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

% **Reserved on : 10th February, 2023**
Pronounced on: 14th March, 2023

\+ **O.M.P.(I) (COMM.) 401/2022 and I.A. No. 22368/2022**

YASSH DEEP BUILDERS LLP ….. Petitioner
Through: Mr.Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawal, Mr.Karan Luthra, Ms.Aarushi Tiku, Mr.Shravan Niranjan and Mr.Satyam Agarwal, Advocates.

versus

SUSHIL KUMAR SINGH & ANR. ..…Respondents
Through: Mr.Neeraj Malhotra, Senior Advocate with Mr.Rajiv Virmani, Mr.Gaurav Jain, Mr. Atul Malhotra and Mr.Amit Kumar and Mr.Anuj Malhotra and Reda Tayyaba, Advocates for respondent no. 1
Ms. Radhika Bishwajit Dubey, Advocate for respondent no. 2

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

1. The petitioner vide the present petition under Section 9 of the Arbitration & Conciliation Act, 1996 (herein after referred to as 'the Act') has sought the following reliefs:

"Direct the Respondent No. 1, its representatives, attorneys, heirs, executors, administrators, successors and permitted assigns, to jointly and severally maintain status quo as to the possession and title of the land admeasuring 94 Kanal and 7 Marla equivalent to 11. 793 7 5 acres situated in the revenue estate of village Dhunela, Tehsil Sohna, District Gurugram, Haryana 122001 during the pendency of the Arbitration proceedings;

(ii) Restrain the Respondent No. I, its representatives, attorneys, heirs, executors, administrators, successors and permitted assigns etc. from directly or indirectly, selling, transferring, alienating or creating any third party rights in any manner whatsoever with respect to the land admeasuring 94 Kanal and 7 Marla equivalent to 11.79375 acres situated ir.. the revenue estate of village Dhunela, Tehsil Sohna, District Gurugram, Haryana 122001, which is a subject matter of the Collaboration Agreement dated 15.05.2018 and First Supplementary Collaboration Agreement dated 03.06.2019;

(iii) Direct the Respondent No. 1 to render all assistance to the Petitioner to obtain all statutory clearances/ regulatory approvals/ consents/licenses in terms of Clause 9.3 of the Collaboration Agreement dated 15.05.2018.
(iv) Pass ex parte ad interim orders in terms of prayers (i) to (iii) above;

(v) Pass any such other or further order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

FACTUAL MATRIX

2. The following course of events have culminated into the present dispute between the parties and has also led to the filing of the instant petition:-

i. The petitioner is a limited liability Partnership incorporated under the Limited Liability Partnership Act, 2008, having LLP Identification No. AAM-4745 and having its registered office at 477/4 Basai Road, Ram Nagar, Gurugram-122001. The respondent no. 1 is the owner of the land admeasuring 94 Kanal & 7 Marla, or 11.79375 acres, situated in the Revenue Estate of Village Dhunela, Tehsil Sohna, Gurugram, Haryana-122001. The respondent no. 2 is the erstwhile partner of the petitioner firm.

ii. On 15th May, 2018, the petitioner entered into a Collaboration Agreement with the respondent no. 1 for the development of a land admeasuring 119 Kanal and 6 Marla, equivalent to 14.9125 acres situated in the village Dhunela, Tehsil Sohna, District Gurugram, Haryana-122001 (hereinafter referred to as 'the Property'), whereby the petitioner agreed to develop the project over the Collaboration Property at its own costs and expenses. As consideration the respondent No.1 was to receive certain amounts of the money within a stipulated period and the portion of the developed Collaboration Property

was earmarked and to be allocated to the respondent No.1.

iii. Clause (2) required the petitioner to pay a sum of Rs. 5,96,50,000/- to the respondent No.1 as an interest free non-refundable earnest money out of which Rs.2,00,00,000/- was paid at the time of signing of the Collaboration Agreement and post dated cheques issued for the balance payment. Under the terms of the Collaboration Agreement, the petitioner was, *inter alia*, obliged to apply for licence/ approvals/ permits/ certification etc. for the development of the property in a timely and orderly manner.

iv. In the terms of the Collaboration Agreement, an irrevocable General Power of Attorney dated 15th May, 2018 was also executed in favour of the petitioner for the petitioner, amongst others, to apply and obtain licence/sanction for converting the property from its agricultural use to any other suitable use and as also to get the plan sanctioned from the concerned authority for developing a residential complex at the said property.

v. On 16th May, 2018, the petitioner filed an application before the Directorate of the Town and Country Planning, Haryana, (hereinafter referred to as 'DTCP') for the grant of licence for the development of the project at the said property.

vi. On 3rd June, 2019, the petitioner and the respondent No.1 executed a First Supplementary Collaboration Agreement whereby:

a. The land for development was reduced from 119 Kanal & 6 Marla to 94 Kanal & 7 Marla equivalent to 11.79375 acres;

b. The non-refundable earnest money was reduced to at INR.4,21,62,656/- as also the area to be allocated to the respondent No.1 was reduced to a piece of land admeasuring 12,973 square yards.

vii. In view of the First Supplementary Agreement, the respondent No.1 issued a fresh General Power of Attorney dated 3rd June, 2019. But no specific reason had been assigned for execution of the First Supplementary Agreement by the petitioner. On 20th April, 2019, the petitioner's cheque bearing No. 000049 dated 15.3.2019 for Rs.1,46,50,000/- drawn on HDFC Bank in favour of respondent No.1 for the part payment of the above mentioned security amount was dishonoured due to " insufficient funds".

viii. It is the respondents' case that it was to help the petitioner and to cure the default of Rs.1,46,50,000/-, the respondent No.1 agreed to reduce the development area

as a result of which First Supplementary Collaboration Agreement was executed.

ix. The Collaboration Agreement stood terminated by the respondent No.1 by way of a letter dated 29th September, 2021. However, it is the petitioner's case that the petitioner never received any communication from the respondent No.1 seeking to terminate the Collaboration Agreement and it was only during the hearing of the present petition, the petitioner came to know about the purported termination letter.

x. In the interregnum a Second Supplementary Collaboration Agreement dated 17.8.2020 was executed which is vehemently disputed by the petitioner as being a forged and fabricated document.

xi. It is the petitioner's case that on 14.12.2022 on receipt of a phone call regarding the said property for being put for sale, the petitioner made enquiry on 15.12.2022, when it was confronted with the Second Supplementary Collaboration Agreement. As per the petitioner, there was no such Second Supplementary Collaboration Agreement nor was there any authorization granted to the respondent No.2 to execute such agreement on behalf of the petitioner in respect of the said property. It is also the case of the petitioner that on 19.12.2022, it was further confronted with the deed of cancellation dated 29.9.2021

cancelling the General Power of Attorney dated 3.6.2019 issued by the respondent No.1 in terms of the Collaboration Agreement.

xii. Therefore, the petitioner is before this Court seeking interim protection qua the Collaboration Property submitting to the effect that there is a serious and genuine apprehension that the respondent No.1 and 2 would create third party rights in the Collaboration Property to defeat the rights of the petitioner.

