid backdrop that the Kerala High Court had observed that the vendor had clearly agreed not to resile from the contract in the normal course and even if there occurred a breach or violation of any obligations, the liability of parties would then be confined to a refund of the monies agreed upon. It was in the backdrop of Clause 13 that the Kerala High Court had come to conclude that that the contract was not “inherently determinable”. It becomes further pertinent to observe that the Kerala High Court proceeds on the premise that Section 14(d) uses the expression

“inherently determinable”. However, at no stage of its legislative journey did the provision employ that phrase.

36. The Court further finds that the aforesaid decisions of the Bombay and Kerala High Courts had also fallen for consideration of this Court in **DLF Home Developers Limited v. Shipra Estate Limited**¹⁸. While dealing with the scope of Section 14, the Court in *DLF Home Developers* had made the following pertinent observations: -

“78. Section 14 of the Specific Relief Act, 1963 sets out certain classes of contracts that are not specifically enforceable. One such class of contracts comprises of contracts, which are in their nature determinable. Clause (d) of Section 21 of the Specific Relief Act, 1877 expressly provided that contracts which are in their nature ‘revocable’ are unenforceable. The said statute was repealed and replaced by the Specific Relief Act, 1963. Clause (c) of Section 14(1) of the Specific Relief Act, 1963, as was in force prior to Specific Relief Act, 1877, expressly provided that contracts, which are in the nature determinable, were not specifically enforceable. The word ‘revocable’ as used in Clause (d) of Section 21 of the Specific Relief Act, 1877 was replaced by the word ‘determinable’. The rationale for excluding such contracts, which are in their nature determinable, from the ambit of those contracts which may be specifically enforced, is apparent. There would be little purpose in granting the relief of specific performance of a contract, which the parties were entitled to terminate or otherwise determine. The relief of specific performance is an equitable relief. It is founded on the principle that the parties to a contract must be entitled to the benefits from the contracts entered into by them. However, if the terms or the nature of that contract entitles the parties to terminate the contract, there would be little purpose in directing specific performance of that contract. Plainly, no such relief can be granted in equity.

79. Viewed in the aforesaid perspective, it is at once apparent that the contract is in its nature determinable if the same can be terminated or its specific performance can be avoided by the parties. Thus, contracts that can be terminated by the parties at will

¹⁸ 2021 SCC OnLine Del 4902

or are in respect of relationships, which either party can terminate; would be contracts that in their nature are determinable. If a party can repudiate the contract at its will, it is obvious that the same cannot be enforced against the said party.

80. However, if a party cannot terminate the contract as long as the other party is willing to perform its obligations, the contract cannot be considered as determinable and it would, in equity, be liable to be enforced against a party that fails to perform the same. Almost all contracts can be terminated by a party if the other party fails to perform its obligations. Such a contract cannot be stated to be determinable solely because it can be terminated by a party if the other party is in breach of its obligations. The party who is not in default would, in equity, be entitled to seek performance of that contract. In such cases, it cannot be an answer to the non-defaulting party's claim that the other party could avoid the contract of the party seeking specific performance, had breached the contract; therefore, the same is not specifically enforceable. Thus, the question whether a contract is in its nature determinable, must be answered by ascertaining whether the party against whom it is sought to be enforced would otherwise have the right to terminate or determine the contract even though the other party are ready and willing to perform the contract and are not in default."

37. Proceeding further to notice the decisions in *Amritsar Gas*, this Court proceeded to observe as follows: -

"90. The decision in *Indian Oil Corporation Ltd. v. Amritsar Gas Service* (supra) essentially, rested on two grounds. First, the conclusion of the arbitral tribunal that the contract in question was determinable. In view of this finding, it was clearly not open for the arbitral tribunal to have directed specific performance of the contract. Second and more important, the fact that the contract in question (Distributorship Agreement) could otherwise be terminated by either party by giving thirty days' notice. Clearly, if the terms of a contract entitles either of the parties to terminate the same in its absolute discretion, it would be inequitable to denude the parties of their right to otherwise terminate the same. Enforcing specific performance of a contract of its nature would clearly be a futile exercise. Plainly, such contracts, which can be determined by either parties at will in their absolute discretion, are contracts which in their nature are determinable and therefore, the parties to such contracts cannot in equity seek specific performance against a party, by completely ignoring its right to terminate the same at will.

91. The decision in the case of *Rajasthan Breweries Ltd. v. The Stroh Brewery Company* (supra) is not strictly applicable to the facts of the present case. In that case, the appellant had sought a temporary injunction seeking stay of the notices of termination issued by the respondent. In that case, the Technical Knowhow Agreement as well as the Technical Assistance Agreement executed between the parties were terminated. In terms of the contracts, the appellant had agreed to render services and also provide the knowhow. The respondent terminated these agreements alleging that the appellant had failed to meet the requisite quality and standards. In a contract of this nature, the purchaser could not be compelled to accept technical assistance and knowhow, which according to it were not up to the standards. On the other hand, the appellant's claim could be satisfied by the amount payable under the said contracts if it was found that the termination was illegal. It is important to note that the court concluded that “*even in absence of a specific clause authorizing and enabling either party to terminate the agreement in the event of happening of events specified therein the same could be terminated even without assigning any reason by serving a reasonable notice*”. It is obvious that the court found that the contract in question was “*in its nature determinable*”

38. In *DLF Home Developers*, the learned Judge also had an occasion to consider certain other decisions rendered by the Orissa and Gujarat High Courts on the subject. The Court deems it apposite to reproduce the following paragraphs which deal with this issue: -

“**92.** In *Orissa Manganeses and Minerals (Pvt.) Ltd. v. Adhunik Steel Ltd.*, AIR 2005 Ori 113, the Orissa High Court considered a contract which entitled either party to terminate the contract if after issuing ninety-days' notice to remedy the breach, the same was not cured. The court did not accept the agreement in question was in its nature determinable and not specifically enforceable. It held that since “*only in the event either party fails to remedy the breach, the agreement can be terminated. Therefore, it cannot be said that the agreement is determinable at the instance of either party*”. This decision was carried in appeal before the Supreme Court. The Supreme Court did not upset the aforesaid view; it modified the order and restrained the appellant from creating any third-party rights in respect of the mine in

question and also restrained the appellant from contracting with any third party to carry on the mining operations. [*Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.* : (2007) 7 SCC 125].

