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

% Judgment delivered on: 30th June, 2023

\+ O.M.P.(I) (COMM.) 204/2023

GHH BUMI MINING SERVICES PVT. LTD.

.....Petitioner

versus

HINDUSTAN ZINC LTD. ..... Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Sandeep Sethi, Sr. Advocate with Mr. Aayush Agarwala, Mr. Anuj P. Agarwala, Mr. Siddham Nahata, Ms. Bhumika Sharma and Mr. Auritro Mukherjee, Advocates.

For the Respondent: Mr. Krishnan Venugopal, Sr. Advocate, Mr. Uday N. Tiwary with Mr. Akshat Tiwary, Advocates.

CORAM:-
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J (ORAL)

1. Present petition has been filed under Section 9 of the Arbitration & Conciliation Act, 1996 (in short 'said Act') seeking urgent directions from this Court for staying operation of the termination by the respondent of a project awarded to it.

2. Since pressing urgency in the matter has been expressed by Sh. Sandeep Sethi, Ld. Senior Advocate, with the consent of both the sides, the arguments have been heard for the purposes of final

disposal.

3. According to the petitioner, the project in question was for providing services including development of an underground approach to ore body to produce mines at Zwarmala Mine in Udaipur District, Rajasthan. This project was awarded on 30.12.2020 for 48 months i.e. till 31.12.2024. This was an extremely capital-intensive project which required huge investment of resources and creating of necessary infrastructure by the petitioner. The job was being done, all along, by the petitioner in the most earnest manner. However, by virtue of letter dated 31.05.2023, the respondent has, arbitrarily and in complete violation of the specific terms of the agreement between the parties, has chosen to terminate the services of the petitioner with effect from 30.06.2023. According to the petitioner, it had invested huge money, resources and manpower in the aforesaid project and the contract could not have been terminated in unilateral manner, particularly when it was not guilty of any breach, much less a material one.

4. The attention of the Court has also been drawn towards various clauses of the contract as well as to the several communications exchanged between the parties. It is claimed that it was obligatory for the respondent to have adhered to the terms mentioned in the contract and if at all the respondent was of the view that there were material breaches, it should have given three breach notices, as contemplated under the contract and only if the petitioner had not carried out the requisite remedy, the contract could have been terminated. According to the petitioner, there is nothing which may indicate that there was any breach on the part of the petitioner. According to the petitioner, if

one goes through the alleged breach notices, it would become clear that these were, in fact, never the notices which could be termed as 'breach notices' and thus there is arbitrary and illegal termination of the contract, without any cause and without any kind of lapse on the part of the petitioner. It is prayed that if the interest of the petitioner is not protected, it will be in complete defiance of the provisions of the contract and would also cause irreversible and irreparable loss to the petitioner, who has already made extensive investment of resources and manpower and has employed as many as 430 personnel on the aforesaid project. It is thus prayed that the termination letter dated 31.05.2023 be directed to be stayed and the respondent be restrained from taking any coercive steps in furtherance thereto.

5. The application has been vehemently opposed. According to Sh. Krishnan Venugopal, learned Senior Counsel for the respondent, this Court cannot entertain the above request and stay the termination. It is claimed that the contract in question was 'determinable in nature' and when any such contract is determinable in nature and thus cannot be specifically enforced, no injunction against termination and thereby enforcement of contract can be issued.

6. The core issue is obviously plain and simple.

7. Whether the contract in question is determinable by nature or not?

8. Sh. Sandeep Sethi, learned Senior Counsel for the petitioner has relied upon the judgments of Coordinate Bench of this Court given in ***Ascot Hotels and Resorts Pvt. Ltd. & Anr. vs. Connaught Plaza Restaurants Pvt. Ltd.***: **2018 SCC Online Del 7940 and *Golden***

