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

Judgment reserved on: 29.05.2014

% Judgment delivered on: 01.07.2014

\+ **O.M.P. 630/2014**

THIESS MINECS INDIA PVT LTD ..... Petitioner

Through: Dr. A.M. Singhvi & Mr. Sandeep Sethi, Senior Advocates along with Ms. Pallavi Shroff, Mr.Dhruv Dewan, Mr. Siddhartha Datta, Mr. Rohan Batra, Ms. Anannya Ghosh & Mr.Aditya Nayyar, Advocates.

versus

NTPC LTD ..... Respondent

Through: Mr. Abhinav Vasisht, Senior Advocate along with Mr. Nandish Vyash, Mr. Anuj Malhotra & Mr.Manpreet Lamba, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

J U D G M E N T

VIPIN SANGHI, J.

1. This petition has been preferred by the petitioner under Section 9 of the Arbitration & Conciliation Act, 1996 (the Act) primarily to seek a restraint against the respondent from giving effect to the termination of contract between the parties, in pursuance of the termination letter dated

07.05.2014. The petitioner also seeks other consequential ad interim injunctive reliefs.

2. Though no notice has been issued in the petition, the respondents have appeared and opposed the petition. I have heard detailed submissions of learned senior counsel on both sides.

3. The parties entered into the contract, namely, the "Project Agreement" for development and operation of Pakri Barwadh Coal Block in the State of Jharkhand on 14.07.2011. The said contract contemplated two stages – the first stage was the development stage, and the second stage is the operations stage. Clause 4.4(a) of the contract provides that the development stage was to commence on the "commencement date" and end on 360th day immediately following the commencement date, unless such 360th day is extended by the parties in accordance with clause 8.3. The operations stage was to commence on the "coal production start date". The "coal production start date" means the day immediately following the last day of the development stage. Consequently, the contract did not provide for any hiatus between the completion of the development stage, and the start of the operations stage.

4. The notice of termination dated 07.05.2014 elaborately sets out the historical background in which the project agreement was executed and the developments which took place from time to time in relation to the said agreement. Though the petitioner has disputed the allegations made by the respondent in the said termination notice, there is hardly any dispute with regard to the narration of developments that have taken place since the

execution of the project agreement. Therefore, the background facts are being narrated by reference to the statements contained in the termination notice.

5. In the notice of termination dated 07.05.2014, the respondent, inter alia, states that a letter of acceptance dated 30.11.2010, resulting in a concluding and binding contract was issued - by which a contract for development and operation of Pakri Barwadh Coal Block for a period of 27 years – effective from the date of letter of acceptance, was awarded to the petitioner. The project agreement was subsequently signed on 14.07.2011. The termination notice states that the Pakri Barwadh Coal Block was allotted to the respondent in 2004. It was a US$ 11 Billion project to develop and operate the green field project for the Pakri Barwadh Coal Block in Jharkhand. The coal block with reserves of 1.4 billion tonnes, is the largest amongst six acreages held by the respondent, and has national importance inasmuch, as, it is one of the largest coal mining projects for India over the next few years. The termination notice recites that a detailed bid process was initiated by the respondent to identify and appoint an internationally qualified mine developer and operator for timely, efficient and optimized mining operations by inviting bids in the year 2007 from financially strong and experienced mining operators. The Request for Proposal (RFP) issued on 08.02.2007 required the bidders to visit the site and satisfy themselves as to the adequacy of the local conditions, including approach roads to the site, adequacy of existing culverts/ bridges/ roads for bringing equipment and machinery to the site, water and power supply conditions and other relevant matters. Discussions between the parties for

appointment of the petitioner as a mine operator and developer commenced in 2006, when a proposal of the petitioner was first discussed with the respondent. When the petitioner submitted its proposal in response to the RFP document on 12.04.2007, the petitioner stated that it would commence work immediately upon issuance of the letter of acceptance by the respondent, and would complete all its obligations for development stage within 360 days – as specified in the RFP document.

6. The notice of termination further states that the petitioner – vide communications dated 12.04.2007 & 20.06.2007, set out the timeline for carrying out major activities to undertake development of the community. The respondent claims that these communications show that the petitioner was conscious of the resistance being faced by the respondent from the local community for land clearance and rehabilitation, and the petitioner proposed to keep the timeline in spite of the said difficulties. The respondent claims that the petitioner also represented that, if it were to be appointed as the mine developer/ operator, it would commence a range of community service in parallel to the respondent's land acquisition and rehabilitation activities. The notice of termination further records that during 2008-10 detailed discussions and correspondence on technical, commercial and pricing aspects of the contract took place between the parties. All this while the petitioner kept its offer, in response to the RFP, open. The discussions led to issuance of the letter of acceptance by the respondent to the petitioner on 30.11.2010 and execution of the project agreement on 14.07.2011. The termination notice also sets out the representations held out by the petitioner with regard to its expertise, experience and capability. The notice of

termination, by reference to specific clauses of the project agreement, also sets out the fact that the petitioner had gained insight of the site and surrounding conditions, and that the petitioner had made its own assessment as to the physical conditions, geology and geo-technical characteristics of the site and its surroundings. Clause 3.2(f) of the project agreement is relied upon by the respondent, whereunder the petitioner relieved the respondent from any liability, loss or expense suffered by the petitioner, on account of inaccuracy of the information relating to the site.

7. The notice of termination states that as per the original schedule set out in the project agreement, the "development stage" was to be completed on the 360th day immediately following the commencement date, i.e. the date of issuance of letter of acceptance by the respondent (which was 30.11.2010). The mining operations were to commence on the immediately following day. Consequently, the development stage should have been completed on 25.11.2011, and the mining operation should have been started on 26.11.2011. The respondent alleges that as on 03.12.2011, the delays/ failures on the part of the petitioner communicated to the petitioner, were the following:

> *"i. Final Project Development Memorandum submission was made in September 2011 instead of December 2010 (as required under Clause 1.1 (definition of Project Design Memorandum), which had delayed the design and start of work.*
>
> *ii. Draft Operational Plan was submitted only in the latter part of 2011, instead of January 29, 2011 as required under Clause 8.2(a)(i), which had resulted in delay of working schedule of owners and mine operators.*

iii. Land for secondary sizing, reclaimer stacker and coal stockyard area had been provided to you on October 15, 2011 by NTPC's letter dated October 15, 2011. However, no demarcation on the ground had been done in spite of several reminder including by NTPC's letter dated November 5, 2011".

8. The respondent claims that, had the mining operations started as scheduled, the respondent would have benefitted from the mining of the coal for a period of two years before issuance of termination notice.

9. The respondent states in the notice of termination that, since clause 4.4 and 8.3(3) of the project agreement contemplated that the development stage could be extended by a further period of 450 days, the respondent was compelled to extend the period of development stage accordingly – as per provisions of clause 8.3(b) of the project development agreement.

10. At this stage, I may refer to the relevant clauses of the Project Agreement which deal with the aspect of default and termination.

