IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION

ARBITRATION PETITION (L) NO. 956 OF 2018

Provident Multi-Trading Pvt. Ltd.)
A company incorporated under the Companies)
Act, 2013 having its registered address at Shop)
No. 135, Veena Mall, Sweet Land Layout, Off.)
W.E. Highway, Kandivali (East),)
Mumbai - 400 101) … Petitioner

Versus

Maharashtra Maritime Board)
Home Department (Ports and Transport))
Government of Maharashtra, having address)
at Indian Mercantile Chambers, 3rd Floor, 14)
Ramjibhai Kamani Marg, Ballard Estate,)
Mumbai - 400 001) … Respondent

Mr. Sharan Jagtiani with Mr. Karl Tamboly, Mr. Dinesh Juvekar, Mr. Mayur Shetty with Mr. Dikshat Mehra, Ms. Priyanka Kapadia, Mr. Chintan Gandhi I/by Rajani Associates, for Petitioner.

Mr. Darius Khambata, Senior Advocate with Mr. Siraj Rustomjee, Senior Advocate, Mr. Ishwar Nankani, Mr. H.S.Khokhawala with Ms. Janki Garde, Ms. Agrima Khanna, Ms. Aanchal Agarwal I/by Nankani and Associates, for Respondent.

CORAM: S.J. KATHAWALLA, J.

RESERVED ON : 11th OCTOBER, 2018

PRONOUNCED ON : 30TH MAY, 2019

(IN CHAMBERS)

JUDGMENT :

1. The above Petition is filed by the Petitioner under Section 9 of the Arbitration and Conciliation Act, 1996 ("**the Act**") for the following interim reliefs:

> "a. *Pending the hearing and final disposal of the arbitral proceedings, this Hon'ble Court be pleased to stay the operation and effect of the Impugned Letter cancelling / revoking the Letter of Award;*
>
> *b. Pending the hearing and final disposal of the arbitral proceedings, the Respondent be restrained by an order of injunction from this Hon'ble Court from acting upon or taking any steps in furtherance to or on the basis of the Impugned Letter cancelling / revoking the Letter of Award;*
>
> *c. Pending the hearing and final disposal of the arbitral proceedings, the Respondent be restrained by an order of injunction from this Hon'ble Court from acting upon or taking any steps in furtherance to or on the basis of the SCN;*
>
> *d. Pending the hearing and final disposal of the arbitral proceedings, the Respondent be restrained by an order of injunction from accepting any bids or taking any steps for awarding the contract under the new tender document floated by Respondent at* ***Exhibit "LL"*** *hereto;*
>
> *e. Pending the hearing and final disposal of the arbitral proceedings, this Hon'ble Court be pleased to issue an injunction restraining the Respondent from invoking the bank guarantee furnished by the Petitioner and forfeiting the EMD deposited by the Petitioner;"*

2. The facts necessary for the adjudication of the present Petition are as under:

2.1 The Respondent issued a tender being Tender No. MMB/Traffic/Tender No.2 in October, 2017 ("**Tender**"). Under the Tender, the Respondent invited bids for the selection of a Ro-Pax Vessel Operator for plying Ro-Pax ferry from Ferry Wharf, Mumbai to Mandwa, Raigad ("**Project**"). Clause 7.6 of the Tender provides that the Ro-Pax service is to be ready to start by March, 2018.

2.2 The Petitioner, along with a consortium, submitted its bid pursuant to the Tender on 6th November, 2017.

2.3 On 27th November, 2017, the Petitioner submitted a letter providing a brief description of 2 vessels. No names of the proposed vessels were furnished by the Petitioner.

2.4 On 6th December, 2017, a letter of award came to be issued by the Respondent in favour of the Petitioner declaring the Petitioner as the successful bidder pursuant to its bid in response to the Tender ("**Letter of Award**"). The following terms under the Letter of Award are relevant :

> "5. You are requested to furnish details of vessel procurement, leasing_and mobilization of suitably experienced staff with Ro-Pax/ passenger ferry experience, post which, the contract will be signed by MMB.
>
> 6. You are also requested to provide a commitment undertaking on a non-judicial stamp paper of appropriate value by your investors,

stating their financial commitment in your company for the subject project, before signing of contract with MMB.

7. Please note that MMB has a right to revoke this Letter of Award and forfeit the Bank Guarantee in case of non-compliance of relevant terms and conditions of the Tender and this LOA. "

2.5. On 12th December, 2017, the Petitioner confirmed its acceptance of the Letter of Award and the terms and conditions therein by forwarding an acknowledged copy of the Letter of Award to the Respondent.

2.6 By a further letter dated 21st December, 2017, the Petitioner furnished in favour of the Respondent a bank guarantee amounting to Rs.50,00,000/- (Rupees Fifty Lacs Only) ("**Bank Guarantee**"). The Bank Guarantee is valid until the 31st of March, 2020.

2.7 On 1st January, 2018, the Respondent addressed a letter to the Petitioner calling upon it to comply with certain obligations under the Letter of Award. Under Clause 5 of the Letter of Award, the Respondent called upon the Petitioner to furnish details of vessel procurement/leasing and mobilization of suitable experienced staff with Ro-Pax/passenger ferry experience. The Respondent requested that the Project timelines are met within the stipulated period. The Petitioner responded on 9th January, 2018 stating that it is in the process of shortlisting suitable vessels, discussions

related thereto and would provide the requisite information before the end of January, 2018.

2.8 The Respondent addressed another letter dated 23rd January, 2018 to the Petitioner recording:

> *"xxx*
> *Sir,*
>
> *Kindly refer to above-reffered letters dtd. 06.12.2017 and 1.1.2018.*
>
> *2. You were requested vide this office letter dtd. 1.1.2018-*
>
> *(i) To furnish details of vessel procurement/leasing and mobilization of suitably experienced staff with Ro-pax/passenger ferry experience*
>
> *(ii) To provide a commitment undertaking on a non-judicial stamp paper of appropriate value by your investors, stating their financial commitment in your company for the subject project, before signing of contract with MMB.*
>
> *3. However, your reply to the aforesaid letter is still awaited. You may please note that the details of your proposed vessels are required by us for fine tuning the embarkation/disembarkation arrangements at Mandwa Port.*
>
> *4. It is once again brought to your kind notice that we are looking forward to start the Ro-Pax service on this route from 1st April, 2018. This is one of the ambitious projects of the Government and its progress is closely monitored, both from the State and Central level.*

5. View above, it is requested that details, as mentioned in para-2 above, may be forwarded to this office at the earliest.

xxx"

2.9 On 30th January, 2018, the Petitioner addressed a letter to the Respondent as under:

"xxx
Dear sir,

Please find following reply to your queries.