Tobacco Limited vs. Golden Toble Private Limited **: 2021 SCC Online Del 4506**. He has also drawn the attention of this Court to the various clauses of the contract and the communication exchanged between the parties. According to Sh. Sethi, the alleged communications dated 26.10.2022, 16.01.2023 and 05.05.2023 cannot be labelled as breach notices and, therefore, the contract could not have been terminated. On the strength of ***Ascot Hotels and Resorts Pvt. Ltd.*** (supra), it is argued that since the respondent did not adhere to the contractual terms and did not send the breach notices as envisaged in the contract, it was not lawful for the respondent to have abruptly terminated the contract. Sh. Sethi, learned Senior Counsel does admit that ***Ascot Hotels and Resorts Pvt. Ltd.*** (supra) was a case in which rather the Arbitrator had decided an application under Section 17 of the said Act, which was challenged by way of filing of an appeal under Section 37(2) of the said Act but according to him, the principle regarding grant of injunction remains virtually the same.

9. According to Sh. Sethi, the petitioner has been able to show a *prima facie* case and even the balance of convenience is in his favour and, therefore, the petitioner is entitled to immediate injunction, supplementing that if no relief was granted, there would not be any other manner in which the petitioner could be said to be appropriately and adequately compensated. It is also contended that though the termination clause was there in the contract but it was only if the breach notices had been issued in the appropriate manner and, therefore, in such a situation, the petitioner is very much entitled to interim relief under Section 9 of the said Act. It is contended that as

per various relevant clauses, the respondent has to, *inter alia,* demonstrate as under:

i) That the Petitioner is guilty of lapse which constitutes a breach of a specific term of the agreement;

ii) That such breach is a 'material' breach under the agreement;

iii) That such material breach relates to obligations concerning
provision of services or materials in respect of the project;

iv) That such material breach has not been cured within the time granted; and

v) That there have been three or more such material breaches which have not been cured by the Petitioner.

10. On the other hand, the respondent has relied upon ***Inter ADS Exhibition Pvt. Ltd. vs. Busworld International Cooperative Vennootschap Met BeperkteAnasprakelijkheid***:2020 SCC Online Del 2485,***National Highways Authority of India vs. Panipat Jalandhar NH-I Tollway Pvt. Ltd.***: 2021 SCC Online Del 2632,***Roadway Solutions Infra Limited vs. Highway Authority of India*** : 2023 SCC Online Del 3082, ***C. Gopal Reddy and Company vs. National Highways and Infrastructure Development Corporation Ltd. and Another*** : 2023 SCC Online Del 2393, ***ABP Network Private Limited vs. Malika Malhotra*** : 2021 SCC Online Del 4733, ***Rajasthan Breweries Limited vs. the Stroh Brewery Company***: 2000 (55) DRJ (DB) and ***Lalit Kumar Bagla vs. Karam Chand Thapar & Bros. (CS) Ltd.***: 2013 SCC Online Del 3532.

11. I have carefully gone through the relevant documents, including the contract and the alleged notices, perused the precedents cited at the bar and given my anxious consideration to the rival contentions.

12. The term '*determinable in nature'* has not been defined under any Statute/Act. The word, "determinable", in legal parlance shall indicate and suggest 'liable to end upon the happening of a contingency'. Thus, any contract which provides for the termination at the instance of either of the parties and/or at the occurrence or non-occurrence of a certain event is determinable in nature. It cannot be said that only that contract which was terminable without any cause would be called determinable by nature. I may also, however, hasten to add that agreements executed for indefinite durations, such as for partnerships, employment, public leases, and perpetual licenses, generally, contain no termination clause. However, still, in absence thereof, in a given case, such indefinite or *ad infinitum* contracts, without termination clauses, can also be declared as 'inherently determinable', while applying rule of reasonableness. Be that as may, the import and scope of determinability of any agreement needs to be understood and gathered after analysis of contractual terms and broad intention of parties.

13. However, it is admittedly true that if the contract is eventually found to be determinable, then the bar provided under Section 14 and sec 41 of the Specific Relief Act, 1963 shall come into play, which read as under:-

> ***"Section 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 qualification of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable."

Section 41.

Injunction when refused- An injunction cannot be granted-

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;

(c) to restrain any person from applying to any legislative body;

(d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;

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

(f) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(g) to prevent a continuing breach in which the plaintiff has acquiesced;

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust;

[(ha) If it would impede or delay the progress of completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.]