11. Clause 24 of the contract deals with the aspect of suspension and termination of the contract. The said clause defines "Event of Default" as follows:

*"**Event of Default**" means with respect to a party any of the following:*
a) a party becomes insolvent;

b) the party commits a material breach of its obligations under this agreement which is capable of being remedied and does not remedy the breach within 14 days of receiving notice in writing from the other party specifying the breach and requiring the breach to be remedied: or

the party committing a material breach of its obligations under this agreement which is not capable of being remedied"

(Emphasis supplied)

12. The respondent owner has the right to terminate the contract as stipulated under clause 24.3. Clause 24.3 (b) is relevant and the same reads as follows:

"(b) The following events or the circumstances shall be "Mine Operator's Events of Default":

i) Any of the warranties offered by the Mine Operator in clause 3.1(b) is not true or incorrect;

ii) The Mine Operator fails to renew the Contract Performance Guarantee, in accordance with Clause 6.2, atleast 6 months prior to its expiry;

iii) The Mine Operator fails to make satisfactory progress or achieve milestones in accordance with the agreed Operational Plan specified at Clause 8.2(a) (duly considering any extension under Clause 8.3 or subsequently), except where the progress has been held up because of delay in achieving Owner's milestones identified the Operational Plan (duly considering any extension under Clause 8.3 or subsequently);

iv) The Mine Operator does not maintain or timely renew the required Approvals, as specified in Clause 7.2, resulting in material suspension of Mining Services for a continuous period of 3 months during the Operations Stage;

v) The Short Delivery is more than 50% pursuant to Clause 15.3(a) for a continuous period of three (3) months or the Short Delivery, in aggregate for any Operating Year is more than 30% of ACQ specified in AAPP for that Operating Year;

vi) The coal delivered by the Mine Operator continues to be rejected for a continuous period of three months in any Operating Year on account of quality of coal not meeting the criteria specified in Clause 15.6(e);

vii) If the Mine Operator disposes of all or a substantial part of the Mine Operator's Plant and Equipments without the prior written consent of the Owner;

viii) If the Mine Operator disposes of any of the Owner's Facilities without the prior written consent of the Owner in violation of Clauses 13.5(c) and 13.5(d);

ix) If the Mine Operator becomes bankrupt or insolvent, has a receiving order issued against it, enters into a compromise with its creditors, or, its governing body approves a resolution or order is made for its liquidation/winding up (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), a receiver is appointed over any part of its undertaking or assets, or if the Mine Operator takes or suffers any other analogous action in consequence of debt;

x) If the Mine Operator assigns or transfers the Agreement or any right or interest therein in violation of the provisions of this Agreement;

xi) If the Mine Operator, in the reasonable judgment of the Owner has engaged in corrupt or fraudulent practices in competing for or in executing the Agreement pursuant to Clause 9.1;

xii) In the Mine Operator does not recommence providing the Mining Services within 7 days of receipt of the Owner's notice under Clause 24.1(d);

xiii) If the Mine Operator fails to meet the obligations set out in Clause 8.2;

xiv) Any other Event of Default in respect of the Mine Operator, not explicitly covered above."

(Emphasis supplied)

13. Clause 24.4 deals with the aspect of show-cause/ termination for an event of default and the same reads as follows:

"Show cause/Termination of an Event of Default

a) In case of an occurrence of a Mine Operator's Event of Default, the Owner may issue the Mine Operator a written notice confirming its intent to terminate this Agreement.
Such notice shall:
i) state that it is a notice under clause 24.3(b) of this agreement, and
ii) specify the alleged event along with supporting information/documents that the Owner may have,

b) In case of an occurrence of an Owner's Event of Default, the Mine Operator may issue the Owner a written notice confirming its intent to terminate this Agreement.
Such notice shall:
i) state that is a notice under clause 24.2(b) of this Agreement, and
ii) specify the alleged event along with supporting information/documents that the Owner may have.

c) Upon receipt of notice of termination by the non terminating party pursuant to clause 24.5(3) or 24.5(b) as the case may be, the Parties shall discuss in good faith for a period of thirty (30) days the options for the cessation of event that led to the issue of the notice. It is clarified that during the period of thirty (30) days the obligations of the parties shall continue to subsist.

d) At any time after the expiry of such period of thirty (30) days after the terminating Party gave notice to the other Party pursuant to 24.5(a) or 24.5(b) as the case may be unless the circumstances constituting the termination event have either been fully remedied to the satisfaction

> *or such terminating Party or have ceased to apply, such terminating Party may terminate this Agreement by giving a forty five (45) day prior written notice of such termination to the non termination party."*
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> (Emphasis supplied)

14. The respondent further states that a show-cause notice was issued to the petitioner on 10.07.2012 in exercise of the respondent's right contained in clause 24.4 (a) on account of occurrence of events of default mentioned in the said show-cause notice. In the notice of termination, the respondent also refers to the caution notice dated 26.04.2012 issued by the Ministry of Coal to the respondent – in view of the extensive delays in the development activities of the mine. The key defaults attributed to the petitioner in the show-cause notice issued under clause 24.3(iii), 24.3(b) (xiii) and/ or 24.3(b) (xiv) of the project agreement included:

> *"i. A delay of more than 275 days in the finalization of the Project Design Memorandum (submitted on September 16, 2011 instead of December 15, 2010);*
>
> *ii. A delay of more than 12 months in the finalization of the Operational Plan (finalized on March 22, 2012 instead of March 15, 2011);*
>
> *iii. Failure to commence construction work of the MDO colony, even though NTPC had handed over the land to you on July 5, 2011 along with the legal possession certificates.*
>
> *iv. Failure to commence work with respect to the coal stockyard, reclaimer etc. even though, land free from encumbrance (along with the clearance letters) was provided to you on October 15, 2011.*

v. Failure to commence site activity causing a delay of more than 2 years, even though land for the coal lab, core shed and training centre was provided to you on February 9, 2012.

vi. Failures to complete ground survey work for infrastructure by January 29, 2011 vide Operational Plan.

vii. Failure to complete the basic engineering drawings for infrastructure within the stipulated timeline".

15. The notice of termination records that a reply was sent to the show-cause notice on 08.08.2012. The respondent alleges that the grounds taken in the reply were not tenable, and were mere excuses for the petitioner's delay. The respondent further states that pursuant to the terms of the project agreement, the respondent entered into "good faith discussions" with the petitioner in accordance with clause 24.4.(c), 23.1(b) and clause 8.3(b) of the project agreement. Pursuant to the good faith discussions, the respondent agreed to extend the time period of development stage for a further period of 360 days (the first extension of 450 days already having been granted earlier). The parties signed the minutes of meeting dated 07.02.2013 and 20.02.2013 as good faith discussions. The respondent states that extension of development phase was granted up to 11.02.2014. The respondent states that in the aforesaid meetings, the petitioner continued to make commitments pertaining to completion of development stage in 360 days; construction of infrastructure at the earliest, and; best efforts to start excavation for creation of box cuts by May 2013 on the forest land handed over to the petitioner.