SUBMISSIONS

On behalf of the Petitioner

3. Mr.Rajiv Nayar, the learned senior counsel appearing for the petitioner submitted that the respondent No.1 and the respondent No.2 have been acting in collusion and attempting to defeat the rights of the petitioner in the Collaboration Property. It is submitted that the Collaboration Agreement dated 15th May, 2018 was an indeterminable contract, therefore, created indefensible rights in favour of the petitioner. However, the respondents have sought to terminate the contract by way of entering into a Second Supplementary Collaboration Agreement despite the fact that, by way of the Collaboration Agreement, indefeasible rights had been created in favour of the petitioner and the petitioner was in physical possession of the Collaboration Property.

4. It is further submitted that the petitioner has paid an amount of Rs.4.21 Crores to the respondent No.1 and for its possession of the Collaboration Property, the petitioner has fulfilled its obligations under

the Collaboration Agreement. Even otherwise, the petitioner has always been ready and willing to perform its part under the Collaboration Agreement and has been taking all necessary steps to obtain the required licence. However, it is the respondent No.1 who in connivance with respondent No.2 is attempting to come out of the Collaboration Agreement by relying on false and fabricated documents. Therefore, the petitioner having a strong *prima facie* case in its favour is entitled to the relief of Specific Performance of the Collaboration Agreement and preservation of the Collaboration Property being the subject matter of the dispute between the parties.

5. The learned senior counsel appearing for the petitioner further submitted that the petitioner and even the respondent No. 1 were working towards achieving the development of the Collaboration Property and obtaining all statutory permissions, licenses and regulatory approvals required thereof. Acting upon the said Collaboration Agreement, a license for the development of the said land had been applied for on 16th May, 2018 by the petitioner vide License No. CTP/12558/2018. However, the petitioner came to know only on 14th December, 2022 that the respondent No. 1 had put up the Collaboration Property for sale in the market.

6. It is also argued on behalf of the petitioner that the Second Supplementary Collaboration Agreement is a forged and fabricated document created by the respondent Nos.1 and 2 as an excuse to wriggle out of the binding Collaboration Agreement and defraud the petitioner. In this regard it was contended that no such agreement was executed by the petitioner nor any permission/authorization was granted by the petitioner to the respondent No.2 to execute any such so called Second

Supplementary Collaboration Agreement in respect of the Collaboration Property. Further, the clauses in the Second Supplementary Collaboration Agreement are unconscionable and virtually efface the understanding, rights and obligations under the original Collaboration Agreement dated 15th May, 2018. It was argued that the said Second Supplementary Collaboration Agreement seeks to change the very nature of the Collaboration Agreement from an indeterminable to a determinable contract.

7. It was further submitted that the Second Supplementary Collaboration Agreement is supported by a false resolution dated 3rd June, 2019 which is also a fabricated document created by the respondents in cahoots with each other, i.e., respondent Nos. 1 and 2.

8. The learned senior counsel appearing for the petitioner submitted that on 15th December, 2022, the petitioner made an enquiry at the office of the Sub-Registrar, District Sohna. The petitioner attempted to confront the respondent No.2, however, no communication could be made with the respondent No.1. It is further submitted that immediately upon coming to know of the fraudulent acts of the respondent No. 2, the petitioner removed the respondent No.2 as a partner on 20th December, 2022.

9. The learned senior counsel submitted that Clause 1.3 of the Collaboration Agreement specifically provided that the respondent No. 1 shall hand over the physical possession of the Collaboration Property to the petitioner and the entire area to be developed and constructed on the Collaboration Property shall exclusively belong to the petitioner for the benefit of the petitioner. It is further stipulated that the respondent no. 1 shall not in any way interfere with or obstruct the development of the

Collaboration Property. As per the updated Clause 2 of the Collaboration Agreement, the non-refundable earnest money to be paid by the petitioner to the respondent no. 1, which was reduced to Rs. 4,21,62,656/-, was also duly paid by the petitioner to the respondent no. 1. Yet the respondent, in blatant violation of the terms of the Collaboration Agreement, entered into a Supplementary Agreement.

10. It is submitted that the petitioner had filed the instant petition seeking the reliefs as aforementioned, the reliefs *qua* the Collaboration Property so as to restrain the respondents from creating any third party interest in the said Property.

11. It is submitted that the Second Supplementary Collaboration Agreement changes the very edifice and nature of the Collaboration Agreement dated 15th May 2018 by introduction of certain clauses which are unconscionable and allow the respondent no. 1 to exit the Collaboration Agreement while at the same time forfeiting a huge consideration of more than Rs.4.21 Crores paid, without having invested a single penny. The said Second Supplementary Collaboration Agreement also seeks to change the very nature of the Collaboration Agreement from indeterminable to a determinable contract at the option of the respondent no. 1, on events which are not within the control of the petitioner.

12. The learned senior counsel submitted that it is *ex-facie* apparent that the respondent Nos. 1 and 2 in collusion with each other have, with ill intention, devised a stratagem to cheat and defraud the petitioner by, on the one hand, executing a Collaboration Agreement with the petitioner and taking a huge consideration of Rs.4.21 Crores and, on the other hand, by seeking to create third party rights in the Collaboration Property by

offering it for sale in the market. This action of the respondents is in the teeth of the Collaboration Agreement which creates indefensible rights in favour of the petitioner and is inherently a contract which is indeterminable in nature.

13. It is further submitted that the petitioner is entitled to specific performance of the Collaboration Agreement dated 15th May 2018 since it has performed all its obligations under the Agreement and has also paid a consideration of Rs.4.21 Crores to the respondent No. 1. Moreover, the Collaboration Property ought to be preserved in favour of the petitioner.

14. Learned senior counsel appearing for the petitioner submitted that irreparable harm and injury would be caused to the petitioner inasmuch as the Collaboration Property is a unique parcel of land and has huge potential for development and the petitioner is already in physical possession of the land and has taken various steps in order to obtain licenses for the development of the Collaboration Property. The petitioner has, for the last 4 years, spent a huge amount of time, money and efforts in furtherance of the Collaboration Agreement including having paid a sum of approximately Rs.4.21 Crores to the respondent No. 1. It is further submitted that no prejudice whatsoever would be caused to the respondents in the event the respondents are directed to maintain *status quo* as to the right, title, interest, and possession of the Collaboration Property pending Arbitration proceedings. It is further submitted that the balance of convenience is also entirely in favour of the petitioner and against the respondent No. 1 who has with open eyes executed the Collaboration Agreement and already received a valuable consideration for the same.