***Point No. 5 of LoA**: Attached herewith the details of shortlisted vessels.*

***Point No. 6 of LoA**: Attached herewith copy of commitment undertaking on a non-judicial stamp paper by our investor.*

xxx"

A perusal of the annexure to this letter indicates that the Petitioner shortlisted 4 vessels by the names of N0001, N0002, N0003 and N0004. However, the Letter of Award mandated the selection of 2 vessels. Further, this letter did not provide details of the procurement/leasing of these vessels nor did it provide details for mobilization of the proposed staff and their experience.

2.10 On 9th February, 2018, the Petitioner addressed a letter to the Chairman, Mumbai Port Trust recording that it met with the team of Mumbai Port Trust a few weeks ago at Ferry Wharf. Further, that the Petitioner did not find adequate passenger

facilities and that it noted there were no arrangements for passengers to embark and disembark from the ship.

2.11 On 15th February, 2018, the Respondent forwarded a draft agreement to the Petitioner to be entered into amongst themselves.

2.12 On 27th February, 2018 i.e. approximately 3 months after the Letter of Award, the Petitioner addressed the following letter to the Respondent:

> *"xxx*
>
> *We are working with best of our ability to roll out the Project at the earliest and working on various aspects of the project. However, given the size of the project, it would need substantial investments which will come through a mix of Equity and Debt.*
>
> *We are in the process of closing equity investors to investment in the Company. Further, any debt funding also requires a sound equity base. In view of the expansion of the equity base of the Company, the shareholding in the Company may change and promoters/consortium members' stake may reduce. However such equity investments will only enhance the financial strength of the Company, which will ultimately help in better execution of the Project. Also, the investors in the Company would be mostly, financial investors/strategic investors, so that the operational control of the Project remains with the Company/management.*
>
> *The aforesaid restrictive condition about no reduction in stake of promoters, is preventing any new equity issuance/expansion of equity base, which is an important requirement for project of this size. Also, your office had asked us to*

give "Letter of Undertaking" pertaining to equity infusion in the Company. However the restrictive clause above itself prohibits any change in the shareholding of the Company.

In view of the same, we request you that the said condition of no reduction in the stake by the promoters/consortium partners, may please be modified, wherein Promoters/consortium stake reduction may be allowed, with a condition that majority level in the company being not less than 51% be owned by the Promoters/consortium members etc.

We request you to kindly consider approval of the same and oblige.

xxx"

2.13 On 8th March, 2018, the Respondent addressed a letter to the Petitioner *inter alia* stating that *"it is regretfully informed that as yet, we have not been informed of the details of the vessels which have been finalized from the shortlisted vessels."* and "*Your response on the draft agreement is still awaited.*" and *"... As the expected date of commencement of the service is barely a month away, it is expected from you that all-out efforts are made to meet the deadline of the project.... In view of the above, it is, once again, requested that necessary actions be initiated on "war-footing" to make this prestigious venture successful."*

2.14 The Petitioner addressed a letter in reply on the 15th of March 2018 affirming that the details of the shortlisted vessels were already submitted on 30th January, 2018. Separately, it was pointed out that the Shipping Corporation of India has issued a

tender for In Chartering of vessels for ferry services between Ferry Wharf and Mandwa, Alibaug. This, according to the Petitioner, was in conflict with the assurance of the Respondent that the Petitioner would implement the Project on an exclusive basis.

2.15 On 2nd April, 2018, the Chief Executive Officer of the Respondent addressed the following letter to the Petitioner:

> *"xxx*
> *Sir,*
>
> *Please refer to this office letter dtd. 8th March 2018 requesting you to provide details of vessels finalized for operating on Ferry Wharf-Mandwa route and also, your response on the draft agreement.*
>
> *2. However, it is regrettably informed that your response on the above issues is still awaited. You have been, time and again, apprised about the importance of this project in terms of development of passenger water transport system, as a part of decongesting Mumbai. It may be pointed out that you have been constantly requested to speed up the process of procuring/ chartering the vessels to meet the timelines of this prestigious project. This office has also been providing necessary technical guidance to you, on vessel related issues. In spite of such pro-active steps from MMB to support you, we are yet to receive any firm commitment from you regarding procurement or in-chartering of the vessels. Further, the signing of the Agreement remains pending, due to no response from you, on our draft agreement, forwarded on 15/02/2018.*

3. View above, you are requested to remain present in this office along with your technical team, today at 1700 Hrs., as conveyed to you orally, so as to work out future course of action for project implementation.

xxx"

2.16 The Petitioner responded at 16:55 stating that as its CEO is presently in Pune, it would not be possible for him to attend the Respondent's office. The Petitioner further remarked that it understands the importance of the prestigious project and is doing everything possible to make the project a grand success.

2.17 On 6th April, 2018, the Petitioner addressed a letter enclosing the draft agreement with changes in track mode. Amongst other changes, the Petitioner altered the requirement of 2 vessels to 1 vessel. On the same day, the Respondent addressed a letter to the Petitioner referring to the meeting which took place on 3rd April 2018 in which the Petitioner had specified that one vessel located in China will be chartered by it for the Project. The Respondent asked the Petitioner to convey its commitment that the vessel meets all the criteria under the Tender. Further, the Respondent also sought details of the organizational structure and technical team deployed for handling the Project as the technical partner had not given inputs regarding the vessel procurement/ in-chartering and project implementation.

2.18 On 9th April, 2018 i.e. approximately 4 months after the Letter of Award, the Petitioner submitted the specifications of the shortlisted vessel in China, being *'AGIOS SPIRIDON'*.

2.19 On 9th April, 2018, in response to the letter dated 15th March 2018, the Petitioner responded by bringing to the Respondent's notice that the Shipping Corporation of India has re-published its query for the in-chartering of vessels in violation of the exclusivity clause in the Tender being Clause No.5.2.3. The Petitioner further recorded that due to the re-published query, the owner of the vessel has not only increased the prices substantially but has also come up with atrocious terms of chartering.