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter."

(emphasis supplied)

14. It is contended by Sh. Krishnan Venugopal, Sr. Advocate that the contract in question was determinable by its very nature and, therefore, keeping in mind the provisions contained in Section14(d) and Section 41of the Specific Relief Act, 1963, the petitioner is not entitled to any injunction. It is also claimed that the notices given to the petitioner were clearly 'breach notices' and it does not lie in the mouth of the petitioner to say that these were casual communication. It is contended that there was poor performance and poor sight management which badly impacted the production and development and there was no visible sign of improvement and, therefore, the petitioner was fully justified in, eventually, terminating the contract.

15. Copy of the contract dated 30.12.2020 executed between the parties is on record. Clause 4 relates to 'consequence of default' and clause 12 talks about 'termination and suspension'. These read as under:-

4. "<u>Consequences of Default</u>

4.1 If the Service Provider, breaches any of the warranties or representation under the Contract; or breaches any other provision of the Contract or any of the Materials or the Services otherwise fail to comply with the provisions of the Contract, <u>the Owner shall notify the Service Provider of the failure of the Materials or Services to comply with the contract or the breach of warranty</u>, as the case may be.

4.2 If the service provider fails to rectify any breach in supply of the materials or services under this contract, which

being capable of remedy are not remedied within 14 days of notice of such default, the Owner may at its discretion and without prejudice to other rights and remedies under the Contract or otherwise, avail itself of any one or more of the remedies as hereunder

4.2.1. give the Service Provider the opportunity at the Service Provider's expense either to remedy any defect in the Materials or Services or to supply replacement Materials or Services or substitute Services and carry out any other necessary work to ensure that the terms of the Contract are fulfilled within a reasonable period specified by the Owner

4.2.2. claim such direct actual damages foreseeable or otherwise as may have been sustained as a result of such breach or breaches of the Contract as per terms and conditions of PO or under applicable Trade Usage;

4.2.3. opt to use or consume the Materials or Services in the event of non-availability of substitute Materials or Services or to maintain operations of the plant or to avoid plant shut down but without prejudice to its right to claim damages arising due to off-spec Materials or Services

4.2.4. only In the event Service Provider is unable to meet its obligations under 4.2.1 to obtain substitute Materials or Services or purchase substitute services elsewhere solely at the risk and cost of the Service Provider ("Risk Purchase") would Owner then be entitled to obtain substitute Services and/or Materials from a third party and to recover from the Service Provider any expenditure reasonably incurred by the Owner in excess of the price it would have paid under this Contract in obtaining the Materials or Services in

substitution from another Service Provider. The additional cost and expenses so incurred by the Owner in procuring the whole or part of Materials or Services shall be liable to be recovered from the charges payable to the Service Provider or the Security deposit or Bank Guarantee so deposited by the Service Provider.

4.3. If the Owner exercises its rights under clause 4.2.3 above in respect of Materials or Services which do not meet the requirements specified in the Contract, the Service Provider shall grant necessary right to the Owner to utilise the relevant Materials or Services until such time as they meet those requirements.

4.4. Notwithstanding anything to the contrary in this Agreement, it is expressly agreed by the Parties that acceptance of any defective or sub-standard quality Material/ Service, delayed delivery and/or performance by the Owner in its sole discretion, shall not prejudice any right/claim of the Owner to damages for supply of such defective or sub-standard quality Material/Service, delayed delivery and/or performance and/or for breach of the Agreement. In the foregoing, the Owner shall reasonably determine the amount of damages that shall be leviable upon/payable by the Service Provider and provide detailed supporting documentation for such determination. Any damages so determined by the Owner shall be paid by the Service Provider within fifteen (15) days provided that if the Service Provider disputes any amount claimed by the Owner as due and payable, it will notify the Owner, specifying the reasons for the dispute. The Service Provider will then pay the undisputed amount and withhold payment of any disputed amount, pending resolution as provided herein. The levy of damages/acceptance of performance, as above, shall not

prejudice any rights of the Owner as per other terms of this Agreement/Purchase order.