15. The learned senior counsel appearing for the petitioner further argued that under Section 10 of the Specific Relief Act, 1963, (hereinafter referred to as "Specific Relief Act") the respondent No.1 cannot run away from the Collaboration Agreement through any device or artifice as the grant-cum-relief of specific performance is mandatory, if the readiness and willingness on the part of the petitioner is proved. It is further submitted that in the present case the conduct of the petitioner has been blemish free and the petitioner has expressed its readiness and willingness at each stage of the transaction. Thus, the respondent No.1 cannot be allowed to frustrate the Collaboration Agreement by alienating the Collaboration Property and reducing the petitioner's claim to only damages.

16. In support of its contentions, reliance has been placed on behalf of the petitioner on the judgment of the Hon'ble Supreme Court in ***B. Santoshamma V. D. Sarala***; **2020 (19) SCC 80**, ***N. Srinivasa V. Kuttukaran Machine Tools Ltd***. ; **(2009) 5 SCC 182** and the judgment of this Court in ***DLF Home Developers Ltd. V. Shipra Estate Ltd. & Ors***.; **2021 SCC OnLine Del 4902**.

17. Therefore, it is prayed that the instant petition be allowed and the reliefs sought be granted in favour of the petitioner.

On behalf of the Respondents

(RESPONDENT No.1)

18. Mr.Neeraj Malhotra, the learned senior counsel appearing for the respondent No.1 at the first instance raised objection to the

maintainability of the petition on the grounds of concealment and suppression of material facts.

19. It is submitted that the petitioner has suppressed the fact that the Collaboration Agreement stands terminated and the petitioner itself has filed on record the Deed of Cancellation dated 29th September 2021 as Annexure P-10 to the petition.

20. It is submitted that the petitioner has wrongly stated that it has fulfilled its obligations as per the Collaboration Agreement. It is further submitted that as per Clause 2.14 of the Second Supplementary Collaboration Agreement dated 17th August 2020, the petitioner was to obtain license of the project to be developed on the Collaboration Property by 15th December 2020, however, the petitioner failed to do so. It is further submitted that the petitioner even failed to obtain the required license for the project for almost 40 months, i.e., till the termination of the Collaboration Agreement and that even till the filing of the instant petition, the said license was not obtained. It is further submitted that since, the license was not obtained by the petitioner, the respondent no. 1 was left with no other option but to terminate the Collaboration Agreement and the General Power of Attorney vide a Legal Notice dated 29th September 2021.

21. It is also submitted that there were consistent defaults on the part of the petitioner submitting to the effect that after execution of the petitioner failed to pay towards the part payment of the security amount as ITS cheque was dishonoured due to " Insufficient Funds" . It is further submitted that the petitioner never had any financial capacity to perform its commitments. It is further submitted that to help the petitioner and to

cure the default of Rs.1.465 Crores the respondent no.1 agreed to reduce the development area and resultantly the First Supplement Collaboration Agreement was executed. It is further submitted that on account of the delays on the part of the petitioner, when the licence was not forth coming, after waiting for two years the Second Supplementary Collaboration Agreement dated 17th August, 2020 was executed so as to put a long stop date on obtaining the licence. It is further submitted that when the long stop date also got crossed without the receipt of licence and after further wait of nine months, the respondent No.1 had no choice but to terminate the agreement which was in the knowledge of the petitioner.

22. It was argued that it is only when the DTCP, vide its order dated 16th March, 2021 finally returned the application of the petitioner for grant of licence for the project, and when the respondent No.1 came to know about it, the respondent No.1 terminated the Collaboration Agreement and cancelled the General Power of Attorney vide notice dated 29th September, 2021, whereafter the possession of the Collaboration Property was to be restored in the name of the respondent No.1 which fact was well within the knowledge of the petitioner and its partners.

23. It is further submitted on behalf of the respondent No.1 that petitioner has been siting over the land of the respondent No.1 for more than five years even without obtaining the required licence and that an amount of Rs.4.21 Crores can never be a sufficient consideration for the land now worth Rs.120 Crores.

24. It is further submitted on behalf of the respondent that upon the termination of the Collaboration Agreement the arbitration clause provided for therein no longer remained in existence. It is further submitted that the petitioner has failed to demonstrate even a single arbitral dispute giving rise to any cause of action for filing the instant petition.

25. It is further submitted that petitioner has falsely stated that the respondent No.1 and the respondent No.2 conspired to deceive the petitioner by creating a falsified Second Supplementary Collaboration Agreement. It is submitted on behalf of the respondent No.1 that the respondent no.2 was the designated partner of the petitioner at the time of execution of the Second Supplementary Collaboration Agreement. Moreover, the petitioner has not disputed the veracity of the First Supplementary Collaboration Agreement dated 3rd June, 2019 executed by the petitioner through its designated partner, i.e., respondent No.2 with the respondent No.1. The said agreement was signed by the respondent No.2 based on the authority granted in his favour by the petitioner vide a Resolution dated 3rd June, 2019.

26. The learned senior counsel appearing for the respondent No.1 further submitted that the authority granted in favour of the respondent No.2 by the petitioner vide Resolution dated 3rd June, 2019 was withdrawn by the petitioner on 2nd March, 2021, which was done much after the execution of the Second Supplementary Collaboration Agreement dated 17th August, 2020. It is further submitted that even after withdrawal of the authority on 2nd March, 2021, the Minutes of Meeting

of the subsequent calendar does not even whisper anything of sort and respondent No.2 continued to attend such meetings.

27. It is submitted that as per Clause 2 of the Collaboration Agreement dated 15th May, 2018, the petitioner was required to pay a non-refundable security deposit of Rs.5,96,50,000/- to the respondent No.1. However, the petitioner failed to pay the entire amount of the security deposit and on 20th April, 2019, cheque No. No.000049 dated 15th March, 2019 for Rs.1,46,50,000/- drawn on HDFC Bank issued by the petitioner in favour of the respondent No.1 for the part payment of the above said security deposit was dishonoured due to "Insufficient Funds" . It is submitted that this clearly establishes that the petitioner never had any financial capacity to complete its part of obligations.

28. It is further submitted that the petitioner in this petition has alleged fraud and fabrication, however, the said issues cannot be decided by this Court in the proceedings arising under the Act.

29. The learned senior counsel appearing for the respondent No.1 submitted that the petitioner by way of present petition is seeking to sit tight on the Collaboration Property which exclusively belongs to the respondent No. l, by distorting and misrepresenting the facts before this Court and thus the respondent no. 1 is made to suffer hardship due to failures and inactions of the petitioner. It is submitted that the Collaboration Property is worth more than Rs.100 Crores and the petitioner is trying to grab the property by paying a paltry security deposit of Rs.4.21 Crores.

30. It is further argued that in case as the present one in view of the Section 14(1)(c) read with Section 16 and Section 14(1)(d) of the Specific

Relief Act, an injunction cannot be granted in favour of the petitioner. In support of this contention, reliance has been placed on behalf of the respondent No.1 upon the judgments in ***Rajasthan Breweries Limited V. the Stroh Brewery Company***; **2000 SCC OnLine Del 481** and ***D.R.Sondhi V. Hella Kg Hueck & Co.;*** **2001 SCC OnLine Del 1273**.