2.20 On 12th April, 2018, the Petitioner once again wrote to the Respondent requesting it to urgently establish a line of communication with the Shipping Corporation of India who had re-published its tender for in-chartering of vessels for the 3rd time on 10th April 2018. Further, the Petitioner pointed out that a deadlock had been reached with the vessel owners due to this re-publication by the Shipping Corporation of India of the said online publication. A written confirmation in this regard was requested for so as to enable the Petitioner to proceed with negotiations with the Chinese owners of the vessel.

2.21 On 23rd April, 2018, the Respondent addressed a letter to the Petitioner stating that it has addressed an email dated 11th April 2018 requesting the Maharashtra Port Trust to advise the Shipping Corporation of India to withdraw its query.

2.22 On 26th April, 2018, the Petitioner sent a mail to the Respondent forwarding certain changes to the draft agreement.

2.23 On 2nd May, 2018, the Respondent sent the revised draft of the agreement to the Petitioner as per its discussions with the Petitioner held on 27th April, 2018.

2.24 According to the Petitioner, on 10th May, 2018, Mr. Faust Pinto Jr., the Petitioner's agent, was in negotiations with one Hellas Ships Sales International Co. for acquiring/hiring the vessel *'AGIOS SPIRIDON'*. The terms of such acquisition/hire were negotiated and finalized. However, the Port Authorities at Corfu, Greece refused to give the vessel *'AGIOS SPIRIDON'* permission to be removed from its current trading line due to the unavailability of a replacement vessel. In the e-mail conveying the non-availability of the vessel *'AGIOS SPIRIDON'*, there is no mention of the query published by the Shipping Corporation of India.

2.25 Between 7th and 11th May, 2018, the Petitioner and Respondent exchanged drafts of the agreement to be executed. By an email dated 11th May 2018, the Respondent added certain clauses and other changes and forwarded the same to the Petitioner.

2.26 On the 16th of May 2018, the Petitioner submitted stamp papers to the Respondent for signing the agreement.

2.27 Meanwhile, the Petitioner claimed to be in talks to acquire another vessel by the name of *'GLYKOFILOUSA IV'* for the Project. On 18th May 2018, the Respondent communicated to the Petitioner that the principal dimensions of the proposed vessel meet the criteria required under the Tender.

2.28 On 21st May, 2018, the owners of the vessel *'GLYKOFILOUSA IV'* executed a letter of confirmation in favour of the Petitioner.

2.29 On 30th May, 2018 / 4th June, 2018, the Respondent claims to have completed construction of port facilities and dredging work.

2.30 On 4th June, 2018, the Respondent addressed an email to the owners of the vessel *'GLYKOFILOUSA IV'* stating that according to them, the vessel is suitable for the Project pursuant to its inspection in Greece on 1st June, 2018.

2.31 On 12th June, 2018, the Petitioner addressed a Vessel Delivery Status update to the Respondent regarding 2 vessels shortlisted; i.e. *'MV VOYAGE SYMPHONY'* and *'GLYKOFILOUSA IV'* for the Project.

2.32 On 15th June, 2018, the Respondent asked the Petitioner to show cause as to why the Letter of Award should not be cancelled as the Petitioner had failed to bring in and deploy vessels for the Project (**"Show Cause Notice")**. It was also stated in the

Show Cause Notice that the EMD and Bank Guarantee submitted by the Petitioner would be forfeited.

2.33 In response to the Show Cause Notice, on the 18th June 2018, the Petitioner addressed a detailed letter reasoning as to why the Letter of Award should not be cancelled and the reasons for its alleged non-compliance.

2.34 On 25th June, 2018, the Petitioner forwarded the amendment made to the Agreement dated 20th June, 2018 entered between it and the owner of the vessel *'PROTOPOROUS IV'*.

2.35 On 5th July, 2018, the Petitioner addressed the following email to the Respondent :

> *"Respected sir*
>
> *As discussed in meeting with Hon Minister Sh Nitin Gadkari Ji , I understand the delay in procurement / Chartering of vessel but I commit to get the vessel start sailing before July 18 and to reach Mumbai shores by 10th August subject to weather conditions. I may be allowed this extension and oblige.*
>
> *xxx"*

It is pertinent to note that the Petitioner chose not to annex this e-mail in its Petition. This e-mail has been brought on record by the Respondent in its Affidavit in Reply to the Petition.

2.36 On 11th July, 2018, the Petitioner addressed an e-mail to the Respondent stating that Indigo Seaways has agreed to give its vessel *'SYMPHONY VOYAGE'* minimum till 15th October, 2018.

2.37 According to the Respondent, on 15th July, 2018, the agreement for *'PROTOPOROUS IV'* expired as the Petitioner did not obtain the delivery of the vessel within time. On the same day, a Charter Party contract was entered into between the Petitioner and Indigo Seaways.

2.38 On 16th July, 2018, a meeting was held between the representatives of the Petitioner, Respondent and the owners of vessel *'MV SYMPHONY'*.

2.39 On 18th July, 2018, the Petitioner addressed a letter to the Respondent recording that the vessel *'M.V. SYMPHONY'* is expected to arrive at Mumbai on 22nd July, 2018. The Petitioner requested the Respondent to carry out a joint survey to ascertain the readiness of the ports for passenger services and to execute a formal agreement.

2.40 On 20th July, 2018, the Respondent addressed a letter to the Petitioner recording the minutes of the meeting held on 16th July 2018. At the meeting, it was *inter alia* decided that the Petitioner will sign the agreement immediately and whilst basic details of the vessel have been provided, the Petitioner shall furnish details of the vessel on an urgent basis.

2.41 On 20th July, 2018, an e-mail from Indigo Seaways to the Petitioner was sent requesting payment of advance monthly charter hire of Rs. 1.62 crores.

2.42 On 21st July, 2018, a letter from Indigo Seaways was addressed to the Petitioner stating that *'MV VOYAGE SYMPHONY'* had arrived at Mumbai harbor and had anchored to fulfill charter requirements. On the same day, a 2nd e-mail was sent by Indigo Seaways to the Petitioner stating that Vessel Notice of Readiness was issued at 06:00 hours, thus the first advance monthly charter of Rs. 1.62 crores became payable by the Petitioner to Indigo Seaways.