4.5. In the event of 3 or more material breaches by the Service Provider of its obligations to provide Services or Materials under the Contract, which have not been reasonably remedied by Service Provider pursuant to clause 4.2.2 after having been given the opportunity (each time the rectification period cannot be for more than a month) the Owner may terminate the Contract in whole or in part or to rescind the Purchase Order, in each case without any liability to the Service Provider

4.6. Owner reserves the right to reject Materials in case it is supplied prior to the scheduled delivery date until otherwise specifically waived-off in writing by a representative from the Owner's commercial department, prior to dispatch

(emphasis supplied)

12.TERMINATION & SUSPENSION

12.1. Either Party may immediately terminate all or part of this Agreement/Purchase Order as under

12.1.1. by a written notice to the other Party, as provided under Clause 4.5

12.1.2. if the if other party (i) ceases. or threatens to cease, to function as a going concern or conduct its operations in the normal course of business, (ii) commences, or becomes the subject of, any bankruptcy, insolvency, reorganization (other than in the course of a corporate re-organization or to an affiliate), administration, liquidation or similar proceedings, (iii) makes, or plans to make, a general assignment for the benefit of its creditors, or (iv) either party's creditors attach or take possession of all or a substantial part of said party's assets; the foregoing shall not apply to any action or proceeding which is (a.) in the reasonable

opinion of the party, frivolous or vexatious; or (b.) discharged, stayed or dismissed within ninety (90) days of commencement

12.1.3. if either party is unable to carry out its obligations by reason of Force Majeure events and the force majeure continues for a period more than 180 days, then either Party may, by giving notice in writing, terminate this Agreement with immediate effect. Any such termination shall be without prejudice to any of the right of the Parties accrued prior to the date of such termination

12.2. The Owner may terminate all or part of this Agreement by THREE (3) months' written notice in case service provider has, continuously materially breached HZL Safety protocols, HZL Code of Conduct

Rules and Regulation of DGMS or if the Service Provider fails to obtain any Approval required under the terms of this Agreement

12.3. Upon termination of this Agreement, both Parties shall be relieved of their respective rights and obligations under this Agreement save such obligations and/or liabilities of the Parties set forth herein which (a) that the Parties have expressly agreed will survive any expiration or termination, or (b) by their nature would be intended to be applicable following any such expiration or termination, or (c) have accrued before expiration or termination, as the case may be

12.4. In the event of Service Provider's breach of its material obligations hereunder, no payment shall be due by Owner in respect of such order/Owner order, or, in the case of suspension, until the failure or breach has been remedied to the reasonable satisfaction of Owner

12.5. Notwithstanding anything to the contrary in this Agreement, Owner may, at its sole discretion, suspend this Agreement / any Purchase Order, in whole or in part, upon

Three (3) months written notice to Service Provider for 3 or more repeated material breaches of safety protocols as per HZL norms if Service Provider has failed to remedy such breaches after written notice. The Owner shall promptly notify the Service Provider in writing of the same.

12.6. In the event of written notice pursuant to Clause above based on Service Provider's material breach of any of its obligations under the Agreement, no payment shall be due by Owner in respect of such order/Owner order, or, in the case of suspension, until the failure or breach has been remedied tothe reasonable satisfaction of Owner

12.7. Subject to Clause above, in the event of suspension of a Purchase Order, the Material being supplied under such Contract Agreement shall, at Owners discretion, either be delivered to the delivery address or shall be securely and separately stored at Service Provider's premises, at Owner's sole cost and expense, and marked as the property of Owner until either the manufacture and/or provision of such Material is resumed or Owner terminates the Purchase Order and instructs Service Provider with regard to the disposal of the Material stored at Service Provider's premises. The proceeds of the disposal shall be adjusted against any compensation payable hereunder

12.8. Owner further reserves the right to Terminate the Contract immediately in case of Service Provider sub-contracting/assigning this Contract without prior approval from the Owner".

16. According to the respondent, three material breach notices were sent to the petitioner and attention of this Court has been drawn towards the aforesaid three notices dated 26.10.2022, 16.01.2023 and 05.05.2023.