16. The respondent then sets out the allegedly continuing defaults which existed on the expiry of the development period after the second extension –

which expired on 11.02.2014. The defaults allegedly found by the respondent, and contained in the termination notice are the following:

> *"i. Occurrence of Event of Default under clause 24.3(b) (iii) of the Project Agreement i.e. a delay of more than 275 days in the execution of the Project Design Memorandum (submitted on September 16, 2011) in contravention of clause 1.1 (definition of 'Project Design Memorandum') of the Project Agreement;*
> *ii. Occurrence of Event of Default under clause 24.3(b)(iii) of the Project Agreement i.e. a delay of more than 12 months in the execution of the Operational Plan (submitted on March 22, 2012) in contravention of clause 8.2(a) of the Project Agreement; and*
> *iii. Occurrence of Event of Default under clause 24.3(b)(xiii) and 24.3(b)(xiv) of the Project Agreement i.e. failure to commence work with respect to the coal stockyard, reclaimer etc. under clause 8.2(e) of the Project Agreement, even though, land free from encumbrance (along with the clearance letters) was provided to you on October 15, 2011;*
> *iv. Occurrence of Event of Default under clause 24.3(b)(iii) of the Project Agreement i.e. failure to make satisfactory progress or achieve milestones in accordance with the agreed Operational Plan specified at clause 8.2(a) (duly considering any extension under clause 8.3 or subsequently);*
> *v. Occurrence of Event of Default under clause 24.3(b)(xiii) and 24.3(b)(xiv) of the Project Agreement i.e. failure to commence site activity under clause 8.2(c) and Work Schedule for Constructing Fixed Infrastructure Facilities annexed to the Operational Pan – causing a delay of more than 2 years, even though land for the coal lab, core shed and training centre was provided to you on February 9, 2012;*
> *vi. Occurrence of Event of Default under clause 24.3(b)(iii) of the Project Agreement i.e. a delay of more than 11 months in the execution of the Basic Engineering Drawings (submitted on November 16, 2011) in contravention of the Work Schedule for Constructing Fixed Infrastructure Facilities annexed to the Operational Plan.*

vii. Occurrence of Event of Default under clause 24.3(b)(xiii) and 24.3(b)(xiv) of the Project Agreement i.e. failure to commence work at the Site, despite the provision of land for mining (487.78 Ha), dump (65.26 Ha) and infrastructure (71.65 Ha) has been made by NTPC after completing all the due processes of land and obtaining the clearances under the Forest Conversation Act, 1980 and from the State government in contravention of clause 8.2(e) of the Project Agreement".

17. The respondent stated that:

"Presently, the state of affairs with respect to the project is that, inspite of having access to the site and mobilizing your equipments therein, you have not even commenced sufficient work to complete the Development Stage and have in fact sought a third notice of extension of time for the Development Stage by your letter dated December 11, 2013".

18. The respondent further stated in the termination notice as follows:

"29. As is evident from the said clause, in the event that the obligation under clauses 8.1 and 8.2 were not completed within 360 days from the Commencement Date, the Defaulting Party would have a right to seek extension of Development Stage by a period of 450 days and in the event the Defaulting Party failed to fulfill its obligations during the extended period any further action would be dependent on good faith discussions. It may be recalled that the extensions of the Development Stage have been sought by you, as clearly recorded in the minutes dated February 7, 2013, February 20, 2013 and January 24, 2014 wherein requests for extensions were considered, subject to the conditions specified. It is therefore apparent that the Development Stage could not be completed for reasons attributable to you, and that you (and not NTPC) were the defaulting party. The result of the good faith discussions held in February 2013 was to have an extension of the period for completion of the Development Stage until February 11, 2014.

This extension period is now completed. On completion of this period in accordance with the terms of good faith discussions, it is abundantly clear that the contract has lapsed and/or expired in accordance with the terms of clause 8.3(b). The logical conclusion of the non-completion of the Development Stage is that the contract cannot proceed to the next stage, viz. the Operations Stage, and hence the contract stands lapsed and/or expired.

30. Without prejudice to the above, as per clause 24.4(d) of the Project Agreement, if after the issuance of the Show Cause Notice by NTPC, the circumstances constituting the termination have not been remedied by you to the satisfaction of NTPC or have not ceased to apply, then NTPC has a right to terminate the Project Agreement, any time after the expiry of the 30 days period for good faith discussion. Thereafter, NTPC due to continuance of the aforesaid Events of Defaults in any event is also independently exercising its rights to terminate the Project Agreement under clause 24.4(d) of the Project Agreement.

31. At the meeting held on January 24, 2014, you were aware of the aforesaid delay and requested further extension in time. NTPC agreed to consider your request but had explicitly stated that the same would be "subject to approval of competent authority of NTPC". After the meeting, we received from you, your own 'Development Stage Progress Report' of January 2014, in which you also categorically stated the extension requested by you was pursuant to the 'good faith discussions'. The Senior Management/competent authority has deliberated on your request and has, however decided not to grant such extension".

19. The respondent also refers to a meeting held between the parties on 24.01.2014, wherein the respondent agreed to consider the petitioner's request for further extension of time by 360 days. The respondent states that the said decision was, however, *"subject to approval of competent authority of NTPC"*. The respondent states that the senior management/ competent

authority had deliberated on the petitioner's request, and has decided not to grant such extension. The respondent states that the Ministry of Coal imposed a conditional bank guarantee and issued a warning to the respondent of a potential deallocation of the coal blocks on account of severe delay in completion of the project. The respondent alleges that the alleged inability of the petitioner to fulfill its obligations had resulted in non-utilisation of a reserve of coal in the Pakri Barwadh Coal Block which was a waste of natural resources. The lack of production had triggered in increase in the coal, thereby resulting in huge expenditure – causing enormous loss to the national exchequer. The respondent stated that it was left with no option but to terminate the project agreement under clause 24.4(d) thereof. The operative portion of the termination notice reads:

> *"35. Accordingly, without prejudice to any of NTPC's other rights under the Project Agreement and related documents and under applicable law, which are expressly reserved,* ***NTPC hereby intimates you that it does not agree to extend the Development Stage any further and that, as per the Clause 8.3(b) of the Project Agreement, the Project Agreement has lapsed and/or expired. Without prejudice to the aforesaid and in the alternative, in any event, NTPC hereby also intimates you of its decision to terminate the Project Agreement under clause 24.4(d), and accordingly the Project Agreement shall stand terminated on the expiry of the notice period of 45 days from the date of this letter, i.e. June 22, 2014.*** *Any further actions, which may be taken by you to delay or prejudice, the Pakri Barwadih mining project any further shall be entirely at your own risk as to the costs and consequences thereof"*
>
> (Emphasis supplied)

20. Thus, it appears that the development stage has not been completed and the operations stage has not yet started. There is a serious dispute with

regard to the reasons for the delay in achieving the operations stage. Whereas the petitioner puts the blame for the same on the respondent – by claiming in para 1(c) of the petition that:

> *"i. Despite having been allocated the coal block as far back as in 2004, the Respondent has failed to make available to the Petitioner sufficient and encumbrance free land with reasonable access, as required by the Contract and the Mine Plan approved by the Ministry of Coal, on which the latter could have undertaken execution of its obligations during the Development Stage of the Contract;*
>
> *ii. Even the physical possession of the land purportedly made available by the Respondent has never been actually handed over to the Petitioner to commence works thereon;*
>
> *iii. In any event, the land purportedly made available was stricken with severe law and order problems occasioned by the Respondent's failure to implement a suitable Rehabilitation and Resettlement Policy for 2021 families as required under the Contract as well as the Environmental Clearance received for the Project dated 19 May 2009, further restraining the Petitioner from carrying out any mining activity thereon.*
>
> *iv. The Respondent's insistence to commence works on the land purportedly made available to the Petitioner will not only be in contravention of the statutorily approved Mine Plan, applicable statutes and other statutory approvals including the Environmental Clearance dated 19 May 2009 but would have also jeopardized the safety of the persons residing at the Site."*,

the claim of the respondent is that the petitioner has not taken steps to complete the development stage by its own defaults, despite repeated

extensions. The respondent has, inter alia, stated in the termination notice as follows:

> *"35. Accordingly, without prejudice to any of NTPC's other rights under the Project Agreement and related documents and under applicable law, which are expressly reserved,* ***NTPC hereby intimates you that it does not agree to extend the Development Stage any further and that, as per the Clause 8.3(b) of the Project Agreement, the Project Agreement has lapsed and/or expired. Without prejudice to the aforesaid and in the alternative, in any event, NTPC hereby also intimates you of its decision to terminate the Project Agreement under clause 24.4(d), and accordingly the Project Agreement shall stand terminated on the expiry of the notice period of 45 days from the date of this letter, i.e. June 22, 2014.*** *Any further actions, which may be taken by you to delay or prejudice, the Pakri Barwadih mining project any further shall be entirely at your own risk as to the costs and consequences thereof"*
>
> (Emphasis supplied)

21. As noticed above, the petitioner, inter alia, seeks a restraint against the respondent from giving effect to the said termination letter dated 07.05.2014.