31. To buttress the argument that the Second Supplementary Collaboration Agreement is not a forged and fabricated document, it was submitted by the respondent No.1 that respondent No.2 (who signed the Second Supplementary Collaboration Agreement on behalf of the petitioner) was a designated partner of the petitioner at the time of execution of the Second Supplementary Collaboration Agreement. The respondent No.2 till the date of the execution of the Second Supplementary Collaboration Agreement was the designated partner of the petitioner. The authority granted in favour of the respondent No.2 by the petitioner vide a Board Resolution dated 3rd June 2019 was not withdrawn by the petitioner, no earlier than 2nd March, 2021 which was done much after the execution of the Second Supplementary Collaboration Agreement. The respondent No.1 has vehemently disputed that the Board Resolution dated 3rd June 2019 is forged and fabricated.

32. Therefore, it is submitted that the instant petition being devoid of merit is liable to be dismissed.

(RESPONDENT No.2)

33. Ms. Radhika Bishwajit Dubey, learned counsel for the respondent No. 2 also submitted that the present petition filed by the petitioner

deserves to be dismissed summarily on the sole ground of concealment and suppression of material facts and various false and misleading statements have been made by the petitioner in the present petition. It is submitted that the petitioner was well aware of the termination of the Collaboration Agreement.

34. It is argued that the Second Supplementary Collaboration Agreement is a validly executed agreement. So far as the Board Resolution dated 3rd June, 2019 is concerned, it is submitted that the petitioner has not disputed or denied the issuance of authority or questioned its validity or authenticity in favour of respondent No.2 in its petition. In fact, on the contrary, the petitioner has filed a set of documents in support of its petition which contains and refers to the said Board Resolution.

35. It is submitted that as per the Minutes of the Meeting dated 2nd March, 2021, the old Resolutions were terminated from 2nd March, 2021 onwards. Assuming without admitting that no authority was given in favour of the respondent No.2 by the petitioner vide Resolution dated 3rd June, 2019, then the First Supplementary Collaboration Agreement should also not be a valid document. However, the petitioner has not disputed or denied the existence of the First Supplementary Collaboration Agreement.

36. Ms.Dubey further submitted that it was also in the knowledge of the petitioner that the Resolution dated 3rd June, 2019 was a document filed along with the First Supplementary Collaboration Agreement with the Sub-Registrar's office in Gurgaon. It is only through the rejoinder to the short reply filed on behalf of the respondent No.2 that the petitioner

for the first time questioned the said Board Resolution dated 3rd June, 2019 filed by the petitioner itself and introduced new facts and documents which the respondent No.2 vehemently denies.

37. It is further submitted that the documents filed along with the rejoinder by the petitioner are false, forged and fabricated and Resolution dated 3rd June, 2019, sought to be challenged in the rejoinder, has been in existence prior to the filing of the petition. It is submitted that nothing precluded the petitioner to file the same with the petition. It is only after the respondent No.2's reply that petitioner through its rejoinder sought to challenge the purported Resolution dated 3rd June, 2019 which was in existence earlier.

38. It is the case of the respondent No.2 that when the petitioner raised a question as to the authenticity of the document for the first time through its rejoinder, the respondent No.2 approached the Sub-Registrar's office to get a certified copy of the First Collaboration Agreement, the respondent No.2 was shocked to discover that the petitioner in collusion with the staff at the Sub-Registrar's office tried to replace the original Resolution dated 3rd June, 2019 with the purported Resolution dated 3rd June, 2019. The respondent No.2 immediately complained to the Tehsildar Sohna about the same who in turn got an FIR bearing 0065 dated 7th February, 2023 lodged with the Haryana Police, City Sohna Police Station.

39. It is further submitted that the copy of the Minutes of the Meeting dated 27th June, 2019 and 29th June, 2019 are fabricated for they bear the signatures of Mr.Deepak Kumar Agarwal alone despite the Minutes of Meetings noting the presence of other persons including respondent No.2.

It is further submitted that a bare comparison of the Minutes of Meetings filed along with petition with the purported Minutes of Meetings filed with petition bear the signatures of all present in those meetings as opposed to the purported Minutes of Meetings filed along with the rejoinder would show that the Minutes of Meetings filed with the petition bear the signatures of all present in those meetings as opposed to the purported Minutes of Meetings filed with the rejoinder which bears the signature of only Mr.Deepak Kumar Agarwal.

40. It was also argued on behalf of the respondent No.2 that the purported reports issued by the Forensics questioning the authenticity of the Second Supplementary Collaboration Agreement cannot be relied on for the same are procured from a private party.

41. Therefore, it is submitted that the instant petition is nothing but an abuse of process of law and warrants dismissal from this Court.

42. Heard the learned counsel appearing on behalf of the parties and perused the record.

FINDINGS AND ANALYSIS

43. In the instant case, the petitioner has invoked Section 10 of the Specific Relief Act, 1963 to submit that it was entitled to specific performance of the contract, that is, the Collaboration Agreement dated 15th May 2018. For a proper adjudication of this claim raised by the petitioner, it is pertinent to examine the provision and the bearing it may have on the facts and circumstances of the instant case.

44. Section 10 of the Specific Relief Act is reproduced hereunder:-

> *"CONTRACTS WHICH CAN BE SPECIFICALLY ENFORCED*
> *10. Specific performance in respect of contracts.—The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16."*

45. Section 10 of the Specific Relief Act, which provides for specific performance of a contract, acts as an enabling provision which a party to a contract may invoke to seek its enforcement with the intervention of the courts. The provision is to be read with Sections 11(2), 14 and 16 of the said Act which provide for situations in which specific performance of a contract may not be invoked or is barred.

46. The relief of specific performance is an equitable relief. As per the amended Act, the courts no longer have discretionary powers under the Specific Relief Act while granting such a relief. The court may be required to be satisfied on certain tests before granting the relief of specific performance, however, upon fulfilment of the ingredients and satisfaction of the court, a relief of specific performance may mandatorily be granted. To this effect, the Hon'ble Supreme Court in ***Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd.*, (2023) 1 SCC 355** while holding that the amendments brought to the Specific Relief Act in the year 2018 are prospective and not retrospective in nature, observed as under:-

> *"**44.** We may note that the Specific Relief Act, 1963 is the second legislation, replacing the earlier 1877 enactment of the Specific Relief Act. The 1963 Act was enacted after consideration of the Law Commission in its Ninth Report. The 1963 Act more or less*

followed the English position on equitable remedy of specific performance. In Common Law, the remedy of specific performance was unknown in the initial days and courts only granted damages for the value of goods if there was any breach of contract. Accordingly English courts, in the early years, granted monetary relief. In order to rectify the harsh stance of law, Courts of Equity in England started granting relief of specific performance if the Court of Equity found that granting damages would be inadequate or some special equitable rights of the plaintiff under a trust have been breached.