2.43 On 23rd July, 2018, the Petitioner entered into an agreement for hiring the vessel *'MV SYMPHONY VOYAGE'* for the Project and addressed a letter to the Respondent informing them that the said vessel is available at the Mumbai port and called upon the Respondent to execute the formal agreement as to the arrival of the said vessel for deployment. The Petitioner also recorded that on 23rd July, 2018 its CEO was present at the office of the Respondent for execution of the agreement. However, the agreement did not get executed, as on 23rd July, 2018 the Petitioner had procured 1 charter party agreement (for *MV SYMPHONY VOYAGE*) as the charter party agreement for '*M.V. PROTOPORUS'* had already expired.

2.44 On 24th July, 2018, a 3rd reminder e-mail was sent by Indigo Seaways to the Petitioner requesting payment of advance monthly charter hire of Rs. 1.62 Crores. On the same day, the Petitioner sent an e-mail to Indigo Seaways, accepting the Notice of Readiness and assuring that the payment schedule would be shared with it. Also, the

Petitioner forwarded to the Respondent, an addendum to the agreement dated 24th July 2018 for the vessel *'PROTOPOROUS IV'*. As per the addendum, the time for delivery of the vessel was revised from 10th -15th July, 2018 to 16th – 21st August, 2018.

2.45 On 24th July, 2018, the Petitioner forwarded an execution plan for the Ro-Pax vessels *'VOYAGE SYMPHONY'* and *'PROTOPOROUS IV'* to the Respondent. As per the execution plan, 1 out of the 2 vessels had arrived at Mumbai. Further, the Petitioner was still required to obtain the necessary permissions for both vessels.

2.46 On 24th July, 2018, the Petitioner addressed a legal notice to Mr. Deepak Saigal, who, according to the Petitioner under the pretext of investigating in the Project, obtained access to confidential information from the Petitioner in respect of the Project. The Petitioner's Advocate recorded that Mr. Saigal is attempting at sabotaging the Project.

2.47 On 25th July, 2018, a 4th reminder was sent by Indigo Seaways to the Petitioner requesting payment of advance monthly charter of Rs. 1.62 Crores.

2.48 On 27th July, 2018, the Petitioner once again requested the Respondent to execute a formal agreement for the Project. However, on this date as well, only 1 of the 2 vessels were in Mumbai.

2.49 On 30th July, 2018, due to the failure of the Petitioner to make payments for the Charter of '*MV SYMPHONY VOYAGE*', the owner of the vessel cancelled the Charter Party Agreement, interalia stating as under :

"xxx

As per the terms of the subject Charter Party, the Charterers are required to pay the monthly charter hire of Rs. 1.62 crores, in advance, and the first advance became payable on the Vessel tendering NOR i.e. on 21st July 2018 at 0600 Hrs.

However, despite our intimation of the NOR (within the laycan – 24th July 2018) and request for payment of the advance charter hire by our letter dated 20th July 2018 and subsequent emails dated 21st July '18, 24th July'18 and 25th July'18, no payments have been received from you towards advance charter hire. Infact you have communicated your financial inability to make advance payment for charter hire as per the Charter Party.

xxx

In view thereof, we hereby terminate the Charter party dated 15th July, 2018 on grounds of repudiatory breach of the Charter Party dated 15th July 2018 on your part and hold you liable for all damages for losses suffered by us and subsequent damages and losses which may arise on account of this act of your breach and also for payment of costs and expenses incurred by us in relation the Charter Party, which please take notice."

2.50 On 31st July, 2018, the Respondent issued a detailed letter to the Petitioner cancelling/revoking the Letter of Award ("**Impugned Letter**"). In the Impugned Letter, the Respondent *inter alia* stated that the Petitioner was required to initiate all necessary activities for successful implementation of the Project by April, 2018.

However, till date, the Petitioner has not been able to either procure or long term hire/charter suitable vessels. The Respondent recorded that it is undisputedly clear that despite the lapse of 7 months from the Letter of Award, the Petitioner is unable to comply with its basic and fundamental obligation of procuring or long term hiring/chartering 2 suitable vessels. The Respondent further recorded that the Petitioner sought to amend the relevant clause in the draft agreement by replacing the words *"**Two** Ro-Pax vessels of the required parameters have been made ready in all aspects, for commencing the said service between Ferry Wharf and Mandwa"* with *"**One** Ro-Pax vessel of the required parameters have been made ready in all aspects, for commencing the said service between Ferry Wharf and Mandwa". Inter alia* on these grounds, the Respondent cancelled/revoked the Letter of Award.

2.51 On 3rd August, 2018, the Respondent issued a fresh tender for selection of Ro-Pax Vessel Operator ("**New Tender**"). The technical bid opening date was 22nd August, 2018 and the financial bid opening date was 27th August, 2018.

2.52 On 13th August, 2018, the Respondent addressed a letter to the Petitioner referring to its earlier letter dated 31st July, 2018 cancelling/revoking the Letter of Award. In this letter, the Respondent called upon the Petitioner to show cause as to why the Petitioner should not be barred from participating in future tenders floated by the Maharashtra Maritime Board contracts ("**Second Show Cause Notice**"). On the

16th of August, 2018, the Petitioner addressed a reply to the Second Show Cause Notice.

2.53 On 21st August, 2018, the Petitioner filed the present Section 9 Petition.

2.54 On 24th August, 2018, the Executive Engineer of the Respondent claims to have addressed a letter to the Sailing Consultant informing him that the terminal building and other facilities such as parking and breakwater have been completed at Mandwa Ro-Pax Jetty on 30th May, 2018.

2.55 On 28th August, 2018, this Court passed the following order :

"P.C.:

1. Stand over to 31st August, 2018.

2. Parties to maintain status quo as of today"

2.56 On 31st August, 2018 one Esquire Shipping and Trading Pvt. Ltd. submitted its bid under the New Tender issued by the Respondent. Mr. Deepak Saigal is a director of Esquire Shipping and Trading Pvt. Ltd. The Petitioner did not bid for the New Tender though the Petitioner's representative had participated in the pre-bid meeting.

2.57 Post the hearing on 31st August, 2018, the following order came to be passed :

"P.C.:

1. Stand over to 7th September, 2018.

2. The Respondent shall be at liberty to open the tenders and process the bids. However, they shall not award the contract in favour of any bidder until the adjourned date. This order is passed as a workable order without giving a detailed hearing to the parties. No equity shall be claimed by the Respondent in view of this order."