93. In *Intercontinental Hotels Group India Pvt. Ltd. v. Shiva Satya Hotels Pvt. Ltd.*, 2013 SCC OnLine Guj 8678, the Gujarat High Court considered the question whether the contract in that case was determinable. The Court held that the expression determinable could be considered as synonymous to revocable. The Court noted that in *Rajasthan Breweries Ltd. v. The Stroh Brewery Company* (supra), this Court had given one test and in *Adhunik Steel Ltd.* (supra), the Orissa High Court had taken a somewhat different view. After considering the meaning of the expression 'in its nature determinable' as used in Section 14(1)(c) [renumbered as clause (d) of Section 14(1) as substituted by Act 18 of 2018 with effect from 1.10.2018] of the Specific Relief Act, 1963, the Court held that the question, whether an agreement is in its nature determinable, would require one to address the question whether it is possible to issue an order of specific performance and enforce that order. The relevant extract of the decision is set out below:

"47. What is meant by determinable? Its dictionary meaning as per *Oxford English Dictionary* is, (i) Fixed definable (ii) Able to be authoritatively decided, definitely fixed or definitely ascertained and (iii) Liable to come to an end, terminable. In the earlier Act i.e. Specific Relief Act, 1877-Clause (d) of Section 21 had used the word 'revocable'. The Law Commission had suggested that 'revocable' is not the proper expression. Following the recommendation of Law Commission, the word 'determinable' is introduced. So, word 'determinable' can be considered as a synonyms of word 'revocable'. Further, when term in question in the agreement is not incomplete, or not lacking in clarity or it is not uncertain and such term or terms of the agreement is breached and question arose for determination whether the agreement is determinable or not, then answer most likely than 'not', in all cases would be in negative i.e. not determinable. How to consider that agreement is determinable in nature or not? In *Rajasthan Breweries Ltd.'s case* (supra) gives one test, viz., all voidable agreements are revocable and such agreements are determinable. In *Adhunik Steel's case* (supra), the Orissa High Court took the view that provision of closing the breach i.e. calling upon the other side to remedy the breach within 90 days makes the agreement not determinable at the instance of either party. In *Mariott International Inc.'s case* the Court found that agreement is not specifically enforceable on account of Section 14(1)(a) and 14(1)(b). Clause- (c) does not appear to have been specifically

considered by the Court. One way of looking at it, is to ask the question whether it is possible to issue order of specific performance and possible to enforce that order? In other words, the Court would not issue idle or formal order or the direction. The Court would not issue futile direction. Obviously, the facts and circumstances of the case-mainly the terms of the agreement-would decide whether it is just, proper and legal to enforce the agreement or not. Determinability of the agreement may be determined by applying the test of 'propriety.'”

39. The learned Judge ultimately held as under: -

“94. The question whether the contract by its very nature is determinable is required to be answered by ascertaining the nature of the contract. Contracts of agency, partnerships, contracts to provide service, employment contracts, contracts of personal service, contracts where the standards of performance are subjective, contracts that require a high degree of supervision to enforce, and contracts in perpetuity are, subject to exceptions, in their nature determinable. These contracts can be terminated by either party by a reasonable notice.

95. In addition, it is also necessary to ascertain the intention of the parties. It is important to address the question, whether the parties intended the contract to be determinable and thereby, not specifically enforceable. Plainly, if in terms of the express language of the contract, the parties have agreed that their contract will be specifically enforceable; the courts would have to assume to the said effect. This is not to say that the courts are bound to issue an injunction or specifically enforce the contract; but it would certainly require to give due consideration to the intention of the parties.”

40. *DLF Home Developers*, however, must be understood bearing in mind Clause 10 of the **Agreement To Sell**¹⁹ and which specifically spoke of specific performance and the right of parties to seek performance of the contract notwithstanding an event of breach. Clause 10 of the ATS read as follows: -

“10. SPECIFIC PERFORMANCE

¹⁹ ATS

The Parties agree that in the event of any breach or threatened breach by the Seller, and, or, Promoter and, or, IHFL of any covenant, obligation or other provision set forth in this Agreement, the Purchaser shall be entitled, in addition to any other remedy that may be available to it, to seek; (i) any decree or order of specific performance to enforce the observance and performance of any covenant, obligation or other provisions of this Agreement by the Seller, and, or, Promoter and, or, IHFL; and, or, (ii) any injunction restraining such breach or threatened breach by the Seller, and, or, Promoter and, or, IHFL. The Parties agree that the Sale Property is a special property and in the event of any breach or default of any terms of this Agreement by the Seller, and/or, Promoter and/or IHFL monetary relief shall not be sufficient and the Purchaser is entitled to seek mandatory or any other injunctions at an interim stage.”