45. *In any case, grant of such relief, which emanated from equitable principles, remained discretionary. This principle is clearly explained by Swinfen Eady M.R., in Whiteley Ltd. v. Hilt [Whiteley Ltd. v. Hilt, (1918) 2 KB 808 (CA)] , in the following manner : (KB p. 819)*

> *"... the power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where the damages would fully compensate."*

46. *However, this was not the position under the Civil Law. Under the Civil Law of contracts, adherence to the sanctity of contract is enforced with greater rigour by inversing the situation. The reason for choice of damages and specific performance range from legal to economic. It is*

in this context that the courts cannot engage on the merits of having damages or specific performance or a hybrid. It is best left to the legislature to choose the course best-suited to the economy without sheepishly following the typecast approach in England or Civil Law systems.

48. *We do not subscribe to the aforesaid reasoning provided by the High Court for the simple reason that after the 2018 Amendment, specific performance, which stood as a discretionary remedy, is not (sic now) codified as an enforceable right which is not dependent anymore on equitable principles expounded by Judges, rather it is founded on satisfaction of the requisite ingredients as provided under the Specific Relief Act. For determination of whether a substituted law is procedural or substantive, reference to the nature of the parent enactment may not be material. Instead, it is the nature of the amendments which determine whether they are in the realm of procedural or substantive law.*

51. *In any case, the amendment carried out in 2018 was enacted to further bolster adherence to the sanctity of contracts. This approach was radical and created new rights and obligations which did not exist prior to such an amendment. Section 10, after amendment, reads as under:*

> *"**10. Specific performance in respect of contracts**.—The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of Section 11, Section 14 and Section 16."*

> ***52.*** *This provision, which remained in the realm of the courts' discretion, was converted into a mandatory provision, prescribing a power the courts had to exercise when the ingredients were fulfilled. This was a significant step in the growth of commercial law as the sanctity of contracts was reinforced with parties having to comply with contracts and thereby reducing efficient breaches.*
>
> ***53.*** *Under the pre-amended Specific Relief Act, one of the major considerations for grant of specific performance was the adequacy of damages under Section 14(1)(a). However, this consideration has now been completely done away with, in order to provide better compensation to the aggrieved party in the form of specific performance.*
>
> ***54.*** *Having come to the conclusion that the 2018 Amendment was not a mere procedural enactment, rather it had substantive principles built into its working, this Court cannot hold that such amendments would apply retrospectively."*

47. However, the question before this Court is substantially different. In the instant matter, the Collaboration Agreement between the parties already stands terminated. The said termination has not been challenged by either the petitioner or even the respondent No. 2 (former designated partner of the petitioner). Therefore, the issue which remains is ***whether the petitioner can seek specific performance of a contract which no longer remains in existence***. It is the petitioner's case that it was always

ready and willing to perform its part of the obligations under the contract, however, the facts of the present case speak to the contrary.

48. The cases cited on behalf of the petitioner, i.e., ***B. Santoshamma*** (Supra), ***N. Srinivasa*** (Supra) and ***DLF Home Developers Ltd. V. Shipra Estate Ltd. & Ors***.; (Supra) in support of its arguments deal with facts different from the present one and hence, are not applicable to the instant dispute between the parties.

49. It is trite law that continuous readiness and willingness on the part of the petitioner is a condition precedent for the grant of relief of Specific Performance. It is the bounden duty of the petitioner to prove its readiness and willingness by way of adducing evidence. The crucial facet has to be determined by considering all the circumstances including availability of funds and mere statements or averment in the present petition of readiness and willingness would not suffice. Under Section 16(c) of the Specific Relief Act, a distinction can be drawn between readiness and willingness to perform the contract. Both ingredients are necessary to be established for the grant of relief of the specific performance.

50. While readiness means the capacity of the petitioner to perform the contract, willingness relates to the conduct of the petitioner. It is not disputed that under the Collaboration Agreement (amended by the First Supplementary Agreement), the petitioner was required to get a licence from DTCP in a timely manner which it failed to get even after 5 years.

51. Though this Court knows that the contract did not stipulate a particular time period within which this licence was to be obtained, it ought to have been obtained within a reasonable time period. Thus, the

time period cannot be completely ignored. It is also not disputed that the petitioner was unable to make payment towards the earnest money as was initially agreed between the parties, which was one of the crucial factors while executing the First Supplementary Agreement. It is also not disputed that one of the post dated cheques handed over at the time of the Collaboration Agreement was dishonoured for "Insufficient Funds".

52. In the present case, the petitioner through the Minutes of the Meeting filed has itself admitted about the worsen condition of the LLP and how the LLP has been observing serious financial crunch and losses which is effecting its state of affairs and market status. I am, thus, of the *prima facie* view that owing to failure to obtain the licence within reasonable time period and its adversely affected and worsening financial condition, the petitioner has failed to prove its readiness and willingness to perform the essential terms of the Collaboration Agreement.

53. The learned senior counsel appearing on behalf of the respondent No.1 argued that the petitioner had only paid an amount of Rs.4.21 Crores as earnest money while the price of the land is about at INR 120 Crores. Having paid an amount insignificant in comparison to the value of the property, the petitioner is not entitled to discretionary equitable relief of specific performance. This Court finds weight in the argument as was also observed by Hon'ble Supreme Court in ***Saradamani Kandappan vs S. Rajalakshmi & Ors*** **; (2011) 12 SCC 18** in context of the sale of an immoveable property. The relevant paragraphs of the judgment is set out herein below:

> *"**37.** The reality arising from this economic change cannot continue to be ignored in*

deciding cases relating to specific performance. The steep increase in prices is a circumstance which makes it inequitable to grant the relief of specific performance where the purchaser does not take steps to complete the sale within the agreed period, and the vendor has not been responsible for any delay or non-performance. A purchaser can no longer take shelter under the principle that time is not of essence in performance of contracts relating to immovable property, to cover his delays, laches, breaches and "non-readiness". The precedents from an era, when high inflation was unknown, holding that time is not of the essence of the contract in regard to immovable properties, may no longer apply, not because the principle laid down therein is unsound or erroneous, but the circumstances that existed when the said principle was evolved, no longer exist. In these days of galloping increases in prices of immovable properties, to hold that a vendor who took an earnest money of say about 10% of the sale price and agreed for three months or four months as the period for performance, did not intend that time should be the essence, will be a cruel joke on him, and will result in injustice. Adding to the misery is the delay in disposal of cases relating to specific performance, as suits and appeals therefrom routinely take two to three decades to attain finality. As a result, an owner agreeing to sell a property for rupees one lakh and received rupees ten thousand as advance may be required to execute a sale deed a quarter century later by receiving the remaining rupees ninety thousand, when the property value has risen to a crore of rupees.

Therefore, it cannot be overlooked that, in fact, the Court is obliged to take initial notice of the phenomenal rise in the price of real estate.