17. In the first notice, it was apprised as under:-

- We have not seen any improvement at site in last 1 month Further the site team is unable to resolve local issues which is aggravated and due to that other OEM's are not ready to support GHHBUMI. Further there is huge availability gap in spares parts, Tyres and RDT.
- With such poor performance and poor site management the production and development is badly hampered
- We can not tolerate such non performance and is now forced to look for other alternates

18. In Second notice, it was, broadly speaking, pointed out as under:

- The performance of whole GHH team is not improving.
- There were equipments issues.
- Both PMs were not performing from month start and causing delay in commissioning of high-grade stope.
- There were issues with Explosive carrier due to non-availability of spare and scissor lift due to non-availability of axle.
- With such type of equipment's availability, the target of this month was not achieved.

19. In third notice, primarily, the statutory defaults were pointed out by claiming that GSTR-l & GSTR-3B had not been filed as on date and GST Non-compliance amount was around 2 Crore+ as on 29.04.23

20. It is thus contended and that all these were formal expression of material breaches which were not taken seriously enough by the petitioner and, therefore, he cannot be permitted to raise any kind of grudge or grievance now.

21. As already noticed above, primarily, it is to be seen that whether the contract in question is determinable in nature or not.

22. According to Sh. Sethi, learned Senior Counsel for the petitioner, the contract would become *determinable in nature* only when it can be terminated without giving any cause or reason. According to him, in the present case, there was a pre-condition and it was only when three or more material breaches had not been allegedly reasonably remedied by the petitioner, the respondent could have

terminated the contract in whole or in part and therefore, since the termination was based on a specifically provided contingency, the contract was not determinable by its very nature.

23. However, the aforesaid argument does not cut any ice.

24. The contract, manifestly, seems determinable in nature and once three breach notices were sent pointing out the deficiencies and lapses and if the service provider took those in a nonchalant manner and does not bother to rectify the issues pointed out despite opportunity, there was no choice left but to terminate the contract. These were not casual communications albeit it is different story that these were taken casually by the petitioner.

25. In ***ABP Network Private Limited*** ***(****supra)*, it has been specifically observed that a contract can be regarded as determinable by its nature where it stipulated any pre-termination formality. Para 47 of the judgment reads as under:-

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

26. In ***Rajasthan Breweries Limited*** *(supra),*an application under Section 9 of the said Act was moved seeking *ad interim* temporary injunction restraining the operation of two notices of termination. The learned Single Judge of this court rejected the application on the ground that the contracts were determinable while relying upon Section 41 read with the Section 14(1)(c), as it was then, of the

Specific Relief Act, 1963. The learned Single Judge also held that the two agreements contained clauses which permitted their termination at the occurrence of any of the events envisaged thereby. Such order was challenged in appeal before the Division Bench claiming that an agreement which was determinable at the instance of either of the parties was not "in its nature determinable". The Division Bench rejected the aforesaid submission and observed thus:-

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

27. It was thus held that the remedy, in the event of an illegal termination, would only be to seek compensation for wrongful termination and not to maintain a claim for specific performance of the agreements. Observing that any injunction against specific performance of the agreements was statutorily prohibited, as they were determinable in nature. The order of the learned Single Judge was upheld and the appeal was dismissed.

28. In ***Inter ADS Exhibition Pvt. Ltd.*** *(supra),* it has been observed that whether the termination notice met the requirement of the contract or not and thus whether the termination was a valid termination or not would be the questions which were required to be examined and adjudicated upon by the Arbitrator. It was also observed that since in either events, the agreement was terminable, the specific performance of the contract could not have been granted nor could any injunction be issued restraining the respondent from giving effect to the notice of termination as that would, in effect, amount to enforcement of the