41. It was this particular clause which ultimately weighed with the learned Judge in coming to the conclusion that the ATS was not a determinable contract. Contrary to the facts which are obtained in *DLF Home Developers*, Clause 23.1 of the Contract Agreement does not confer a right on the petitioner to enforce the contract notwithstanding a breach having occurred and which in consequence has triggered a termination action. In order to allay all doubts that may be said to persist or exist, the Court while closing the discussion on this issue deems it apposite to extract the following succinct explanation of the ambit of Section 14(d) as it appears in the judgement of the Court in **ABP Network Private Limited Vs Malika Malhotra**²⁰:-

“26. The expression “in its nature determinable” is, to say the least, delightfully vague. The exact import of the words “in its nature” is not easy to discern. Nor is it easy to distinguish a contract which is “in its nature determinable”, from a contract which is merely “determinable”.

²⁰ 2021 SCC OnLine Del 4733

32. The expression “in its nature determinable” came up for consideration, before the Supreme Court, again, in *Indian Oil Co. Ltd. v. Amritsar Gas Service*. The Court was, in that case, seized with a Distributorship Agreement between Indian Oil Co. Ltd. (IOCL) and Amritsar Gas Service (AGS). Clauses 27 and 28 of the Distributorship Agreement envisaged termination thereof. Clause 27 contemplated termination of the Distribution Agreement contingent on the happening of specified events, whereas Clause 28 permitted either party “without prejudice to the foregoing provision or anything to the contrary” contained in the agreement to terminate the agreement by thirty days notice to the other party “without assigning any reason for such termination”. IOCL terminated the Distributorship Agreement. The matter was carried, by AGS, to arbitration. The arbitrator held the termination of AGS's distributorship, by IOCL, not to have been validly effected. As a consequence, the arbitrator held AGS to be entitled to compensation owing to breach of the contract by IOCL, till the breach was remedied by restoration of the distributorship of AGS. The quantum of compensation was worked out as, the commission that AGS would have earned on supply of gas cylinders to its customers, had its distributorship not been terminated. The arbitrator found that, in the peculiar facts of the case, which were exceptional, IOCL was liable to remedy the breach by restoration of the distributorship. *Inter alia*, one of the “exceptional” facts, justifying restoration of the distributorship, was the fact that the termination of the distributorship was not in accordance with the termination clause contained in the Distributorship Agreement. The arbitrator, however, reserved, to IOCL, the right to terminate the distributorship of AGS in accordance with the terms of the Distributorship Agreement.

45. From these passages, in my opinion, it is not possible to take home a clearly discernible ratio, which would justify applying this decision to the facts before us. In para 17, the Division Bench recognized the apparent merit in the contention, of the appellant before it, that, as generally understood, the agreement between the appellant and the respondent could be treated as “determinable” in nature. Para 18, however, sought to draw a distinction in view of the facts before the Division Bench on the principle of the existence of “a fault liability and the fault effect and that no fault liability and that no fault effect”. The Division Bench went on to observe - and, I confess, I am constrained to entirely agree with the observation - that the expression “in its nature determinable” does not throw any light on its actual scope and effect and as to whether it would embrace fault-effect determination. This finding is obviously returned in view of the peculiar manner in which the

termination clause in the agreements (extracted *supra*) was worded. The clause, according to the Division Bench, embraced a “fault liability” following the termination, resulting in restoration of the parties to the *status quo ante*.

46. No similar clause exists in the letter of appointment issued by the petitioner to the respondent. *Upma Khanna* does not, therefore, appear to be of particular relevance to the facts before us.

47. A contract which is determinable, whether by efflux of time or at the option of either of, or both, the parties, and whether preceded by the requirement of issuance of notice or any other pre-termination formality, or not, is, therefore, to be regarded as “in its nature determinable”, within the meaning of Section 14(d) of the Specific Relief Act.”

42. The Court then proceeds to consider the judgment rendered in *KSL and Industries*. Learned counsel had placed reliance upon the said decision to principally buttress his submission that the Termination Notice is liable to be tested also on the principles underlying Article 14 of the Constitution. However, before proceeding to deal with that issue, it must at the outset be noticed that the grant of injunction in *KSL and Industries* was principally founded on the terms of the Memorandum of Understanding²¹ and on the basis of which the Court had held that the contract was not determinable. *KSL and Industries* was a case where the petitioner was essentially seeking specific performance of the MoU. This is evident from paragraphs 86 and 87 of the report which are extracted hereinbelow: -

“86. So far as clause (b) of Section 14(1) of the Specific Relief Act is concerned, the purpose of execution of the MOU was to secure the execution of the definitive agreements. The forms of these agreements are annexed to the MOU itself and the terms and conditions thereof are not open to negotiation. If one party does not agree to any proposal made by the other to alter or amend any term of the definitive agreements, the parties have no option but to

²¹ MoU

proceed to execute the definitive agreements in the form which they exist.

87. The petitioner is only seeking specific performance of the terms of the MOU, i.e. execution of the definitive agreements. In itself, the execution of the definitive agreements cannot be said to be imbued with minute or numerous details, or to be dependant on personal qualifications or volition of either of the parties, or of a nature of which the Court cannot enforce specific performance. Consequently, the bar under Section 14 of the Specific Relief Act urged by the respondent, in my view, prima facie, is not made out in the present case.”

43. It is thus evident from the aforesaid conclusions which came to be recorded in *KSL and Industries* that the contract which formed subject matter of consideration was clearly distinct from Article 23 of the Contract Agreement in the present case. While the Court in *KSL and Industries* has further proceeded to recognise the constitutional obligations placed on authorities which are State within the meaning of Article 12 of the Constitution and also observes that decisions rendered in the context of proceedings under Article 226 of the Constitution would also be equally applicable in proceedings emanating out of contractual disputes and thus to arbitration also, the Court notes that the invocation of public element principles stands unequivocally denounced by the Division Bench of our Court in *Indian Railways Catering and Tourism Corp*, as would be evident from the following extracts of that decision:-

“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.”