54. It has been contended on behalf of the petitioner that the Collaboration Agreement dated 15th May, 2018 was not a determinable contract. To address this argument it is pertinent to refer to Section 14 of the Act which deals with the contracts which are not specifically enforceable by a Court and which reads as under:

> *"14.* ***Contracts not specifically enforceable****.— The following contracts cannot be specifically enforced, namely:—*
> *(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;*
> *(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;*
> *(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and*
> *(d) a contract which is in its nature determinable."*

Therefore, upon a bare reading of the provision, the argument/contention raised on behalf of the petitioner is rejected.

55. This also has bearing on injunctions which may be sought by the parties, as Section 41(e) of the Specific Relief Act, 1963, provides that an injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. However, merely, the fact that a contract comprises an affirmative agreement to

perform a certain act, coupled with a negative agreement expressed or implied not to perform a certain act, the circumstance that the Court is unable to compel a specific performance of affirmative agreement will not be precluded for granting an injunction to perform the negative agreement, provided that the party has not failed to perform the contract so as for it is binding on him.

56. The records show that the Second Supplementary Collaboration Agreement was executed between the parties which gives a right to the respondent No.1 to terminate the agreement, in case the licence is not obtained by the particular days/date. It is an admitted fact that the required licence was not obtained by the petitioner within the stipulated time period and respondent No.1 had executed a deed of cancellation dated 29th September, 2021 subsequently.

57. It also cannot be ignored that respondent No.2 (a designated partner of the petitioner at that time), who had been authorized to sign the First Supplementary Collaboration Agreement, had executed the Second Supplementary Collaboration Agreement. The Board Resolution on the basis of which the Second Supplementary Collaboration Agreement was signed, which the petitioner now disputes, was the document produced by the petitioner itself through its petition without challenge to the said Board Resolution.

58. The contention of the petitioner that the Second Supplementary Collaboration Agreement as also the Board Resolution is a forged and fabricated document is really a controversy between the petitioner and the respondent No.2. Going by the doctrine of indoor management, as such, respondent No.1, who is an outsider, is protected and has nothing to do

with the internal functioning of the petitioner. Further, this Court on the contention of the petitioner that the clauses of the Second Supplementary Collaboration Agreement are unconscionable and virtually efface the understandings, rights and obligations of the petitioner under the original Collaboration Agreement also does not find force for it is only reasonable for any prudent mind to protect its right having waited for years for a licence to see the light of the day.

59. 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.

60. Reference in this behalf may be made to the case of ***Rajasthan Breweries Limited V. the Stroh Brewery Company*; 2000 SCC OnLine Del 481,** wherein this Court has held as follows:

> *"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."

61. It is also contended on behalf of the petitioner that intent of the parties while signing the Collaboration Agreement was to create rights over the said property in favour of the petitioner. It is submitted that in pursuance of the agreement the possession was being handed over by the respondent No.1 by executing a General Power of Attorney in favour of the petitioner and hence, the petitioner is entitled to the specific performance of the Agreement. However, this Court does not find force in the arguments advanced. In the present case both respondent No.1 and the petitioner claimed to be in the possession of the said property. Be that as it may, Clause 3.1 of the Collaboration Agreement (as amended by the First Supplementary Collaboration Agreement) provides as under:

> " ***Consideration & Area Allocation***
>
> *The SECOND PARTY hereby transfer all the development/ all other rights of the Scheduled Property along with physical possession thereof to the FIRST PARTY for carrying out the development and construction of residential plotted colony and/or any other project on the Scheduled Property, as may be decided by the FIRST PARTY, at its own cost and expenses by the FIRST PARTY, in consideration of payment of Non-Refundable Earnest Money and allocation of the plotted area to the SECOND PARTY as set out in this Agreement. The FIRST PARTY shall develop the Scheduled Property as it may deem fit and proper at its sole discretion."*

62. From reading of the above clause it is clear that for transfer of all development/all other rights of the scheduled property along with

physical possession to the petitioner, two conditions had to be met. Firstly, the payment of the non-refundable earnest money by the petitioner and secondly, the allocation of plotted area to respondent No.1. Clause 3.4 provides that the petitioner shall allot the said property area to the respondent No.1 after issuance of a licence and other approvals of the project which are necessary prior to the allotment of any plot in the project. Thus, while the first condition was fulfilled by the petitioner, the second condition was not fulfilled for lack of licence, thus, the question of any transfer of rights or physical possession does not arise.

63. 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.

64. 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*** & Ors.**; 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.

65. 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.

66. The Hon'ble Supreme Court in the landmark judgment of ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals (P) Ltd.*, (2007) 7 SCC 125** with respect to the relief under the Specific Relief Act in a Section 9 of the Act petition held as under:-

> *"8. There was considerable debate before us on the scope of Section 9 of the Act. According to learned counsel for Adhunik Steels, Section 9 of the Act stood independent of Section 94 and Order 39 of the Code of Civil Procedure and the exercise of power thereunder was also not trammelled by anything contained in the Specific Relief Act. Learned counsel contended that by way of an interim measure, the court could pass an order for the preservation or custody of the subject-matter of the arbitration agreement irrespective of whether the order that may be passed was in a mandatory form or was in a prohibitory form. The subject-matter of arbitration in the present case was the continued right of Adhunik Steels to mine and lift the ore to the surface on behalf of OMM Private Limited and until the arbitrator decided on whether OMM Private Limited was entitled*

to breach the agreement or terminate the agreement and what would be its consequences, the court had not only the power but the duty to protect the right of Adhunik Steels conferred by the contract when approached under Section 9 of the Act. Learned counsel emphasised that what was liable to be protected in an appropriate case was the subject-matter of the arbitration agreement. Learned counsel referred to The Law and Practice of Commercial Arbitration in England by Mustill and Boyd and relied on the following passage therefrom:

"(b) Safeguarding the subject-matter of the dispute
The existence of a dispute may put at risk the property which forms the subject of the reference, or the rights of a party in respect of that property. Thus, the dispute may prevent perishable goods from being put to their intended use, or may impede the proper exploitation of a profit-earning article, such as a ship. If the disposition of the property has to wait until after the award has resolved the dispute, unnecessary hardship may be caused to the parties. Again, there may be a risk that if the property is left in the custody or control of one of the parties, pending the hearing, he may abuse his position in such a way that even if the other party ultimately succeeds in the arbitration, he will not obtain the full benefit of the award. In cases such as this, the court (and in some instances the arbitrator) has power to intervene, for the purpose of maintaining the status quo until the award is made. The remedies available under the Act are as follows:

(i) The grant of an interlocutory injunction.
(ii) The appointment of a receiver.
(iii) The making of an order for the preservation, custody or sale of the property.
(iv) The securing of the amount in dispute."

11. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject-matter of the arbitration agreement and such interim measure of protection as may appear to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection. The concluding words of the section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep

out the concept of balance of convenience, prima facie case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act.