22. The submission of Mr. Sethi, learned senior counsel for the petitioner, firstly, is that the termination notice proceeds on the basis that upon expiry of the development stage on 11.02.2014, the contract had lapsed and/ or expired in accordance with the terms of clause 8.3(b). He submits that the contract – and more particularly clause 8.3(b), does not contemplate an automatic lapsing or expiry of the project agreement. Clause 8.3(b) reads as follows:

> *"(b) In the event that either Party fails to fulfill its obligations under Clause 8.1 or 8.2, as the case may be, within 360 days from the Commencement Date, the defaulting Party shall have the right to seek extension of Development Stage by a period of 80 days including any extension on account of Force Majeure without any financial implication on either side. However the extension of Development period shall be considered for adjustment of Mining Fee on account of Price escalation. In the event that the defaulting Party fails to fulfill it's the Parties shall have good faith discussions and mutually agree upon the future course of action depending upon the circumstances prevailing at that time."*

23. It is not in dispute that the period of "80 days" stands amended to "450 days". Accordingly, the first extension was granted by the respondent for a period of 450 days, as already noticed above.

24. Mr. Sethi submits that on the one hand the respondent has issued the termination notice, while on the other hand, as late as on 24.01.2014 good faith discussions for extension of development stage period were held between the parties and the respondent had agreed to grant a further extension of 360 days for completion of the development stage to the petitioner. He further submits that the respondent issued communications to the petitioner on 05.03.2014 and 14.03.2014 calling upon the petitioner to continue the development work. Thus, the excuse that the competent authority had not granted approval for extension of time for completion of the development stage by 360 days, was of no avail. Mr. Sethi submits that the respondent did not communicate to the petitioner – till the time of issuance of termination notice, that the competent authority had refused to grant approval for extension of the development stage. Mr. Sethi has pointed out that even during the course of earlier good faith discussions held

on 24.01.2014 and 22.02.2013, the respondent had recorded that the minutes were subject to approval of the competent authority of NTPC. However, no approval was ever communicated to the petitioner. He, therefore, submits that the stipulation laid down by the respondent in the minutes of the meeting held on 24.01.2014 – that the same was subject to approval of the competent authority, was of no avail.

25. Mr. Sethi submits that respondent itself was responsible for the delay in achieving the completion of the development stage, as vast areas of land which form part of the project, and which should have been handed over to the petitioner, were not so handed over on account of encroachments, resistance from the local people and law & order problems. He submits that delivery of the possession of the development area was essential to enable the petitioner to carry on the development work. In this regard, he has referred to the plans filed on record to show that large tracts of areas are encroached and had not been delivered to the petitioner.

26. Mr. Sethi has drawn the attention of the Court to the development stage obligations of the respondent owner as set out in Clause 8.1 of the project agreement. He has also referred to the works stated to have been carried out by the petitioner as set out in paragraph 19(e) of the petition, wherein the petitioner has set out its compliance of its obligations under clause 8.1.

27. Mr. Sethi has also drawn the attention of the Court to the respondent's communication addressed to the Government of India dated 19.06.2013, wherein the respondent has acknowledged that the respondent was at an

advanced stage of coal extraction from the mines in question. In this communication, the respondent had stated that its equipments (i.e. the petitioner's equipments) were lying at the mine mouth in village Chirudih. The respondent had stated in this communication as follows:

> *"As you are aware, NTPC is in advanced stage of coal extraction from Pakri-Barwadih Mines. We need urgent assistance from the Jharkhand Government on the following*
>
> 1. *Our equipments are lying at the mine-mouth, which is in village Chirudih Villagers are cooperating with us and are also taking care of the equipments. However, there are some 200 plus families, who are unauthorized encroachers on the forest land in Chirudih village. We have requested the State Government to evacuate them and indicate, if any, compensation that needs to be paid. The State Government is yet to confirm.*
>
> ***2.*** *With regard to transfer of GMK/Government land, there are some persons who are* ***occupants/------*** *of the Government land for more than 30 years and have been compensated as per Jharkhand Government's Order dated 14-05-2009, which contains the policy decisions for compensation to such persons.* ***Out of 665 acres of Government land, 3 acres have been transferred to NTPC, 499 acres have been approved for transfer, 142 acres is pending for transfer with the State Government and for the balance 21 acres there is no record available with the State Government.***
>
> *Transfer of the total Government land and the settlement of occupants who are not eligible, as per the Jharkhand Government's policy decision order of May 2009 also needs to be addressed by the State Government immediately.*
>
> 3. *The coal evacuation route would be through a road. Along the road, we are having problems in Nagdibad, Arahara and Jugra villages. The State Government will have to enhance*

security arrangements in this area so that road construction work, which has been awarded to CPWD, could be started.

4. *The present Government has also approved R&R Plan on 15-02-2013 and the order was issued on 27-02-2013. However, we are having difficulty in identifying the beneficiaries. The State Government will have to quickly enhance their manpower for identifying the beneficiaries to whom NTPC is ready to make payment."*

(Emphasis supplied)

28. Reference is also made to the letter dated 24.06.2013 of the respondent addressed to the Ministry of Coal, wherein the respondent has, inter alia, stated:

"4. Status of End-use Power Projects : Placed at Annexure-V.

As explained above, NTPC has achieved best progress in Pakri-Barwadih Coal Block despite severe socio-political problems beyond control of NTPC, Men and machinery are placed at mine mouth, land acquisition alongwith community development activities are progressing in full swing and mining can be started at any time. Therefore the show-cause notice may please be withdrawn immediately."

29. Mr. Sethi submits that the respondent cannot blow hot & cold at the same time by accusing the petitioner of not progressing with the development work on the one hand, and acknowledging before the Government, the work done by the petitioner, on the other hand.

30. Mr. Sethi submits that since there were reciprocal obligations and promises to be performed under the project agreement, unless the respondent performed its fundamental obligation of providing the requisite land, the petitioner's obligation to carry out development work would not commence.

31. Mr. Sethi submits that the present case falls under the exception to Section 14(1), as contained in Section 14(3)(c)(iii) of the Specific Relief Act, 1963. Mr. Sethi submits that since the contract in question is in relation of the execution of work on land, and the petitioner has been placed in possession of a part of the land on which the work has to be executed, the factors set out in Section 14(1) of the Specific Relief Act, 1963 would not prevent the specific performance of the project agreement.