44. This Court also bears in mind that even though it is a constitutional court, while trying the instant petition it is essentially called upon to consider the exercise of powers conferred under a special statute. It would thus perhaps be impermissible to invoke its constitutional powers of judicial review while considering a petition under Section 9 of the Act. The adoption of such a course would also run afoul ultimately since even if it were to eventually come to the conclusion that an action is arbitrary, its power to grant an injunction would still be dependent upon and subject to the provisions of Section 14(d) of the SRA.

45. The invocation of a judicial review power in proceedings under Section 9 would also fall foul of the principles which were enunciated in *Rajasthan Breweries* as well as in *Overnite Express Limited* and *Indian Railways Catering* all of which had consistently held that the merits of a termination of a contract are issues which must be

essentially left for determination by the Arbitral Tribunal. That position has been reiterated in a recent decision rendered by a learned Judge in **Yash Deep Builders LLP v. Sushil Kumar Singh and Another**²². The Court deems it apposite to extract the following passages from that decision: -

“61. Having said that since both the parties have made contentions regarding forgery and fabrication of the documents against each other, without going into the controversy and contemplating on the same even otherwise to complete ignore the Second Supplementary Collaboration Agreement, it would not be out of place to state that the Collaboration Agreement being a private corner of the transaction, from the very nature of the agreement could be terminated. The Collaboration Agreement executed between the parties is qua development agreement. This is a commercial transaction between the private parties and hence the same by its very nature is determinable, even if there is termination clause in the Collaboration Agreement.

65. The Collaboration Agreement being determinable in nature in view of the above said discussion is not applicable in specific performance in view of the statutory bar contained in Section 14 (d) of the Specific Relief Act, 1963. Further, there is such no negative covenant in the Collaboration Agreement to make out a case for an injunction.

66. Thus, in terms of Section 14(d) of the Specific Relief Act, 1963, no injunction can be granted to prevent breach of the contract, the performance of which can not enforced. As noted above, the respondent No. 1 has already terminated the Collaboration Agreement vide its notice dated 29th September, 2021, which is not questioned by the petitioner, hence, the remaining relief which may be sought by the petitioner is to seek damages, if any. Thus, where the petitioner is statutorily barred from seeking specific performance of the Collaboration Agreement, the petitioner cannot be held entitled to claim interim relief under Section 9 of the Act. In this regard, reference is made to the case of *Bharat Catering Corporation v. India Railway Catering & Tourism Corporation*, 2009 SCC OnLine Del 3434, this Court has held that the scope of Section 9 does not envisage the restoration of the contract which stands terminated.

²² 2023 SCC OnLine Del 1499

67. 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 the specific performance of a contract.”

46. The decision in *KSL and Industries* being liable to be read in light of the special provisions contained in the MoU was an aspect which was also duly noticed by a learned Judge of the Court in **Zostel Hospitality (P) Ltd. v. Oravel Stays (P) Ltd.**²³. This is evident from the following observations as appearing therein: -

“96. I am also of the opinion that the judgment, of a coordinate Single Bench of this Court, in *K.S.L. Industries*, cannot assist the petitioner. The mere fact that, in that case, too, definitive agreements were to be executed between the parties, cannot render it a useful precedent. There are several features, in the said case, which distinguish the position which obtained there, with that which obtains in the present case. In that case, the MOU between the parties contained a specific clause, making it valid for 240 days from the date of its execution or till the execution of Definitive Agreements, whichever was earlier. There is no such clause in the present case. Further, the MOU was, under Clause 41(ii), enforceable against the parties in express terms. Clause 11 of the MOU, even more significantly, expressly stated that it “constitutes the entire agreement between the parties”. In such circumstances, this Court held, relying on the conduct of the parties, that the MOU was a concluded contract. It was especially noted by this Court, in para 87 of the report, thus, in respect of the Definitive Agreements to be executed between the parties in that case:

“So far as clause (b) of Section 14(1) of the Specific Relief Act is concerned, the purpose of execution of the MOU was to secure the execution of the definitive agreements. *The forms of these agreements are annexed to the MOU itself and*

²³ 2022 SCC OnLine Del 455

the terms and conditions thereof are not open to negotiation. If one party does not agree to any proposal made by the other to alter or amend any term of the definitive agreements, the parties have no option but to proceed to execute the definitive agreements in the form in which they exist.”

(Emphasis supplied)”

47. Turning then to the decisions pronounced by the Bombay High Court, it may be noted that the scope and ambit of Section 14(d) was explained by a learned Judge of the said High Court in **Gujarat Chemical Port Terminal Co. Ltd v. Indian Oil Corporation of India**²⁴ in the following terms: -

“124. Insofar as the issue as to whether the agreement entered into between the parties were in its nature determinable or not and whether the learned arbitrator could grant relief for specific performance of an agreement which in its nature determinable is concerned, it is the case of the petitioner that under clause 25 of the TSA, the said TSA is determinable upon the occurrence of one or more of event mentioned in Articles 25, 25(a), 25(b) or 25(c). It is however the submission of the respondent that since there was no 90 days notice issued by the petitioner for curing the alleged substantial breach in terms of Article 25(b) of the TSA and such alleged breach did not continue beyond a period of 90 days from the date of receipt of the written notice by the petitioner, the contract cannot be considered as determinable. It is not in dispute that the petitioner had earlier issued a notice of termination on 14th August, 2014. The parties thereafter recorded minutes of meeting dated 18th November, 2014 which was held as directed by this court in the order dated 11th September, 2014. It is not in dispute that the petitioner thereafter did not take any action against the respondent pursuant to the said notice dated 14th August, 2014 in view of the subsequent development.