3. The aforesaid is the factual background leading to the present order.

4. Appearing for the Petitioner, Ld. Counsel Mr. Sharan Jagtiani submitted :

4.1 That the Respondent is a statutory body constituted under the Maharashtra Maritime Board Act, 1996 and is therefore, required to act reasonably, without arbitrariness and in accordance with the principles of natural justice. He submitted that the Impugned Letter is contrary to the terms of the Tender, is unfair, unreasonable and arbitrary. In this context, reliance was placed by him on the decisions of the Hon'ble Supreme Court in the case of *Shrilekha Vidyarthi (Kumari) vs. State of U.P.*[1]*; KSL & Industries Ltd. vs. National Textiles Corporation Ltd.*[2].

4.2 That there is no impediment in law for a court hearing an application under Section 9 of the Act to consider the issue of arbitrariness and irrationality in the action of a State instrumentality in commercial dealings with private persons. According to him, the Respondent abandoned/ withdrew its Show Cause Notice dated 15th June, 2018 for cancellation of the Letter of Award. The Show Cause Notice stood

1 [(1991) 1 SCC 212]

2 [2012 SCC Online Del. 4189

abandoned/withdrawn as *(i)* the Respondent elected not to respond to the Petitioner's reply dated 18th June, 2018 in which the Petitioner set out the Respondent's breaches resulting in the delay in deployment of vessels; and *(ii)* the Respondent held meetings with the Petitioner around 5th July, 2018 and 16th July, 2018 and on 20th July, 2018 at which meetings the Respondent directed the Petitioner to immediately sign the formal agreement which shows that the Respondent accepted the contents of the Petitioner's letter dated 18th June, 2018. Therefore, having accepted the Petitioner's reasons set out in the letter dated 18th June, 2018 and having proceeded with the Project for over a month thereafter, it was incumbent upon the Respondent to issue a fresh notice, if it was of the opinion that the Petitioner was not complying with the provisions of Tender. Having failed to do so, the Respondent cannot justify the repudiation of the Letter of Award by relying on the abandoned and withdrawn Show Cause Notice. The Respondent's conduct in relying upon the 15th June, 2018 Show Cause Notice, despite referring to the Petitioner's response dated 18th June, 2018 is arbitrary and in violation of Article 14.

4.3 That the Respondent has cancelled/revoked the Letter of Award on grounds which are not mentioned in the Show Cause Notice. The only ground stated in the Show Cause Notice is the alleged delay in deployment of vessels. However, the Petitioner was never given an opportunity to address the Respondent in respect of the grounds stated in the Impugned Letter dated 31st July, 2018. It is incumbent on the

Respondent, being an instrumentality of the State, to issue a comprehensive Show Cause Notice containing all grounds on which the contract may be repudiated. This is especially as the Petitioner will be subjected to serious civil consequences such as forfeiture of earnest money deposit and possible invocation of the Bank Guarantee in addition to cancelling the exclusive right of the Petitioner to ply vessels on the designated route for 15 years and possible blacklisting. It is trite law that a show cause notice should be clear and precise so as to give the affected party adequate information of the case they have to meet and make an effective defense. Denial of notice and opportunity to respond vitiates the action taken. In this context, reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Harbanslal Sahnia & Anr. vs. Indian Oil Corporation Ltd. & Ors.*[3].

4.4 That the Petitioner has evidenced its financial ability by fulfilling the terms of the Tender which required the furnishing of the Bank Guarantee and Earnest Money Deposit of Rs.25,000/-. The fact that the Petitioner was in talks with other investors such as Mr. Deepak Saigal cannot and does not compel the inference that the Budhrani Group of Companies has withdrawn its financial commitment undertaking.

4.5 That the obligations of the Respondent and the Petitioner under the Tender are reciprocal and sequential and the Respondent's admitted delay in performance of its obligations delayed the commencement of the Project. The delays attributable to the

3 [(2003) 2 SCC 107

Petitioner and the alleged lack of readiness overlook the reciprocal and sequential nature of promises under the Tender coupled with the Respondent's failure to fulfil its prior obligation.

4.6 That on a true and correct interpretation of the Tender, it is clear that the Respondent and the Petitioner were required, firstly, to enter into a formal agreement and thereafter, the Respondent was to complete the port infrastructure and dredging by March, 2018 and the Project was to commence simultaneously by March, 2018. The Respondent's failure to execute a formal agreement with the Petitioner resulted in the creation of a situation where, despite having the financial capability, the Petitioner was unable to commit to M/s. Indigo Seaways and pay the advance charter fees on account of which, the charter party agreement was terminated. The failure to execute the formal agreement is a repudiatory breach of a prior reciprocal obligation. The Respondent is therefore, precluded from arguing the Petitioner's readiness and willingness.

4.7 That the Respondent failed to cure the breach of the exclusivity clause on account of parallel tender/query published by the Shipping Corporation of India. The failure to execute the formal agreement coupled with the Respondent's failure to resolve the issue with the Shipping Corporation of India created several hurdles for the Petitioner in concluding negotiations.

4.8 That the Respondent's case that the port infrastructure was completed on 30th May, 2018 is false. The Respondent's reliance on the internal letter dated 24th August, 2018 to demonstrate that the port infrastructure was completed by 30th May, 2018 is entirely suspect and has been authored solely for the purpose of making out a defence in the present proceedings which were served upon the Respondent on 22nd August, 2018 i.e. 2 days prior to the date of the letter. Since time was not of the essence, assuming whilst denying that the Petitioner delayed the commencement of the Project, such delay is not a repudiatory breach which would entitle the Respondent to cancel/revoke the Letter of Award. Reliance was placed on the decision of Hon'ble Supreme Court in the case of *Hind Construction Contractors vs. State of Maharashtra*[4].

4.9 That there is no merit in any of the grounds set out in the Impugned Letter dated 31st July, 2018 which are not stated in the Show Cause Notice.

4.10 That the New Tender, is vitiated by *mala fides* as Mr. Deepak Saigal has colluded with the Respondent to procure the cancellation of the Letter of Award. This is evident from the relaxation given to the new tenderer to bring in only 1 vessel instead of 2 vessels as is the requirement under the Tender. That there is a clear bias and collateral motive in cancelling the Letter of Award on 31st July, 2018 and issuing a New Tender 3 days later under which the purportedly mandatory conditions are relaxed.

4 [(1979) 2 SCC 70

4.11 That in the present case, damages are not an adequate or complete remedy in lieu of specific performance. Reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd.*[5].