32. Mr. Sethi further submits that the termination notice is premised on alleged events of default in respect whereof the petitioner was never put to notice as envisaged under clause 24 of the project agreement and, consequently, the termination notice is in breach of the contractual terms and procedure. He submits that when, as a result of good faith discussions, the respondent agreed to extension of time for completion of the development stage work by 360 days, the show-cause notice dated 10.07.2012 stood withdrawn/ closed. He submits that if – according to the respondent, there was any further breach of the project agreement by the petitioner, it was obligatory for the respondent to issue a fresh show-cause notice; grant an opportunity to deal with the allegations against it, and; enter into good faith discussions. He submits that good faith discussions did take place in January 2014, i.e. just before the expiry of the last extension of 360 days, and the respondent also granted a further extension of 360 days. Thus, the termination notice is in breach of the contractual terms.

33. Mr. Sethi has also sought to place reliance on the order passed by this Court in O.M.P. No.302/2014 titled ***M/s Gwalior – Jhansi Expressway Limited Vs. National Highway Authority of India*** dated 12.03.2014,

whereby the Court restrained the respondent from taking coercive action on the basis of notice of termination dated 07.03.2014 in respect of a concession agreement, and the order dated 21.05.2014 in O.M.P. No.584/2014 titled ***MBL Infrastructures Limited Vs. National Highway Authority of India,*** whereby the Court granted an ex-parte ad interim order of stay, restraining the respondent from giving effect to its show-cause notice for termination of the contract for construction of approach roads. Mr. Sethi submits that where the petitioner had made out a strong prima facie case – as in the present case, this Court is not powerless in the matter of grant of injunction against termination of the contract.

34. Dr. Singhvi, learned senior counsel for the petitioner has also advanced his submissions. Dr. Singhvi submits that since the respondent is a public sector undertaking, its actions and conduct have to be in consonance with reasonableness and its actions are liable to be judged on the touchstone of Article 14 of the Constitution of India even in contractual matters. The conduct of the respondent cannot be unreasonable or arbitrary. In this regard, he placed reliance on the judgment of this Court in ***KSL & Industries Ltd Vs. National Textiles Corporation Ltd.,*** 2012 (6) R.A.J. 570 (Del).

35. On the other hand, the submission of Mr. Abhinav Vasisht, learned senior counsel for the respondent is that the project agreement is a terminable contract. He submits that the project agreement itself shows that money is adequate compensation in the event of an alleged illegal termination. He further submits that the termination notice in the present case sets out, in detail, the reasons and justification for termination of the

project agreement and it cannot be said that the same has been issued unreasonably or arbitrarily. Mr. Vasisht has drawn the attention of the Court to clause 24.7 of the project agreement which deals with the aspect of limitation of liability. The same reads as follows:

> *"24.7 Limitation of Liability*
>
> *Notwithstanding anything stated anywhere in the agreement, the liability of either party for any operating year shall be limited to INR 1500 Million saving the provisions of indemnity specified at Clause 19.1, provisions of Clause 24.5(a)(i) and circumstances where a Party has been grossly negligent or in willful misconduct of its obligations. It is clarified that the liability limit of INR 1500 Million shall apply on annual basis in any Operating Year and shall not be cumulated in the succeeding operating year. In addition the liability of either Party on termination saving the provisions of indemnity specified at Clause 19.1 and circumstances where a Party has been grossly negligent or in willful misconduct of its obligations, shall not exceed the following amounts:*
>
> *(a) Development Stage – INR 700 Million*
>
> *(b) Operations Stage – INR 1500 Million*
>
> *During Development Stage, the aforesaid liability on termination shall be in addition to the recovery of Development Stage Expenditure from the Mine Operator."*

36. Mr. Vasisht submits that the aforesaid clause itself shows that the contract is a terminable contract. He has also referred to clause 24.3(c). This clause provides that the owner, i.e. the respondent may - at its sole discretion, terminate the agreement for its convenience at any time during the currency of the agreement. The said clause reads as follows:

> *"(c) Owner's convenience*

> *Notwithstanding any other provision of this Agreement, the Owner may, at its sole discretion, terminate this Agreement for its convenience at any time during the Term of the Agreement, where in the sole opinion of this Owner, to continue with the mining operation would cause it significant ongoing financial losses. Such option to terminate this Agreement shall be exercisable by the Owner by way of a written notice from the Owner to the Mine Operator at least ninety (90) days' in advance of such termination."*

37. Mr. Vasisht submits that the project in question is a project of national importance. It is amongst the largest among six reserves of coal held by the respondent. It is the one of the largest coal mining projects for India over the next few years, having a very large outlay of US$ 11 Billion. Mr. Vasisht submits that the inaction of the petitioner has resulted in a national waste, as the respondent has been deprived - for over two years, of the use & enjoyment of coal which was to be extracted from the mine. Mr. Vasisht submits that the respondent was well-aware of the ground situation as it existed, and had - with open eyes, entered into the project agreement while making commitments and holding out representations of timely completion of the development work and commencement of the mining work. In this regard, he has referred to the petitioner's communication of 20.06.2007, wherein the petitioner recognized that the land clearance and rehabilitation team of the respondent is experiencing resistance from the community which may delay the process. The petitioner stated in this communication as follows:

> *"However, despite Thiess Minecs propose that NTPC continue with their original timeline, July for submission of price bids and award in August – Sept 2007."*

38. Mr. Vasisht submits that the respondent had put the petitioner to notice that acquisition of land was underway. He submits that the project agreement does not envisage that the entire land under the project would be delivered to the petitioner at the beginning of the contract itself. In this regard, he has referred to clause 1.1 contained in Schedule 5 of the bidding document, which reads as follows:

> *1.1 Land Acquisition*
>
> ***Owner is acquiring the required land in a phased manner for Mining Services including the land required for infrastructure facilities and Mine Operator's residential facility**. The rehabilitation and resettlement of the PAPs shall be undertaken as per the Owner's R&R policy and Rehabilitation Action Plan as may be approved by NTPC. After the land is handed over free from any encumbrances to the Mine Operator maintenance of the land status thereafter, shall be the responsibility of the Mine operator."* (emphasis supplied)

39. Mr. Vasisht submits that the decision in ***KSL & Industries Ltd*** (supra) has no application to the facts of the present case since, unlike in that case, in the present case, it cannot be said that there are no reasons or justifications for termination of the project agreement. He refers to paragraph 100 of the said decision, wherein this Court had observed as follows:

> *"100. From the facts narrated above, it, prima facie, appears that there is no justification offered by the respondent for the sudden termination of the MOU without furnishing any reasons thereof, when both the parties and, in particular, the petitioner, had taken all the steps that were expected of it in furtherance of the MOU. I may note that the respondent has not*

even offered to explain or justify its conduct in terminating the MOU and its defence is only that the termination is in terms of the MOU. Prima facie, I am, therefore, of the view that the termination of the MOU vide letter dated 14.09.2010 is arbitrary, irrational and illegal".”

40. Mr. Vasisht has also placed reliance on the judgment of the Division Bench of this Court in ***MIC Electronics Ltd. & Another Vs. Municipal Corporation of Delhi & Another***, FAO(OS) No.714/2010 decided on 11.02.2011. In this decision, the Division Bench, inter alia, noticed the decision in ***Assistant Excise Commissioner Vs. Issac Peter***, (1994) 4 SCC 104, wherein the Supreme Court had, inter alia, observed:

“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 and 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.”

41. In the same decision, the Division Bench considered the consequence of the fact that the contract was determinable by its very nature and held as follows:

“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."