125. A perusal of Article 25 of the said TSA clearly indicates that both the parties are permitted to terminate the said agreement upon the occurrence of one or more events set out in the said article. I am thus not inclined to accept the submission of the learned senior counsel for the respondent that the said contract is not determinable or the said contract is such which is in its nature nor determinable

²⁴ 2016 SCC OnLine Bom 2605

as contemplated under section 14(1)(c) of the Specific Relief Act, 1963. This court has considered this issue in the judgment of this court in case of Spice Digital Ltd. (supra) and has held that the injunction under section 17 of the Arbitration Act in case of a contract which is determinable or is terminated is statutorily prohibited. This court has held that the learned arbitrator while deciding the application under section 17 and this court while deciding under section 9 of the Arbitration Act cannot continue operation of such determinable contract, otherwise it would amount to re-writing the contract. This court while taking such view has adverted to the judgment of Supreme Court in case of Cox and Kings India Limited (supra), judgment of Supreme Court in case of Indian Oil Corporation Ltd. v. Amritsar Gas Service (supra) and judgment of Delhi High Court in case of Rajasthan Breweries Limited v. Stroh Brewery Company, reported in AIR 2000 Del 450. In my view, the judgment of this court in case of Spice Digital Ltd. (supra) squarely applies to the facts of this case. I am respectfully bound by the said judgment.

126. Supreme Court in case of Cox and Kings India Limited (supra) has held that by seeking interim relief so as to restore the lease agreement which had been terminated, the party had applied for creating a fresh agreement which is not permissible. Supreme Court also held that merely because the party had invested large sum of money in the project was not entitled to a mandatory order of injunction once the lease agreement had been terminated. It is held that remedy of such party would lie in an action for damages against the other party for breach of any of the terms and conditions of the agreement. In my view merely because the respondent had alleged to have spent a sum of Rs. 90 crores on laying pipelines from its refinery to the port of the petitioner for pumping naphtha for the purpose of export, that cannot be a ground for granting a mandatory order against the petitioner to permit the respondent to export naphtha under section 17 of the Arbitration Act.”

48. The decision in *Gujarat Chemical* assumes significance since the said judgment was rendered in the context of a **Terminalling Service Agreement**²⁵ and which had contemplated determination upon the occurrence of events spelt out in different Articles of the TSA. It also took note of Article 25 of the TSA and which had

²⁵ TSA

conferred rights upon respective parties to terminate the Agreement upon the occurrence of one or more of the events specified in that Article 25. The decision in *Gujarat Chemical* followed the principles laid down by the said High Court in an earlier decision rendered in **Spice Digital Ltd. v. Vistass Digital Media Pvt. Ltd.**,²⁶. *Spice Digital*, too, was a judgment rendered in the context of a termination clause appearing in the Agreement and which had contemplated parties having the right to effect termination upon breach of a performance representation, warranty or material obligation. Significantly, both *Gujarat Chemical* and *Spice Digital* were judgments rendered prior in point of time to *Narendra Hirawat-I*. Both those decisions while dealing with contracts which contemplated termination upon the occurrence of an eventuality or an event had held those to be determinable and thus falling within the scope of Section 14(d). The aforementioned two decisions do not appear to have been either noticed or considered by the learned Judge in *Narendra Hirawat-I* at all. In any case both *Gujarat Chemical* and *Spice Digital* explain the scope of Section 14(d) on lines similar to that adopted and propounded by this Court in *M/s Turning Around Logistics* and *National Highways Authority*.

49. The Court notes that *Narendra Hirawat-I* and *T.O. Abraham* expound the principle of Section 14(d) of the SRA being restricted to contracts which embody provisions for determination thereof by either of the parties without cause or one which would be exercisable even in

²⁶ 2012 MhLJ Online 105

the absence of a breach or a trigger event. Both those decisions propound the concept of inherently determinable contracts and those answering the characteristics highlighted above. However, those principles do not find resonance in the various decisions which have been noticed in the preceding parts of this decision.

50. This Court is in any case bound by the enunciation of the legal position as embodied in the decisions of this Court in *M/s Turning Around Logistics* and *National Highways Authority* both of which had explained the injunct embodied in Section 14(d) of the SRA to be applicable to all revocable or voidable contracts. Those decisions in unequivocal terms explain the extent of the statutory embargo enshrined in Section 14(d) of the SRA as extending to contracts which can be revoked in terms of the stipulations contained therein. The principle appears to be founded upon the reasoning that a contract which could be revoked by either of the parties cannot be specifically enforced. *T.O. Abraham* and *DLF* were decisions dealing with contracts which contained clauses conferring a right on parties to seek specific performance notwithstanding an event of breach or default having occurred or seek other remedial reliefs. It was those clauses which appear to have weighed upon the Court to come to conclude that the contracts were not by their very nature determinable.

51. The matter may then be examined on the plain language of Section 14(d) and which speaks of contracts which by their nature are determinable as not liable to be specifically enforced. It becomes pertinent to note that the Specific Relief Act, 1877 in Section 21(d)

had employed the word “revocable”. The Law Commission of India in its Ninth Report suggested that the said phrase be replaced with the word “determinable”. It was this recommendation which ultimately came to be accepted and led to Section 14(d) being framed accordingly. The relevant extracts of the Law Commission Report are set out hereinbelow: -

“Ninth Law Commission Report, 1958

“As the illustration to clause (d) says, an agreement for partnership is not generally specifically enforced. But there are some exceptional cases where such agreements have been enforced. Thus, where the parties have actually entered on the partnership by having commenced the business to be carried on in partnership, a suit lies for obtaining execution of a formal deed of partnership. A contract for the purchase of the share of a partner has also been specifically enforced.