*4.12 T*hat therefore, the operation and effect of the Impugned Letter dated 31st July, 2018 cancelling/revoking the Letter of Award be stayed and the Respondent be restrained by an injunction from acting upon or taking any steps in furtherance to or on the basis of the Impugned Letter or the Impugned Show Cause Notice; the Respondent be restrained from invoking the Bank Guarantee; and that pending the hearing and final disposal of the arbitration, the Respondent be restrained from awarding the contract under the New Tender floated by the Respondent.

5. As opposed to the aforesaid submissions of Mr. Jagtiani, I have heard Ld. Senior Advocate Mr. Darius Khambata who has submitted as follows:

5.1 That the Project is an infrastructure project of public importance which is being delayed by the Petitioner. The Project is expected to improve interland connectivity, boast tourist activities in Alibag and the Konkan region and reduce road congestion.

5.2 That it is in public interest that the Ro-Pax service be started expeditiously. The Respondent has spent about Rs.162 Crores for implementing the Project. The public interest in carrying out the Project far outweigh the benefit of holding up the Project.

5 [(1983) 3 SCC 379]

In this context, reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors.*[6].

*5.3 That t*he Petitioner's actions have delayed the Project and in view thereof, the New Tender had to be issued. An order staying the New Tender as prayed for by the Petitioner, will be counterproductive.

5.4 That the Petitioner was financially incapable of performing the Project. Though the Petitioner has made bald statements that it was financially capable, its actions reflect otherwise. Assuming without admitting that the Petitioner was financially capable, it chose not to fulfil its financial obligations to the vessel owner.

5.5 That the Petitioner failed to procure or long term hire 2 vessels which was its primary obligation under the Tender and Letter of Award.

5.6 That though the Petitioner ultimately agreed to sign the formal agreement as sent by the Respondent, its intention to deviate from the mandatory conditions of the Tender and Letter of Award was reflected in the drafts sent by it. This shows the inability of the Petitioner to perform its obligations.

5.7 That the Petitioner could have obtained the vessels irrespective of the signing of the formal agreement. The Petitioner had defaulted in its payments to Indigo Seaways and the Petitioner's investor/financer Mr. Deepak Saigal had also backed out.

6 [(1999) 1 SCC 492]

5.8 That it is a condition precedent to the relief of specific performance that readiness and willingness should be continuous and must be adjudged with reference to the conduct of the Plaintiff and seen from the totality of facts and circumstances right up to the hearing. In this context, reliance was placed on the decision of the Hon'ble Supreme Court in the case of *Inderchand Jain vs. Motilal*[7].

5.9 That mere alleged delay or default on the part of the Respondent does not absolve the Petitioner from performing obligations and the burden of showing its readiness and willingness to perform the contract.

5.10 That if a party chooses to keep a contract alive and seeks specific performance even after the other party repudiates it, then it must show its readiness and willingness to perform. Such a party is not absolved from its obligations. In this context, reliance was placed on the decisions of the Hon'ble Supreme Court in the case of *Jawahar Lal Wadhwa & Anr. vs. Haripada Chakroberty*[8]*; and in the case of Fercometal S.A.R.L. vs. Mediterranean Shipping Co. S.A.*[9] *and the decision of the Andhra Pradesh High Court in the case of Motilal Srinivasa Sarda vs. The Netha Co-operative Spinning Mills Ltd.*[10].

7 [(2009) 14 SCC 663]

8 [(1989) 1 SCC 76]

9 [(1989) SC 788]

10 AIR 1975 AP 169

5.11 That the Respondent's shore based facilities were ready by 30th May, 2018 and the necessary depth in order to have safe navigation to berth the Vessel was available by 4th June, 2018.

5.12 That the port infrastructure (waiting hall, restroom etc.) has no bearing whatsoever on the Petitioner's obligation of procuring 2 vessels.

5.13 That the Petitioner was in talks with the owners of the Greek Vessel, Agios Spiridon around June, 2018 and therefore, the Petitioner was satisfied with the facilities at the site.

5.14 The obligations of the parties under the Tender were not sequential or conditional upon performance of one another. The Petitioner is deliberately trying to build a sequence which was never contemplated. The plain reading of the terms of the Tender and of the Letter of Award does not establish that the readiness of the 2 vessels was to be after the port infrastructure was complete. Merely because there may be reciprocal promise in a contract, a party cannot refuse performance on the ground of non-performance by the other party. In this context, reliance was placed on Section 54 of the Indian Contract Act.

5.15 That in any event, execution of the formal agreement did not preclude the arrival of the vessels.

5.16 That the Petitioner's submission that the Respondent abandoned/waived the Show Cause Notice is beyond the scope of its pleadings and arguments. In any event,

the Respondent's conduct does not amount to waiver for the fact that upon receiving the Petitioner's response dated 18th June, 2018, the Respondent, without withdrawing the contents of the Show Cause Notice, gave a chance to the Petitioner to perform its obligations under the Tender and Letter of Award. In fact, in its letter dated 5th July, 2018, the Petitioner has admitted its failure to bring the vessels and has sought an extension. There was no requirement of issuing a fresh Show Cause Notice. That the Respondent has acted fairly and reasonably and ample opportunity has been given to the Petitioner to perform the contract. However, it failed to do so. In this Context, reliance was placed on the decisions of the Hon'ble Supreme Court in the case of *Assistant Excise Commissioner & Ors. vs. Issac Peter & Ors.*[11]*;* followed in *S.K. Jain vs. State of Haryana & Anr.*[12] and *Joshi Technologies International Inc. vs. Union of India & Ors.*[13].

5.17 That the Petitioner's remedy, if any, lies in its claim for damages.

5.18 That there is a specific bar under Section 20-A of the Specific Relief Act, 1963 for seeking an injunction on infrastructure projects.

5.19 That the Petition therefore, deserves to be dismissed with costs.

11 [(1994) 4 SCC 104]

12 [(2009) 4 SCC 357]

13 [(2015) 7 SCC 728]

6. I have considered the aforesaid arguments canvassed by the learned Advocates appearing for the Petitioner and Respondent. I have also considered the various decisions of the Apex Court and various High Courts as cited by them.