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

injunctions is contained in Part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

17. In Nepa Ltd. v. Manoj Kumar Agrawal [AIR 1999 MP 57] a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the

Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. Under Section 28 of the Act of 1996, even the Arbitral Tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim reliefs.

18. The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In Siskina (Cargo Owners) v. Distos Compania Navieria SA (The Siskina) [1979 AC 210 : (1977) 3 WLR 818 : (1977) 3 All ER 803 (HL)] Lord Diplock explained the position : (All ER p. 824f-g)
"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

He concluded : (All ER p. 825a-b)

> *"To come within the sub-paragraph the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by the final judgment for an injunction."*

21. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted

termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case.

24. But, in that context, we cannot brush aside the contention of the learned counsel for Adhunik Steels that if OMM Private Limited is permitted to enter into other agreements with others for the same purpose, it would be unjust when the stand of OMM Private Limited is that it was cancelling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. Going by the stand adopted by OMM Private Limited, it is clear that OMM Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of

Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct OMM Private Limited not to enter into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings.

25. At the same time, we see no justification in preventing OMM Private Limited from carrying on the mining operations by itself. It has got a mining lease and subject to any award that may be passed by the arbitrator on the effect of the contract it had entered into with Adhunik Steels, it has the right to mine and lift the minerals therefrom. The carrying on of that activity by OMM Private Limited cannot prejudice Adhunik Steels, since ultimately Adhunik Steels, if it succeeds, would be entitled to get, if not the main relief, compensation for the termination of the contract on the principles well settled in that behalf. Therefore, it is not possible to accede to the contention of learned counsel for Adhunik Steels that in any event OMM Private Limited must be restrained from carrying on any mining operation in the mines concerned pending the arbitral proceedings.

26. We think that we should refrain from discussing the various issues at great length since we feel that any discussion by us in that behalf could prejudice either of the parties before the arbitrator or the Arbitral Tribunal. We have therefore confined ourselves to making such general observations as are necessary in the context of the elaborate arguments raised before us by learned counsel.

27. We therefore dismiss the appeal filed by

> *OMM Private Limited leaving open the questions raised by it for being decided by the arbitrator or Arbitral Tribunal in accordance with law. We also substantially dismiss the appeal filed by Adhunik Steels except to the extent of granting it an order of injunction restraining OMM Private Limited from entering into a transaction for mining and lifting of the ore with any other individual or concern making it clear that it can, on its own, carry on the mining operations in terms of the mining lease."*

67. Further, in ***Pink City Expressway Private Limited vs. NHAI &Anr*, FAO (OS) (COMM) 158/2022** decided on 15th June 2022, the subject was also considered by a Division Bench of this Court and the following was observed:-

> *"19. Law on the scope of interference in a Section 9 petition is no longer res integra. The learned Single Judge has held that the prayer made by the Appellant in the Section 9 petition cannot be granted as that would amount to extending the contract contrary to the decision dated 29.04.2022. It is well-settled that powers under Section 9 can only be exercised for preservation of the subject matter of the dispute till the decision of the Arbitral Tribunal and cannot be extended to directing specific performanceof the contract itself. The learned Single Judge has in this context relied on the judgment of the Division Bench in C.V. Rao (supra) and in our view rightly so. Reliance was also placed on the judgment of another Division Bench in DLF Ltd. (supra).We find no infirmity in the prima facie view that directing the Respondent to extend the contract for a further*

period, beyond 14 months extension granted,would amount to granting specific relief of the contract and is beyond the scope of the powers of the Court under Section 9 of the Act. For a ready reference,we may allude to para 40 of the judgment in DLF Ltd. (supra), as follows:-

> *"40. In C.V. Rao &Ors. v. Strategic Port Investments KPC Ltd. &Ors. 2014 SCC OnLine Del 4441, this Court had held that while exercising jurisdiction under Section 9 of the A&C Act, the Court cannot ignore the underlying principles which govern the analogous powers conferred under Order XXXIX Rules 1 & 2 CPC and Order XXXVIII Rule 5 CPC. Not only is the court required to be satisfied that a valid arbitration agreement existed between the parties, but the powers under Section 9 of the A&C Act could be exercised only for orders of an interim measure of protection in respect of the matters specified in Section 9 (ii)(a) to (e) of the A&C Act. In other words, the orders must relate to preservation of the property, which is the subject matter of the dispute, till the Arbitral Tribunal decides the same. The scope of relief under Section 9 of the A&C Act cannot be extended to directing specific performance of the contract itself."*

68. The law settled is hence clear that by way of a Section 9 petition under the Act, a party may not seek specific performance of the contract. Moreover, in the facts and peculiar circumstances of this case, the relief

of specific performance in a petition of Section 9 of the Act may not be granted by this Court.

69. In the background, facts and circumstances of the instant case, it is also deemed relevant to look into the matters wherein the closely related issues were considered. The Hon'ble Supreme Court while adjudicating a similar issue in ***Yusuf Khan v. Prajita Developers (P) Ltd.*, (2018) 12 SCC 683** observed as under:-

> *"4. The substance of the agreement is that the appellant agreed to "grant to the Developers the right to develop the said property" and the Developers agreed to develop the property on various terms and conditions specified under the agreement. It appears from the record that there is some single venture partnership agreement between the two companies (Developers). From the huge mass of documents filed in these appeals, it appears that there are two documents witnessing such partnership agreement. They are dated 16-6-2006 and 10-12-2008. The language and content of both the documents is substantially similar and an interesting fact which is required to be taken note of is that the 16-6-2006 document refers to the agreement dated 23-6-2006. The complete details of the terms and conditions of the agreement are not necessary for the purpose of this appeal.*
>
> *5. For the present, it must be noted that under the agreement, the Developers agreed to an amount of Rs 10 crores in three instalments as detailed in the agreement. It is agreed under Clause 4 of the agreement that "the owner shall permit the Developers to enter upon the said property and to commence the development*

thereof…." It is agreed under Clause 6 that all the necessary permissions/NOCs/orders which are required to be obtained shall be obtained by the Developers. The appellant is obliged to cooperate by executing appropriate documents for the said purpose. Under Clause 17 [Clause 17. Upon payment of the balance of monetary consideration by the Developers to the owners as provided in Clause 3(b) the owner shall permit and the developers shall have the licence to enter upon the said property to develop the said property to carry on construction on the said property and for that purpose to do all acts, deeds, matters and things as may be necessary.] of the agreement, it is stipulated that the "Developers shall have the licence to enter upon the said property".

6. Under Clause 31 [Clause 31. The developers shall commence the development of the said property and construction of buildings thereon within thirty days from the date of sanction of the final amended building plans and complete the development and construction of all buildings in all respects as provided herein and make the buildings fit and ready for occupation and the developers shall apply for issue of building completion certificate and pending the issue thereof for issue of occupancy certificate of each of the buildings within a period of 24 months from the date of issue of commencement certificate of development.] of the agreement, it is provided that the Developers shall commence development of the said property and the construction of the building thereof within 30 days from the date of the final amended building plan and complete the construction within a period of 24 months from the date of issue of the commencement certificate.