We therefore propose to provide for such cases. We also suggest that the word "revocable" in clause (d) be substituted by the word 'determinable', for, as Pollock and Mulla observe, the expression 'revocable contract' is inaccurate”

52. The meaning of the words “determine” and “revoke” may also be gathered from how they have been defined in various dictionaries and lexicons: -

“The Oxford English Dictionary, Second Edition

Determinable (di't3:minəb(a)l), a. and sb. [In ME, a OF determinable fixed, determinate, ad. L. *determinabilis* (Tertull.) that has an end, finite. In later use, following the ordinary analogy of adjs in-able, in which sense it has also been revived in mod.F. (Not in Cotgr.; 1878 in Dict. Acad.)]

2. Capable of being determined; proper to be determined.

a. Capable of being, or proper to be, legally or authoritatively decided or settled.

b. Capable of being definitely limited, fixed, assigned, or laid down.

c. Capable of being definitely ascertained (a) as to fact or identity, (b) as to meaning or character.

3. Liable to be terminated or to come to an end, terminable (esp. in Law).

B. sb. Philos. (tr. G. das *bestimmbare*.) That which is capable of being given determinate form or of being more precisely specified, spec. (in W. E. Johnson's use) a general term or concept (e.g. colour) under which several specific terms or concepts fall (e.g. red, yellow, green). Also as *adj*.

Determina'bility

; The quality of being determinable.

;The power of proposing an ultimate end, the determinability of the will by ideas.

;Beyond this more formal principle of determinability, there is a transcendental principle of complete determination

De'terminableness. rare.

1737 BAILEY vol. 11, Determinableness, capableness of being determined or decided. **1775** in ASH, and in mod.

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Revoke :

+ 1. To recall, bring back, to a (right) belief, way of life, etc. Also without const. Obs. 1382 WYCLIF Rom. Prol

+ b. To recall, draw back or away, from some belief, practice, etc. (esp. wrong or wicked one.)

+c. To induce (one) to desist or refrain from some purpose or action; to restrain or prevent from something. Also reff. Obs

+d. Without const. To check, restrain .*rare*.

4. To annul, repeal, rescind, cancel.

Revocable

; Capable of being revoked or recalled.

Hence 'revocableness. Also 'revocably adv. 'in a revocable manner' (Webster, 1847).

Revocate,

2. Repressed; rescinded.

Revocate, v. *Obs.* [ad. ppl stem of L. *revocāre* to REVOKE.]

2. To do away with, repress. *rare*⁻¹.

3. To revoke, rescind

Revocation

2. The action of revoking, rescinding, or annulling; withdrawal (of a grant, etc.).

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Black's Law-18TH Edition

Determinable, *adj.*

1. Liable to end upon the happening of a contingency: terminable <fee simple deter- minable>.

2. Able to be determined or ascertained< the delivery date is determinable because she kept the written invoice>.

Revocable (*rev-ə-kə-bəl*), *adj.*

Capable of being can-celed or withdrawn <a revocable transfer>.

Revocation (*rev-ə-KAY-shən*), *n.*

1. An annulment, can-cellation, or reversal, usu. of an act or power. 2. *Contracts*. Withdrawal of an offer by the offeror. Cf. REPUDIATION (2); RESCISSION; REJECTION (1). [Cases: *Contracts* 19; *Sales* 22(2), 23(2). C.J.S. *Contracts* § 63; *Sales* § 32.]

Jowitt's Dictionary of English Law, Volume-1 (A-K)

Determine

; to come to an end, as, *e.g.*, an estate or interest in land

Determinable.

; An interest is said to determine when it comes to an end, whether by limitation, effluxion of time, merger, surrender or otherwise. When and interest is subject to a condition, defeasance, or the like, it is said to be deter- minable on the happening of the event specified in the condition.

Where an interest is given to a woman during widowhood determinable on her remarriage and the subsequent marriage is annulled, the result depends to some extent on whether the annulled marriage was void or voidable. In *Re Dewhirst* [1948] Ch. 198, where income was left to a widow until she remarried it was held that a subsequent marriage annulled for incapacity did not disentitle the I widow from her interest *dum vidua* as

from the date of the nullity decree (Jack- son, *Formation and Annulment of Marriage*, 103 *et seq.*).

Determinable fee

; a fee determinable by limitation or condition (Settled Land Act, 1925, ss. 1, 117 (1) (iv)). By the Law of Property Act, 1925, Sch. I, such fees, if not capable of taking effect as legal estates under Part I of that Act, are converted into equitable interests. Certain estates in fee simple which by statute are liable to be divested and fees simple vested in corporations are legal estates (Law of Property Act, 1925, s. 7 (1) (2): Law of Property (Amendment) Act, 1926, Sch.). See BASE FEE; FEE.

Determinable life interests

; interests for life which may determine upon future contingencies before the life for which they are created expires. The per-son entitled to such an interest, which can now be only an equitable interest (Law of Property Act, 1925, s. 1, Sch. 1 Pt. 1), is among the persons enumerated in the Settled Land Act, 1925, s. 20 (1), as having the powers of a tenant for life. It may arise, *e.g.*, when an interest is granted to a woman during her widow- hood, or to a man until he is promoted to a benefice; in these and similar cases, whenever the contingency happens-when the widow marries, or when the grantee obtains the benefice-the respec-tive interests are absolutely determined and gone. Yet, while they subsist, they are reckoned interests for life; because they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen (2 Bl.Comm. 120, 146).

Jowitt's, Dictionary of English Law, Volume 2, L-Z

Revocation [Lat. *revocare*, to recall], the undoing of a thing granted, or a destroying or making void of some deed which had existence until the act of revo-cation made it void. It may be either general, of all acts and things done before; or special, to revoke a particular thing (5 Co.Rep. 90).

To revoke an offer or authority is to withdraw it. Revocation is the operation of revoking. Revocation is of three kinds: by act of the party; by operation of law; and by order of a court of justice (judicial revocation).