7. Prior to dealing with their respective arguments, it would be necessary to set-out certain clauses from the Tender which read as under :

> *"5.2.1. ii. The selected operator shall procure or long term hire/charter with all the necessary permissions to ply within inland waters, suitable vessels for the terminal at Ferry Wharf and Mandwa. The vessels in operation shall be replaced when operating life of the vessels is over during the course of executing the services as per the contract.*
>
> *5.2.2. iii. The operator shall provide at least 2 vessels for route from Ferry Wharf to Mandwa during the currency of contract…*
>
> *7.6 On accepting Letter of Award, the Successful Bidder will be required to sign an agreement for passenger ferry services, with the MMB. The Ro-Pax Service is to be ready to start by March 2018.*
>
> *12. **Signing of Agreement***
>
> *Within Thirty (30) days from the date of issuance of the Letter of Award, a formal agreement shall be entered into, between MMB and the Successful Bidder. The date of commencement of contract shall be mentioned in the Agreement."*

8. It would also be necessary to set-out the following clauses from the Letter of Award :

"5. You are requested to furnish details of vessel procurement, leasing and mobilization of suitably experienced staff with Ro-Pax/ passenger ferry experience, post which, the contract will be signed by MMB.

6. You are also requested to provide a commitment undertaking on a non-judicial stamp paper of appropriate value by your investors, stating their financial commitment in your company for the subject project, before signing of contract with MMB.

7. Please note that MMB has a right to revoke this Letter of Award and forfeit the Bank Guarantee in case of non-compliance of relevant terms and conditions of the Tender and this LOA."

9. In my view, on a perusal of Clause 5.2.1 (ii), Clause 5.2.1 (iii) of the Tender and Clause 5 of the Letter of Award reproduced hereinabove, there can be little quarrel with the proposition that an integral objective of the Tender read with the Letter of Award was to select such bidder that would procure/long term hire 2 vessels to be used for the Project. The procurement of vessels and their deployment appears to be the foundation of the Tender and Project. With the essence of the Tender, Letter of Award and Project in mind, I shall now deal with the arguments raised for and against the reliefs sought in the present Petition.

10. Firstly, it is pertinent to note that a Show Cause Notice was in fact issued by the Respondent to the Petitioner. It is also pertinent to note that prior to the issuance of the Show Cause Notice on 15th June, 2018, several letters dating back as early as 1st

January, 2018 were repeatedly addressed by the Respondent to the Petitioner *inter alia* calling upon it to comply with its obligation of procuring 2 vessels. The repeated requests for compliance under these letters have already been reproduced hereinabove. The delay on the Petitioner's part in complying with its obligations is borne out from a perusal of the correspondence exchanged between the parties and reproduced hereinabove. The delay on the Petitioner's part stands buttressed on a perusal of the Petitioner's e-mail dated 5th July, 2018 addressed to the Respondent. In this e-mail, the Petitioner has categorically accepted that there had been a delay in the procurement / chartering of vessels. The Petitioner in fact even sought for an extension due to its delay. The Petitioner has chosen not to annex this e-mail to its Petition. This e-mail has been brought on record by the Respondent in its Affidavit in Reply to the Petition. The Show Cause Notice and Impugned Letter proceed on this very basis *viz.* that the Petitioner has failed to *inter alia* comply with its fundamental obligation of procuring 2 vessels despite the lapse of several months from the Letter of Award. In my view, the procuring / long term hire/charter of 2 vessels was a *sine qua non* for the commencement of the Project. Therefore, the reasons as set out in the Show Cause Notice and Impugned Letter issued pursuant thereto cannot be said to be incorrect unfair, unreasonable and arbitrary as Mr. Jagtiani would have it. The correspondence referred to above, reflects that the Respondent was provided with sufficient opportunities to remedy its repeated and continuing breach. However,

despite such repeated opportunities and reminders, the Respondent chose not to comply with its fundamental obligation under the Tender and Letter of Award *viz.* procuring 2 vessels.

11. Mr. Jagtiani also submitted that the Respondent acted arbitrarily in cancelling/revoking the Letter of Award on grounds which did not form part of the Show Cause Notice. Reliance was placed in this respect on the Apex Court's decision in *Harbanslal Sahnia & Anr. vs. Indian Oil Corporation Ltd. & Ors. (supra).* Having gone through the correspondence exchanged between the parties, and especially the letters dated 1st January, 2018, 23rd January, 2018, 8th March, 2018, 2nd April, 2018 and 20th July, 2018, under which letters, the Respondent repeatedly called upon the Petitioner to comply with its obligations, it does not appear to be the case that the Petitioner was put to notice of its alleged breaches as recorded in the Impugned Letter only upon receiving the Impugned Letter. The delay on the Petitioner's part stands buttressed on a perusal of the Petitioner's e-mail dated 5th July, 2018 addressed to the Respondent. In this e-mail, the Petitioner has categorically accepted that there had been a delay in the procurement / chartering of vessels. The Petitioner in fact even sought for an extension due to its delay. In any event, whether or not the Petitioner's termination was legal and in consonance with the Tender or not and/or whether the Impugned Letter was issued *de hors* the Show Cause Notice, is a matter which will be finally decided in the arbitration between the parties, if commenced. Further, if the Petitioner

succeeds in establishing that its termination was illegal, it can always be compensated in damages which would be an adequate relief.

12. It was also Mr. Jagtiani's submission that the Respondent waived/abandoned the Show Cause Notice. In so far as this argument is concerned, I do not agree that merely because the Respondent provided the Petitioner with a further opportunity to remedy its breach after receiving its response dated 15th June, 2018 to the Show Cause Notice, the Show Cause Notice stood waived/abandoned. It was only when despite further opportunities, and the Petitioner failing to remedy its default, did the Respondent terminate the Letter of Award by issuing the Impugned Letter. There was therefore, no question of the Respondent being required to issue a fresh show cause notice. I also cannot subscribe to the argument that merely because the parties met post the Show Cause Notice, certain conditions of the Letter of Award and Tender stood modified. I do not believe a state entity such as the Respondent can merely participate in meetings and orally alter/amend/modify clauses of a Tender/Letter of Award in such manner as suggested by the Petitioner. In my view, the Respondent was entitled to rely upon the Show Cause Notice whilst issuing the Impugned Letter. This, in my opinion, was an act in pursuance of the Show Cause Notice. At the cost of repetition, I repeat that in the event the Petitioner is able to lead sufficient evidence to substantiate that the termination of the Letter of Award is *de hors* the provisions of the Tender, it shall be awarded damages which in my opinion, will be an adequate remedy.