contract. Para 13 of the said judgment reads as under:-

> *"13. Whether the termination notice dated 15.03.2019, met the requirements of Article 12.4 or not and thus, whether the termination was a valid termination or not, would be questions that have to be examined and adjudicated upon by the learned Arbitrator, to be appointed by the parties to resolve their disputes. It would also be for the learned Arbitrator to reconcile Article 7.1 with the recitals in the JVA-II dated 25.10.2011, as reproduced hereinabove, limiting the agreement to four editions. Under Article 7, termination can be either mutually agreed to under Article 7.2 or at the option of either party, on the occurrence of certain events, as listed under Article 7.3, which contemplates a termination with penalty. Again, the question whether the respondent had given 30 days' time to the appellant to make good the default, duly specified in reasonable detail in the communications exchanged between the parties, is not for this court to inquire into. Suffice it is to state that in either event, the agreement was terminable and therefore, the conclusion arrived at by the learned Single Judge that specific performance of the contract could not be granted and nor could any injunction be issued restraining the respondent from giving effect to the notice dated 15.03.2019, as that would in effect amount to enforcement of the contract beyond the said date i.e. 15.03.2019, cannot be faulted."*

29. In ***C. Gopal Reddy and Company*** *(supra),* it has also been observed that when a contract is determinable and cannot be specifically enforced, no injunction against termination and enforcement of the contract can be issued. Therein, the petitioner was awarded a contract. He sought for extension of time but his request was not considered and without considering the reasons stated in the extension letter and without giving any hearing to the petitioner, the

respondent Authority terminated the contract which led to filing of application under sec 9 of said Act. It was contended that the *extension request* had not been considered as per the terms and conditions of the contract. This court, in the final analysis, observed that at said stage, it was not concerned with the merits/correctness of the termination of the contract by respondent no. 1 and any remedies arising therefrom and that such questions may be raised before the parties in the course of arbitral proceedings and may be adjudicated therein. It was observed as under:-

> *29. Section 41 vide clause (ha) states that an injunction cannot be granted in cases where it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto.*
>
> *30. Therefore, under Section 14(d) read with Section 41 of the Specific Relief Act, when a contract is determinable, and cannot be specifically enforced, no injunction against termination and enforcement of the contract can be issued.*
>
> *31. As held in a plethora of judgments including Rajasthan Breweries Ltd. v. Stroh Brewery Co., 2000 SCC OnLine Del 481, Bharat Catering Corpn. v. IRCTC, 2009 SCC OnLine Del 3434 and Inter Ads Exhibition (P) Ltd. v. Busworld International Cooperatieve Vennootschap Met Beperkte Anasprakelijkheid, 2020 SCC OnLine Del 351, and as recently held by a Coordinate bench of this Court in the case of Shubham HP Security Force (P) Ltd. v. Central Warehousing Corpn., (2022) 2 HCC (Del) 264 : 2022 SCC OnLine Del 739, it is a settled position in law that it is not permissible for any party to seek an injunction on the termination of an agreement in the case of a determinable contract. Considering the nature and scope of the present proceedings, such an exercise cannot be undertaken by this Court.*

32. Therefore, the petitioner's prayer restraining the Termination of the Contract Agreement by Respondent No. 1, is not sustainable in law. At this stage, granting a stay of termination would necessarily entail this Court first forming an opinion, albeit a prima facie one, that the termination effected by the respondent was misconceived and contrary to the terms of the agreement.

30. In ***Golden Tobacco Limited*** (supra) relied upon by the petitioner, the position was little different as in that case it was specifically observed that the agreement was in perpetuity and therefore, it was not determinable in nature. Clearly, a contract of such nature could not be considered as determinable in absence of any agreement entitling the party to terminate the same without cause or default on the part of the other party. More importantly, in said case, it was also observed that whether an agreement is in its nature determinable, is required to be understood in the context of the nature of that agreement.