Revocation by act of the party is an intentional or voluntary revocation. The principal instances occur in the case of authorities and powers of attorney and wills. The two former

require no particular form of revocation. A will may be revoked by a subsequent inconsistent will or codicil, or by a writing declaring an intention to revoke, executed with the same formalities as a will, or by the burning, tearing, or otherwise destroying of the will by the testator, or by some person in his presence and by his direction, with the intention of revoking it (Wills Act, 1837, s. 20). As to alterations in wills, see ALTERATION.

A revocation in law, or constructive revocation, is produced by a rule of law, irrespectively of the intention of the parties. Thus, a power of attorney is in general revoked by the death of the principal. A will is revoked by the subsequent marriage of the testator. except, by the Law of Property Act, 1925, s. 177, when expressed to be made in contemplation of a particular marriage (*Sallis v. Jones* [1936] P. 43), and except when made in exercise of a power of appointment under which the property appointed would not, in default of appointment, pass to the personal representatives or next-of-kin of the testator (Wills Act, 1837, s. 18). As to powers of revocation, see POWER. As to the revocation of a guarantee, see GUARANTEE.

When a grant of probate or letters of administration has been improperly obtained, it may be revoked by the court at the instance of a person interested; a grant may also be revoked at the request of the grantee, for instance, where he had erroneously believed himself to be the next-of-kin of the deceased. After revocation the grant is produced at the registry, and cancelled.

An agency is determined in several ways. It may be determined by the principal, either expressly or impliedly, as by appointing another person to do the same act, where the authority of both would be incompatible.

The exceptions to the power of the : principal to revoke his agent's authority at mere pleasure are: when the principal has stipulated that the authority shall be irrevocable, and the agent has also an interest in its execution; when an authority or power is coupled with an interest, or is given for a valuable consideration, or is a part of a security, unless there is a stipulation that it shall be revocable; and when an agent's act in pursuance of his authority has become obligatory, for *nemo potest mutare consilium suum in alterius injuriam*.

The agent may give notice to his principal that he renounces the agency; but if the principal sustains damage thereby, the agent is responsible therefor.

Agency is revoked by operation of law, as by the expiration of the period during which the agency was to exist or to have effect, or by a change of condition or of state producing an incapacity of either the principal or the agent, as mental disability, or where the party is made bankrupt, except as to such rights as do not pass to the trustee under the adjudication; death, unless the authority is coupled with an interest in the thing vested in the agent; extinction of the subject of the agency; ceasing of the principal's powers; or complete execution of the trust confided to the agent, who then is *functus officio*.

Where a person has been held out as an agent, the principal remains liable to persons who have no notice of revocation of the authority.

As to the position when the agent is constituted by power of attorney, see POWER OF ATTORNEY.

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Stroud's Judicial, Dictionary of Words and Phrases, Sixth Edition, Volume 1:A-F

DETERMINABLE

;A demise for, say, three years "determinable" on a prescribed notice, means, that such notice may be given so as to expire at the end of any year of the tenancy; but if it be added "otherwise the tenancy to continue from year to year until the term shall cease by notice to quit at the usual times", that connotes a demise for three years certain, determinable then or at the end of some subsequent year by the prescribed notice (*Jones v. Nixon*, 31 LJ.Ex. 505).

"Determinable at or before the death". (Wills Act 1837 (c. 26). s.33.) An interest given by will by a parent to his child contingently on the child attaining a specified age, is an interest "determinable at or before" the child's death within the exception from s.33 of the Wills Act. If therefore the child predeceases the testator without having attained the age and leaving issue, the section will not apply (*Re Wolson* [1939] Ch. 780)

DETERMINATION

;In context of legal proceedings: A number of cases over the years have had to consider what point amounts to the determination of different kinds of proceedings. The following are notable: *R. v. London Justices* (1890) 25 Q.B.H 357 (acquittal not amounting to appealable determination); *A.-G. v. Hughes* 81 L.T. 679 (letter from charity commissioners to parish council stating opinion on question submitted to them was determination); *Brooks v. Dolby* (1902) 66 J.P. 532 (decision of Local Government Board following reconsideration of decision was the determination); *Hallamshire Industrial Finance Trust v. I.R.C.* [1979] 2 All E.R. 433 (decision by Special Commissioners stating amount of income assessable without stating amount of tax payable was determination); *Gibson v. General Commissioners for Stroud and Morgan* [1989] S.T.C. 421 (decision on preliminary issue enabling tax liability to be quantified was not determination of appeal); *Transport and General Workers' Union v. Webber* [1990] 1.C.R. 711 (recommendation of expulsion from union to be effected in future was not determination to expel).

In context of decision-making: A statutory power for a government department to determine questions does not enable it to legislate or make it an autocrat free to act as it pleases; it must exercise and act with discretion and if it does not do so the King's Bench can and will interfere: *R. v. Board of Education* [1910] 2 K.B. 165.

In property context (leases, other interests and settlements): The determination of a term or estate is the same thing as its termination, meaning not only premature extinction but any kind of coming to an end (*St. Aubyn v. St. Aubyn*, 30 L.J. Ch. 920). An early statutory definition was to the same effect: "the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause" (Agricultural Holdings (England) Act 1883 (c. 61), s. 61).

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REVOCATION.

; "Revocation is the calling back of a thing granted"

As to what amounts to a rescindment, renunciation, or revocation, of a contract, see *Hochster v. De la Tour*, 22 L.J.Q.B. 455, on which case see *Johnstone v. Milling*, 16 Q.B.D. 460. See further ABANDONMENT. See hereon LITIGATION.