42. Lastly, Mr. Vasisht has placed reliance on paragraph 11 of the judgment of the Supreme Court in ***Indian Oil Corporation Ltd. Vs. Amritsar Gas Services & Others***, (1991) 1 SCC 533. The Supreme Court held in following extracts:

"11. We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant-Corporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in M/s. Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [1989] 3 SCC 293 , Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors. (1990) 3 SCC 752, and Km. Shrilekha Vidyarthi etc. etc. v. State of UP, and Ors. (1991) 1 SCC 212.

This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is, therefore, right in contending that 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. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us.

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 1.4.1976, 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 determinate'. 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 the 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."

43. In his rejoinder, Mr. Sethi submits that clause 24.7 relied upon by the respondent does not say that damages can be quantified in case of an illegal termination. This only puts an upper cap/ limitation on the liability that may be incurred upon illegal termination. However, clause 24.7 is not in the nature of a genuine pre-assessment of damages by the parties, i.e. liquidated damages. Thus, the petitioner would have to prove the sufferance of losses and damages, in case the agreement is illegally terminated by the respondent. He submits that the extracted coal had to be shared under the project agreement for a period of 27 years. It is not possible to assess as to how much would have been extracted, and what its value would be over a span of 27 years. The petitioner has, therefore, prayed that the petitioner be permitted to work the contract – without prejudice to the rights & contentions of the parties, and without creating any equity in favour of the petitioner, till such time as the arbitral award is rendered by an Arbitral Tribunal constituted in terms of the agreement.

44. Having heard the submissions of learned counsel on both sides and perused the agreement terms as well as the correspondence/ documents relied upon by the parties, I am of the view that the petitioner has failed to make out a prima-facie case for grant of any injunctive relief as sought for in the present petition.

45. So far as the submission of Mr. Sethi, (founded upon the respondent's stand that the contract had lapsed and/ or expired in accordance with the

terms of clause 8.3(b)) that the project agreement does not postulate that the same shall lapse and/ or expire, is concerned, Mr. Vasisht has emphasised that the termination notice is not founded only upon the said stand of the respondent. The termination notice, in para 35, goes on to state that:

> *"Without prejudice to the aforesaid* ***and in the alternative, in any event, NTPC hereby also intimates you of its decision to terminate the Project Agreement under clause 24.4(d), and accordingly the Project Agreement shall stand terminated on the expiry of the notice period of 45 days from the date of this letter, i.e. June 22, 2014****. Any further actions, which may be taken by you to delay or prejudice, the Pakri Barwadih mining project any further shall be entirely at your own risk as to the costs and consequences thereof"* (emphasis supplied)

46. It would thus be seen that, prima-facie, the respondent has "*without prejudice to .... and in the alternative*" sought to intimate its decision to terminate the project agreement under clause 24.4(d) by giving 45 days notice to the petitioner. Even if it were to be assumed that there is some force in the submission of Mr. Sethi that the project agreement could not lapse and/ or expire under clause 8.3(b), the said submission of Mr. Sethi would be of no avail as the respondent has, in the alternative, sought to terminate the project agreement under clause 24.4(d) by giving the requisite notice. Whether, or not, the petitioner has made out a prima-facie case to claim that the termination of the project agreement under clause 24.4(d) is illegal, is a different issue and shall be considered separately hereinafter. However, merely because the respondent has sought to take the stand that under clause 8.3(b) of the project agreement, the same has lapsed and/ or expired, the termination cannot be stayed since, alternatively, the project agreement has been terminated by resort to clause 24.4(d).

47. So far as Mr. Sethi's reliance on the minutes of the meeting held on 24.01.2014 is concerned, a perusal of the said minutes shows that the same clearly stated that the "*Above minutes shall be subject to approval of competent authority of NTPC*". The petitioner was, therefore, put to notice that the extension of development stage by further 360 days was subject to approval of competent authority of NTPC. Merely because the decision of the competent authority - not to grant further extension of the development stage period, was not communicated to the petitioner prior to the issuance of the termination notice, it does not, prima-facie, lead to the conclusion that the termination notice is illegal. A perusal of the said minutes of 24.01.2014, prima-facie, shows that the petitioner accepted its delay sand defaults at least partially, if not entirely. This appears to be the position since, while agreeing to grant further extension of 360 days of development stage (which was subject to approval of the competent authority of NTPC), NTPC stated that the same shall be "*without any additional financial implication on either side*". The respondent NTPC also requested the petitioner to put in their best offer to ensure development stage is completed within the proposed extended period of 360 days. On the aspect of construction of infrastructure on the earmarked land to the petitioner, the petitioner informed that "*they are taking necessary steps to start the work at the earliest*". This also, prima-facie shows that the petitioner had not taken the necessary steps to start the work on the earmarked land till the time the meeting was held.

48. On the aspect of base mining fee, the petitioner opposed the proposal of the respondent not to escalate the same on the ground that the same would

carry consequent financial implications "*and delays are not attributable to M/s T.M. only*". This, prima-facie, shows that the petitioner admitted that some delays were indeed attributable to it. On the aspect of payment of escalation on the funding for the fixed infrastructure, since there had been substantial delay in development of fixed infrastructure, the respondent NTPC did not agree to the same, and the said refusal of the respondent NTPC to grant escalation on the funding for the fixed infrastructure facilities was agreed to by the petitioner. Pertinently, the said minutes do not record either any grievance of the petitioner, or any assurance of the respondent, for fulfillment of any alleged outstanding obligation of the respondent NTPC.

49. Merely because the respondent had called upon the petitioner - vide communications dated 05.03.2014 and 14.03.2014, to continue the development work, it cannot be presumed that the competent authority of the respondent NTPC had agreed to grant approval for further extension by 360 days of the development stage period. The petitioner was aware that the approval for the extension of the development stage had to be granted by the competent authority. Obviously, it was the expectation of the petitioner, as also the officers of the respondent NTPC, who had participated in the meeting of 24.01.2014, and had sent the communications dated 05.03.2014 and 14.03.2014 that the proposal to extent the development stage period by 360 days would be granted approval by the competent authority of NTPC. It was in that spirit that the communications dated 05.03.2014 and 14.03.2014 appear to have been issued. If the competent authority, subsequently, decided not to grant approval to the proposal for extension of the development period, the petitioner cannot hold the communications dated

05.03.2014 and 14.03.2014 against the respondent. The petitioner cannot presume that the approval of the competent authority of the NTPC to extend the development period was a mere formality, only because, on earlier occasion, the said approval was granted.

50. The submission of the petitioner that the respondent alone was responsible for the delay in completion of the development stage work, as vast areas of land forming part of the project were not handed over on account of encroachments, resistance from local people and others, law & order problems, prima-facie, do not find support from the very minutes relied upon by the petitioner, namely of the meeting held on 24.01.2014. As noticed above, these minutes do not record any grievance of the petitioner, or assurance of the respondent with regard to the delivery of possession of any further parcels of land to the petitioner to enable the petitioner to complete the development stage.

51. The submission of the petitioner that very large tracts of land were not delivered to the petitioner, in fact, militates against the petitioner's case for grant of any injunctive relief as sought by the petitioner.