31. Of course, the petitioner has relied upon ***Ascot Hotels and Resorts Pvt. Ltd.*** *(supra)* in which it has been observed that if the agreement is not terminated in accordance with the clauses of the agreement, the other party was entitled to a relief of injunction. However, the situation in that case was different as those observations were given when the matter had already reached the Arbitrator as the disputes had arisen between the parties. During such period, the contract was also terminated which resulted in filing of application seeking status quo. Such application moved under Section 17 of said Act was disposed of by the Arbitrator directing *status quo* to be

maintained. It was observed by the Arbitrator that appellant had been unable to show the three consecutive defaults in the payment of license fee by the respondent as required in Clause 22.4 of the License Agreement and even the notice of termination dated did not refer to any such default. He further held that the respondent was not seeking specific performance of the agreement and was only challenging the wrongful termination of the same by the appellant. The Arbitrator relying upon the judgment of this Court in *Upma Khanna* v. *Tarun Sawhney* held that denial of the interim protection to the respondent would, in fact, amount to allowing the party committing the wrong to take advantage of its own neglect and default. Such order was eventually upheld by this court. However, in the present case, the termination, primarily, seems to be in synchronization with the contractual terms. Moreover, evidently, the suspension of termination herein would have automatic consequence of performance of contract, which does not seem to be permissible. The decision given by an Arbitrator under Section 17 of said Act in the peculiar facts of that case cannot be robotically and mechanically applied here while discussing an application under sec 9 of said Act, when even the Arbitrator has yet not been appointed.

32. The Specific Relief Act, 1963 was amended in the year 2018 with the objective to give impetus to the legal regime governing enforceability of contracts in India. The pre-2018 Amendment position was that specific performance of an agreement was an equitable and discretionary relief but after the 2018 Amendment, the words "specific performance of any contract may, in the discretion of

the court, be enforced" in Section 10 of the Act, have been substituted with the words "specific performance of a contract shall be enforced subject to [Sections 11(2), 14 and 16 of the Act]". Thus, once the factors mentioned in Sections 11(2), 14 and 16 of the Act are met, it is obligatory upon the courts to order specific performance of a contract. Fact, however, remains that Section 41(e) of the Act provides that an injunction cannot be granted "to prevent the breach of a contract the performance of which would not be specifically enforced". Furthermore, Section 14(d) of the amended Act provides that a contract which is "in its nature determinable" cannot be specifically enforced. Fact remains that a contract which is "in its nature determinable" was incapable of specific performance by virtue of the erstwhile Section 14 (1) (c) continues to remain so even by virtue of the present Section 14 (d). Thus, there cannot be any gainsaying the fact that there is no straight jacket formula as such and each case has to understood in context of its peculiarity and after appreciating the contractual terms and then it needs to be concluded whether the underlying contract is "in its nature determinable" or not. Here the contract seems determinable in nature as ***termination can take place under certain conditions.*** The fact also remains that in such a situation, if the termination order is stayed, it would have obvious impact of granting specific performance of the contract.

33. Interestingly, this court in **Royal Orchids v. Kulbir Singh Kohli& Anr. 2022 SCC OnLine Del 2519,** while dealing with a Memorandum of Understanding (MoU) for redevelopment and

construction of an immovable property, which did not even contain any termination clause, after applying the *Nature of Agreement Approach*, held that time was the essence of the MoU and that breach of timelines as contemplated in the MoU amounted to material breach and MoU, being a private commercial transaction, was determinable in nature. The court had also relied upon *Rajasthan Breweries (supra)* while arriving at such findings.

34. Be that as it may, the question as to whether the termination was strictly in consonance with the contractual terms or not is not to be looked into by this court, in elaborate and exhaustive manner. Suffice it to say, prima facie, there are breach-notices herein. Even if it was to be held that the termination was bad in law or contrary to the terms of the agreement or of understanding between the parties, the remedy for the petitioner would be to seek compensation for the wrongful termination and, therefore, in the garb of interim relief under Section 9 of the said Act, the petitioner cannot claim for specific performance of the Agreement. Such grant of injunction is rather expressly proscribed in a case of contract like the present one.

35. Resultantly, the present petition is dismissed as the petitioner has failed to make out any case for grant of any interim injunction or protection.

36. Before parting, I need not lay emphasis that the observations made herein above are *prima facie* in nature and these should not be construed as a reflection on the merits of the case and would not, in any eventuality, prejudice any proceeding which may take place before the Arbitral Tribunal. These would neither bind nor influence

the Arbitrator while adjudicating, on merits, the disputes between the parties.

MANOJ JAIN, J
(VACATION JUDGE)

JUNE 30, 2023
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