A clause of redemption in a mortgage was not a "power of revocation" within the Mortmain Acts, Charitable Uses Act

1735 (c.36), s.1; Act of 1828 (c. 85), s.1; Act of 1888 (c. 42), s.4(3) (*Doe d. Graham v. Hawkins*, 2 Q.B. 212).

As to what words will revoke a gift to the individual without revoking the subsequent limitations of the property comprised in the gift, see *Re Whitehorne*, applied in *Re McEacharn* [1906] 2 Ch. 121, applying *Re Love*, 47 L.J. Ch. 783, and *Alt v. Gregory*, 8 D.G.M. & G. 221; *secus*, *Philipps v. Allen*, 7 Sim. 446; *Sanford v. Sanford*, 1 D.G. & S. 67; *Boulcott v. Boulcott*, 23 L.J. Ch. 57; *Tabor v. Prentice*, 32 W.R. 872; *Re Dunster* [1909] 1 Ch. 103; *Re Wilkins* [1920] 2 Ch. 63. See *Re Freeman* [1910] 1 Ch. 681, cited THROUGH-OUT. Under the Wills Act 1837 (c. 26), no formalities were required for the execution of a soldier's will, and therefore none were required for its revocation: see *Re Gossage* [1921] P. 194. By s.30 of the Criminal Justice Administration Act 1914 (c. 58), an order made by a court of summary jurisdiction for the periodical payment of money might be revoked, revived, or varied by a subsequent order: see *Dodd v. Dodd* [1920] 1 K.B. 71.

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Words and Phrases™, Permanent Edition, Volume 37B

Colo. 1906. Words "**repeal**" and "**revoke**" are synonymous. *Wilson v. People*, 85 P. 187, 36 Colo. 418.

Ill. 1946. To "revoke" is to recall, cancel, or set aside and means to nullify, declare null and void, to set at naught the provisions of an instrument.-In *re Barrie's Will*, 65 N.E.2d 433, 393 Ill. 111.-Wills 167.

Pa. 1948. "Revoke" means to recall, to take back, to repeal.-In *re Braun's Estate*, 56 A.2d 201, 358 Pa. 271.

Pa. 1903. "Revoke" means to recall, to take back, or to repeal; and where a testator merely changed the time of payment of the bequest, it was not a revocation, though testator called it by that name in his will.-In *re Morrow's Estate*, 54 A. 342, 204 Pa. 484.

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DETERMINABLE EASEMENT

N.C. 1966. Where owner of realty executed duly recorded instrument granting to pipeline company easement of right-of-way for pipeline purposes on initial consideration of \$10,

and provided that on making of additional payment of \$316 within four months easement should become indefeasible, and that if additional payment should not be made, then easement would terminate at end of four months, and additional payment was made, instrument granted a "determinable easement" on initial payment of \$10, and easement became an "indefeasible easement" on payment of the \$316 within four months.-Dees v. Colonial Pipeline Co., 146 S.E.2d 50, 266 N.C. 323.-Ease 26(1).

DETERMINABLE FEES

Ind.1916. "Determinable fees" are interest which may continue forever, but which are liable to be determined by some act or even and are deemed fees because of the possibility of their enduring forever.-Aldred v. Sylvester, 111 N.E. 914, 184 Ind.542.-Estates 6.

Mass.1950. "Determinable fees" are interests which may last forever but which may automatically expire upon occurrence of a stated event and they are fees because they may last forever.-Brown v. Independent Baptist Church of Woburn, 91 N.E.2d 922, 325 Mass. 645.-Estates 6."

53. On an overall conspectus of the aforesaid, this Court finds itself unable to accede to the line of reasoning as suggested in *Narendra Hirawat* or *T.O. Abraham*. Neither the precedents noticed hereinabove nor the lexicons appear to lend credence to the word determinable being read as "inherently determinable" as propounded by the two decisions noticed above. Bearing in mind the above, the Court finds itself unable to hold or interpret Section 14(d) of the SRA to be confined only to those contracts where parties have the right to terminate without assigning any reason or where that power be exercisable even in the absence of an event or breach. As was held in the decisions aforesaid, the power to terminate, whether it be for cause or otherwise, based on an allegation of breach or the happening

of an event, if preserved would lead to the Court recognising such a contract falling within the scope of Section 14(d) of the SRA.

54. The Court may additionally note that the submission of the Contract Agreement not falling within the ambit of Section 14(d) of the SRA and the arguments which were addressed based on the principles laid down in *Narendra Hirawat-I* and *T.O Abraham* would also not apply for the following reason. As is evident from the contents of the Termination Notice, NHIDCL has proceeded to terminate the contract based on the provisions of sub-clauses (d), (e), (f), (g), (p), (q), (n) and (o) of Clause 23.1 (i). It becomes pertinent to observe that while sub-clauses (d), (e), (f), (g), (p), (q) and the nature of breaches contemplated therein may have been curable infractions, sub-clauses (n) and (o) cannot possibly be understood to be breaches to which a cure period could apply.

55. The Court before closing deems it apposite to render the following observations insofar as the issue of the forged BG is concerned. The petitioner has sought to evade the liability that came to be attached consequent to the discovery of those BGs being forged by attributing that infraction to a Financial Consultant which had been engaged by it. The Court is constrained to observe that prima facie the explanation proffered appears to be wholly specious. In any case bearing in mind the unequivocal findings of fact as contained in the Termination Notice coupled with the fact that those findings have not been established to be perverse, the Court is unconvinced that the impugned action of NHIDCL merits interference. However, these and

all other contentions on merits which have been addressed by Mr. Mehta appearing for the petitioner are left open to be agitated in the arbitral proceedings.

56. Accordingly, and for all the aforesaid reasons, the petition shall stand dismissed.

May 23, 2023

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YASHWANT VARMA, J.