52. The petitioner has sought to place reliance on Section 14(3)(c) of the Specific Relief Act. Section 14(3) provides that:

> *"(3) Notwithstanding anything contained in clause (a) or clause (c) or clause (d) of sub-section (1),* ***the court may enforce specific performance in the following cases:****—*
>
> *(a) …… … … …*
>
> *(b) …… … … …*

> *(c)* ***where the suit is for the enforcement of a contract for the construction of any building or the execution of any other work on land****: Provided that the following conditions are fulfilled, namely:—*
>
> *(i) the building or other work is described in the contract in terms sufficiently precise to enable the court to determine the exact nature of the building or work;*
>
> *(ii) the plaintiff has a substantial interest in the performance of the contract and the interest is of such a nature that* ***compensation in money for non-performance of the contract is not an adequate relief****; and*
>
> ***(iii) the defendant has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the building is to be constructed or other work is to be executed.*** "
>
> *(Emphasis supplied)*

53. From the aforesaid extract, it would be seen that of the three pre-conditions, two pre-conditions are that the interest of the plaintiff is of such a nature that compensation in money for non-performance of the contract is not an adequate relief, and that the **defendant** has, in pursuance of the contract, obtained possession of the whole or any part of the land on which the work has to be executed. Thus, the **defendant/respondent** should have been put in possession "*in pursuance of the contract*" and should be in legal possession of the whole or any part of the land on which the work has to be executed. It is the petitioner's own case, as set out in para 1(c) of the petition that the respondent has not been able to obtain and deliver to the petitioner "*sufficient and encumbrance free land with reasonable access*" with the mine plan approved by the Ministry of Coal. It is also the case of the petitioner that "*Even the physical possession of the land purportedly*

made available by the respondent has never been actually handed over to the petitioner to commence works thereon" and "*the land purportedly made available was stricken with severe law and order problems occasioned by the Respondent's failure to implement a suitable Rehabilitation and Resettlement Policy for 2021 families as required under the Contract as well as the Environmental Clearance received for the Project dated 19 May 2009, further restraining the Petitioner from carrying out any mining activity thereon."*

54. The petitioner states that "*The Respondent's insistence to commence works on the land purportedly made available to the Petitioner will not only be in contravention of the statutorily approved Mine Plan, applicable statutes and other statutory approvals including the Environmental Clearance dated 19 May 2009 but would have also jeopardized the safety of the persons residing at the Site*".

55. If the aforesaid stand of the petitioner is accepted, where is the question of specific performance or enforcement of the project agreement? The petitioner's own case is that it has not been put in legal possession of any part of the land on which the contractual work had to be performed.

56. Firstly, there is nothing to suggest that the **respondent** has, **in pursuance of the contract** i.e. the project agreement obtained possession of the whole or any part of the land on which the work had to be executed under the contract. Possession of the land in question had to be obtained by the respondent from the Government, and not from the petitioner. There was, thus, no question of the respondent obtaining possession "*in pursuance*

of the contract". Even otherwise, it is not the petitioners case that the respondent **is in possession** of a substantial part of the land. Secondly, the expression "*any part of the land*", prima-facie, has to be read as a reasonable part of the land, if not a substantial part of the land. It cannot be a miniscule part of the land. A perusal of the respondent's communication dated 19.06.2013 address to the Government of India, relied upon by Mr. Sethi itself shows that "*Out of 665 acres of Government land, **3 acres have been transferred to NTPC**, 499 acres have been approved for transfer, 142 acres is pending for transfer with the State Government and for the balance 21 acres there is no record available with the State Government*". (emphasis supplied)

57. Therefore, only 3 acres out of 665 acres of Government land had been transferred to the respondent, which is a miniscule proportion of the total land translating to 0.45%. Even this land has not been "*actually handed over to the petitioner to commence works thereon*". Thus, it appears, prima facie, that the condition set out in section 14(3)(c)(iii) has not been fulfilled in the present case.

58. Prima-facie, it also appears that the proviso (ii) of the Section 14(3)(c) is not fulfilled inasmuch, as, it cannot be said that compensation in money for non-performance of the contract is not an adequate relief. This is, firstly, because the parties have expressly agreed in clause 24.7 with regard to the limitation of liability by stipulating that the said liability shall not exceed INR 700 Million in respect of the development stage and INR 1500 Million in respect of operations stage. Therefore, the parties have consciously provided for monetary compensation for non-performance of the contract.

Thus, prima-facie, it cannot be said that compensation in money for non-performance of the contract is not an adequate relief. Secondly, the Supreme Court in ***Adhunik Steels Ltd. V. Orissa Manganese and Minerals Pvt. Ltd.***, (2007) 7 SCC 125, while dealing with a case involving termination of a raising contract in relation to a mining project held that compensation for illegal termination of such a contract could be quantified. The Supreme Court, inter alia, held as follows:

> *"20. The question here is whether in the circumstances, an order of injunction could be granted restraining O.M.M. Private Limited from interfering with Adhunik Steels' working of the contract which O.M.M. Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the O.M.M. Private Limited terminating the arrangement entered into between itself and Adhunik Steels. In terms of Order XXXIX Rule 2 of the Code of civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a prima facie case for restraining O.M.M. Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. It is in that context that the High Court has held that this was not a case where the damages that may be suffered by Adhunik Steels by the alleged breach of contract by O.M.M. Private Limited could not be quantified at a future point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These are impoundable (sic imponderables) to some extent but at the same time it cannot be said that at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award".*

59. I may observe that in this case the Supreme Court granted an injunction restraining the respondent Orissa Manganese Minerals Pvt. Ltd. from entering into a contract for mining and lifting of the minerals with any other entity, until the conclusion of the arbitration proceedings. This was because the case of the respondent Orissa Manganese Minerals Pvt. Ltd. was that the raising contract entered into with the petitioner Adhunik Steels Ltd. was in breach of Rule 37 of the Mineral Concession Rules, 1960 and, if that were so, the respondent could not enter into a similar agreement with a third party after termination of the contract with the petitioner on the same principle.

60. However, in the present case, the reason for termination set out by the respondent in its termination notice is not the purported illegality in the execution of the project agreement on account of it being in breach of any provision of any law. I am, therefore, not inclined to grant any such measure as devised by the Supreme Court in ***Adhunik Steels Ltd.*** (supra).

61. Reliance placed by the petitioner on the respondent's communications of 19.06.2013 and 24.06.2013 addressed to the Government of India/ Ministry of Coal has to be taken with a pinch of salt. One cannot lose sight of the fact that these communications were sent by the respondent to defend itself and its contractor, namely the petitioner, against adverse action from the Government of India/ Ministry of Coal. The respondent, thus, appears to have projected a state of affairs - qua the performance of the contract by the petitioner, which is not supported either by the correspondence undertaken between the parties, or even by the minutes of the meeting held on 24.01.2014.