8. By Clause 33 [Clause 33. The provisions contained in Clauses 1-A, 2, 7, 8, 12, 13-A, 8c(B), 16, 17, 18, 20, 21, 23, 24(a) to (c) 25, 26, 27, 28, 29, 31, 32-A and 32-B, 34, 35, 35(B), 8(c), 37 hereof the basic and essential terms of this agreement and in case of any breach of the same it shall be referred to arbitration as provided in Clause 40 before termination of this agreement on account of such breach. The termination on account of breach of this development agreement as provided under Clause 32-A above shall not be the subject-matter of any arbitration as aforesaid and the parties will be entitled to exercise their respective rights under the said Clause 32-A above.(emphasis supplied)] of the agreement, the parties agreed that any dispute arising out of the breach of any one of the various clauses enumerated thereunder shall be resolved by arbitration. It is further provided that any dispute arising out of the termination of the agreement invoking Clause 32-A, shall not be the subject-matter of any arbitration.

10. A number of complicated arrangements were entered into in different combinations at different points of time between the appellant, the Developers and some third parties to the agreement, who are otherwise said to be related to the appellant, the details of which we do not propose to mention in this order.

11. The first respondent filed an application (No. 829 of 2015) under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred to as "the Arbitration Act") for an injunction restraining the appellant from

dispossessing Respondent 1 and also an injunction restraining the appellant from creating any third party right, title or interest in the said property. Initially some ad interim orders were passed in the said application, but the application itself was eventually dismissed on 14-1-2016 [Prajita Developers (P) Ltd. v. Yusuf Khan, 2016 SCC OnLine Bom 604] .

15. On 8-10-2015, the appellant terminated the agreement and informed the same to Prajita by issuing a notice through his lawyer. Relevant part of the notice is as follows:

> *"In view of the above, we hereby terminate the development agreement dated 23-6-2006. And we call upon you to remove yourself from the said property, with immediate effect, otherwise, our client will be taking appropriate action against you.*
>
> *Our client reserves his right to claim damages for not carrying out the activity of the construction on the said property and/or completing the work of construction within the stipulated time and causing severe hardship to our client."*

18.1. The appellant granted to the Developers under the agreement of 23-6-2006 the "right to develop" the property in question.

22. We do not also see any justification for the demand of Prajita for the specific performance of the agreement dated 23-6-2006. In the

circumstances of the case, we are of the opinion that permitting the continuance of the suit for specific performance of the agreement which is more than a decade old against a person from whom Prajita secured the development rights of the property in dispute which ultimately would enable Prajita to 25% of the monetary value of the development potential as against the right of the appellant who is entitled for 75% of the monetary value of the development potential would be unjust.

23. The background of the facts and circumstances of the case whether Prajita would be entitled for any damages apart from receiving the abovementioned amount of Rs 20 crores from the appellant is a matter which requires some examination. We therefore, deem it appropriate to refer the said question for resolution by arbitration between the appellant and Prajita. We, therefore, direct that the parties shall submit the abovementioned dispute for arbitration by Hon'ble Shri Justice P. Venkatarama Reddy, former Judge of this Court in accordance with law. The Registry is directed to communicate this order to Hon'ble Shri Justice P. Venkatarama Reddy."

70. In the case ***S. Rajeswari v. C. Parimala*, 2020 SCC OnLine Mad 13061,** the Madras High Court, while adjudicating a similar issue, held as under:-

*"**35.** The plaintiff has not proved that she was ready and willing to perform her part of contract. The defendant, by notice dated 24.06.2006 terminated the contract and also sent back the amounts already paid by the*

plaintiff. Even though the plaintiff sent a reply, dated 29.09.2006, she has not proved that on the date of sending reply she was having sufficient means to pay the balance sale consideration and the defendant has also stated that since the plaintiff has failed to clear the dues, the defendant made alternative arrangements with private financiers and cleared the dues to the bank and therefore, the defendant cancelled the agreement and sent the legal notice to the plaintiff along with the pay order. From the oral and document evidence, this Court finds that the plaintiff has failed and neglected to pay the balance sale consideration within the time stipulated in the agreement dated 28.10.2005 and therefore, issue numbers 1 to 5 are answered against the plaintiff.

39. *As already held that the plaintiff has not proved the readiness and willingness to perform her part of the contract, she is not entitled for the relief of specific performance and the defendant sent a notice dated 24.06.2006 and terminated the agreement dated 28.10.2005 by sending the advance amount received by the defendant from the plaintiff. Though it is settled preposition that unilateral cancellation is not permissible, but after the expiry of the terms and conditions mentioned in the agreement, and further since the plaintiff did not make the payment to clear the bank dues, the defendant made private arrangements to clear the dues and therefore the purpose has been completed without the help of the plaintiff and hence, the defendant has cancelled the agreement. As per the agreement, the balance sale consideration would be paid at the time of execution of the sale deed. But the plaintiff very well know that the defendant received the possession notice*

> *from the bank and unless the defendant paid the bank dues and redeemed the property he cannot execute the sale deed. Therefore, the plaintiff has not proved that she made the payment to clear the bank dues, except she made payment of Rs. 13,30000 on several dataes. But the plaintiff has not proved that she along with the defendant approached the bank to settle the dues. Therefore, under the circumstances, the plaintiff is not entitled to get the declaration that the agreement dated 28.10.2005 has been duly rescinded and terminated by the defendant on 24.06.2006 and this issue is answered accordingly."*

71. Therefore, it is evident that where the Agreement already stood terminated, without a challenge to the same, there remains no scope for intervention of this Court, specifically under Section 9 of the Arbitration Act or Section 10 of the Specific Relief Act.

CONCLUSION

72. Keeping in view the facts, circumstances, contentions raised in the pleadings, arguments advanced on behalf of the parties, as well as the discussion in the foregoing paragraphs, this Court is of the considered view that the petitioner is not entitled to the relief sought for.

73. The Collaboration Agreement between the parties already stands terminated, therefore, there is an impossibility for this Court to direct its specific performance in a proceedings under Section 9 of the Act. Further, as decided by this Court as well as the Hon'ble Supreme Court,

specific performance of a contract may not be granted in proceedings under Section 9 of the Act. Moreover, the petitioner has failed to show its readiness and willingness to perform the Agreement.

74. The contentions of the parties as regards the arbitrary breach of the terms of the Collaboration Agreement on account of fraud are issues that may be decided by the relevant Forum and shall not be adjudicated by way of the instant proceedings.

75. It is made clear that this Court has not expressed any opinion on the merits of the case and all kinds of contentions of the parties are left open for consideration by the competent Court or Forum.

76. Accordingly, the petition is dismissed.

77. Pending applications, if any, also stand disposed of.

78. The judgment be uploaded on the website forthwith.

Dasti.

(CHANDRA DHARI SINGH)
JUDGE

MARCH 14, 2023
SV/MS