62. The submission of Mr. Sethi that the termination notice is premised on alleged events of default in respect whereof the petitioner was not put to notice as envisaged under clause 24 of the project agreement also, prima-facie, has not merit. This submission is premised essentially on the submission that the show-cause notice dated 10.07.2012 stood withdrawn/ closed as a result of good faith discussions which led to extension of time for completion of development stage by 360 days. Prima-facie, I do not find merit in this submission of the petitioner. The show-cause notice issued by the respondent on 10.07.2012 set out the following events of default (in terms of clause 24.3(b) of the project agreement), allegedly committed by the petitioner:

> "*4. Following event of defaults in terms of clause 24.3(b) of the Project Agreement referred above have been observed on your part which have considerably delayed the mine developmental activities:-*
>
> *a. PDM was to be submitted by TM by 15th Dec 2010 as per C1 1.1 of contract, but TM had submitted completed documents on 16.09.2011 after a delay of 275 days.*
>
> *b. Operation Plan (as per Cl 8.2.(a)) was to be submitted by 29.01.2011 and was to be finailsed by 15th March 2011. But it was finalized on 22nd March 2012 after a delay of more than a year.*
>
> *c. Land at Garikalan & Sikri has been handed over to us as per provisions of LA Act by Jharkand Government and in turn we have handed over the same for MDO Colony to TM on 05.07.2011 & 02.04.2012 respectively (copy of legal possession certificates have been provided to your representative in person & site visit has been also done jointly). However, no action has been taken till date for construction of MDO Colony.*

d. Land, free from encumbrances, for Coal stock yards, reclaimer stacker, secondary sizer was handed over to TM on 15.10.2011 and for Coal Lab, Core shed, Training centre was handed over to TM on 09.02.2012 but no work has been started for setting up these facilities by TM as per contract. Rather TM has been indulging in wasteful correspondence citing flimsy grounds of non availability of land in order to cover its own defaults.

e. Ground survey work for infrastructure was to be completed by 29.01.2011 vide Operational plan, but till date it has not been completed.

f. Basic Engg drawings for infrastructure were submitted on 15.11.2011 with a delay of 11 months. Revised GA drawings of Vocational Training Centre, Coal Lab, Core shed were approved on 23.02.2012. Balance GA drawings are yet to be submitted by you for approval of NTPC".

63. The petitioner was called upon to show-cause within thirty days from the date of the said notice as to why action in terms of clause 24.4 of the project agreement should not be taken against the petitioner for the events of defaults aforesaid. After considering the petitioner's reply to the said show-cause notice, the parties entered into "*good faith discussions*" in terms of clause 24.4(c), clause 23.1(b) and clause 8.3(b). The respondent agreed to extend the time period for development stage by a further period of 360 days by granting extension up to 11.02.2014. Therefore, on the expiry of the extended period on 11.02.2014, the petitioner ought to have completed the development stage work. Merely because the petitioner may have made some progress in the execution of the development stage work, though not completed the same, prima-facie, it was not necessary for the respondent to again issue a show-cause notice to the petitioner, and to again enter into

good faith discussions, and again grant extension of time for completion of the development stage work. If the submission of the petitioner – that after expiry of the extended period (as a result of good faith discussions) it was incumbent on the respondent to again issue a show-cause notice, and again hold good faith discussions, and necessarily grant extension of time for completion of development stage work, were to be accepted, it would become an unending exercise and the purpose of fixing the period within which the development stage work had to be completed would be lost.

64. The petitioner had been put to notice on 10.07.2012 itself with regard to its alleged defaults in failing to achieve the development stage completion. A comparison of the alleged defaults found in the show-cause notice dated 10.07.2012, with those found at the time of issuance of the termination notice would show that the defaults continue to be the same and what changed was merely the stage of the defaulted work. For example, when the show-cause notice dated 10.07.2012 was issued, the respondent found a delay of more than 275 days in submission of the PDM (Project Design Memorandum). In the termination notice dated 07.05.2014, the same has been paraphrased/reworded as delay of more than 275 days "*in the finalization of the project design memorandum*". By the time the termination notice was issued after grant of extension by a further period of 360 days, the petitioner was found to be in default as there was a delay of more than 275 days "*in the execution of the project design memorandum*". Obviously, when the show-cause notice was issued, the petitioner could not have been separately accused of delay in "*execution of the project design memorandum*", since the stage for execution of the project design

memorandum had not even arrived, as there was a delay in submission/finalization of the project design memorandum. Once the extension of the development stage work had been granted, it was for the petitioner to not only submit and finalise the project design memorandum but also to execute the same within the extended period. Prima facie, no separate show-cause notice was necessary since extension of time had been granted for achieving completion of the development stage work, which not only included the aspect of submission/finalization of the project design memorandum, but also its execution.

65. Reliance placed by the petitioner on the orders passed in ***M/s Gwalior – Jhansi Expressway Limited Vs. National Highway Authority of India*** (supra) and ***MBL Infrastructures Limited Vs. National Highway Authority of India*** (supra) are of no avail. Firstly, each case has to be examined on its own facts, and when so examined, I find that the petitioner has not made out a prima-facie case in its favour. Secondly, interim orders do not constitute binding precedence. Thirdly, the order in ***MBL Infrastructures Limited Vs. National Highway Authority of India*** (supra) was an ex-parte order of injunction.

66. So far as reliance placed on ***KSL & Industries Ltd*** (supra) is concerned, on facts, that was a very different case. As pointed by Mr. Vasisht, this Court had, prima-facie, found that there was no justification offered by the respondent in that case for the sudden termination of the MOU without furnishing any reasons therefor, even though, the petitioner therein had taken all the steps that were expected of it in furtherance of the MOU. Even before the Court, the respondent had not offered to explain or

justify its conduct in terminating the MOU. In contrast, the respondent in the present case has sought to justify the termination in great detail by specific reference to the agreement terms; the show-cause notice dated 10.07.2012; the event of default (with specific reference to the contractual clauses); the developments which took place post the issuance of the show-cause notice – namely, the good faith discussions and the extension of the development period by 360 days; the continuation of the defaults by the petitioner even after expiry of the extended period of the development stage; the further good faith discussions held on 24.01.2014, wherein the respondent agreed, in-principle, to grant further extension by 360 days subject to approval by the competent authority; the refusal of the competent authority to grant any further extension of the development stage, and; fact that the Government of India/ Ministry of Coal had threatened action against the respondent on account of non-achievement of the production stage under the agreement. By no stretch of reasoning it cannot be said that the termination notice in the present case is not premised on relevant and cogent materials, or that it does not disclose any reason for the action taken by the respondent. Whether, or not, on facts the action of termination is justified, would ultimately have to be determined by the Arbitral Tribunal. However, at this stage, it cannot be said that the termination notice is patently illegal, either in law, or in breach of the contractual terms.

67. I also find force in the submission of Mr. Vasisht that clause 24.7 and 24.3(c) show that the contract is a terminable contract. Being a terminable contract, no injunction can be granted by the Court to prevent its breach as such a contract is not specifically enforceable. Prima-facie, it appears that

the petitioner was well-aware of the existing ground situation and the difficulty being faced in the process of acquisition of land and re-location of the encroachers/ occupants of land at the site. The petitioner, however, prima facie, proceeded to throw its hat in the ring by taking a calculated risk. The petitioner cannot now find fault with the respondent, and seek to cover its defaults on the ground that the entire land has not been made available to the petitioner.

68. I also find force on the respondent's reliance on the decisions in ***Amritsar Gas Services & Others*** (supra) and ***MIC Electronics Ltd. & Another*** (supra), since the contract between the parties appears to be a terminable contract.

69. For the aforesaid reasons, I find no merit in this petition and dismiss the same with costs quantified at Rs.1 Lakh, to be paid by the petitioner to the respondent within three weeks.

70. It goes without saying that the observations made by me in this order have been made only for the purpose of the present proceeding, and these observations have been made on a prima-facie evaluation of the respective submissions of the parties. They shall not bind the Arbitral Tribunal, or prejudice the case of either party before the Arbitral Tribunal.

(VIPIN SANGHI)
JUDGE

JULY 01, 2014