13. In so far as the arguments on readiness and willingness are concerned, it would be apposite to set-out the following table indicating the various vessels suggested by the Petitioner and their lack of availability / readiness:

Sr. No.	Vessel/s	Particulars
i.	N.A.	By its letter dated 27th November, 2017, the Petitioner assured the Respondent that 2 vessels of specifications as stated therein /similar vessels would be endeavoured to be procured upon award of the contract. Names of the vessels were not provided by the Petitioner.
ii.	N0001 N0002 N0003 N0004	By another letter dated 30th January, 2018 the Petitioner furnished technical details of certain vessels. However, once again, the names of the owners of the vessels and/or their leasing/ procurement details were not provided.
iii.	AGIOS SPIRIDON	By its letter dated 9th April, 2018 addressed to the Respondent, the Petitioner indicated that a vessel by the name of AGIOS SPIRIDON which is located in China would be chartered for a period of 6 months. No procurement/ leasing details

		were provided by the Petitioner to the Respondent. However, by an e-mail dated 10th May, 2018, the charter party communicated to the Petitioner that the vessel would no longer be available as the Port Authorities in Corfu have not provided the requisite permission.
iv.	GLYKOFILOUSA IV	By its letter dated 18th May, 2018, the Petitioner submitted its general arrangement plan for the vessel. No charter party agreement qua this vessel was signed by the Petitioner. At the Petitioner's request and on the Respondent's expense, on 1st June, 2018 officials of the Respondent and the Mumbai Port Trust inspected this vessel in Greece. However, on 4th June, 2018, the Petitioner addressed a letter to the Respondent stating that the owners of this vessel were "*re-thinking*" the proposal and the Petitioner was in discussions with them.

		However, on 12th June, 2018, the Petitioner informed the Respondent that the Charter Party Agreement with the vessel owner could not be concluded.
v.	MV SYMPHONY VOYAGE	On 12th June, 2018, the Petitioner informed the Respondent that they were in the process of entering into an agreement regarding this vessel and that this vessel was scheduled to arrive on 4th July, 2018. However, this vessel arrived only on 21st July, 2018. As per the Petitioner's letter dated 11th July, 2018, the owners of this vessel had agreed to give the vessel only till 15th October, 2018 i.e. for a meagre period of 3 months. Such duration cannot be termed as a long term hire/charter as mandated under the Tender especially since the duration of the Tender is 15 years. The records reflect that the owners of this vessel sent payment reminders to the Petitioner on 29th July, 2018, 21st July, 2018, 24th July, 2019 and 25th July, 2018. Eventually, despite all these reminders, the owners of this vessel were constrained to

		terminate their agreement with the Petitioner due to the Petitioner's financial inability.
vi.	MV PROTOPOROS IV	In June 2018, the Petitioner submitted an unsigned Charter Party Agreement to the Respondent. On 25th June, 2018, the Petitioner enclosed a signed Charter Party Agreement for this vessel. Under this agreement, the date of delivery of the Vessel was 10th -15th July, 2018. However, on 15th July, 2018, this vessel had not even set sail. Subsequently, on 24th July, 2018, the Petitioner enclosed an Addendum executed with the vessel owner whereby the date of delivery was altered to 16-21st August 2018.

14. The above table reflects that despite Clauses 5.2.1. ii, 5.2.2.iii, 7.6 of the Tender and Clause 5 of the Letter of Award and despite being repeatedly put to notice that the Petitioner had to procure 2 vessels, the Petitioner was unable to do so. The very fact that the Petitioner appears to have run from pillar to post to arrange for 2 vessels and was constantly entering into negotiations with various vessel owners demonstrates that

the Petitioner was indeed not in a position to comply with its obligations under the Tender and Letter of award. In view thereof, I am of the considered opinion that the Petitioner was not ready in complying with its obligations under the Tender and Letter of Award. From the records, it appears that the Petitioner is desperately attempting at clutching at straws in order to conceal its lack of readiness and willingness in complying with the terms of the Tender and Letter of Award. The Petitioner has raised a series of defenses so as to justify why it was unable to comply with its obligations under the Tender and Letter of Award. However, in my view, the fact that the Petitioner sought to alter the terms of the Tender from the requirement of procuring 2 vessels instead of 1 vessel is cogent evidence of the Petitioner's conduct in being unable to comply with its obligations under the Tender.

15. It has also been argued that the Petitioner never sought any modification to the mandatory conditions of the Tender *viz.* the number of vessels to be deployed and the consortium stake clause. It was also argued that as the New Tender now requires the procurement of only 1 vessel, the requirement of 2 vessels under the Tender was not mandatory. This, in my opinion, is a wholly ill-advised argument. The Petitioner cannot, in law, rely upon the New Tender to construe provisions as they stood in the Tender. The Tender and New Tender are different contracts published on different dates. Whilst the Petitioner may have agreed to ultimately sign the formal agreement as sent by the Respondent, its intention to deviate from its obligations under the

Tender by forwarding a mark-up to the draft agreement and attempting at replacing the words *"**Two** Ro-Pax vessels of the required parameters have been made ready in all aspects, for commencing the said service between Ferry Wharf and Mandwa"* with *"**One** Ro-Pax vessel of the required parameters have been made ready in all aspects, for commencing the said service between Ferry Wharf and Mandwa*" cannot be ignored. The Petitioner's conduct in attempting at deviating from the terms of the Tender coupled with its correspondence requesting for an extension and the fluctuating names of vessels shortlisted/proposed by the Petitioner indicates that the Petitioner was not at all ready to comply with its obligations under the Tender and Letter of Award. The Petitioner's attempt to alter the terms of the draft agreement are indicative of its inability to comply with its obligations under the Tender. The Petitioner appears to have participated in the Tender and accepted the Letter of Award despite being aware that it did not have the wherewithal to comply with its obligations therein. In this context, it would be relevant to place reliance on the following findings of the Apex Court in its decision rendered in *Umabai v. Nilkanth Dhondiba Chavan*[14] **:**

> *"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the*

14 [(2005) 6 SCC 243]

plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records."

16. In my considered opinion, the query raised by the Shipping Corporation of India cannot in any manner be said to have estopped the Petitioner from complying with its obligations in procuring 2 vessels. Further, the Respondent has brought on record its letter dated 23rd April, 2018 whereunder it took steps to contact the Shipping Corporation of India requesting it to withdraw its query. Such alleged breach would not absolve the Petitioner from complying with its mandatory obligations under the Tender and Letter of Award. Further, no correspondence placed before me reflects that any of the vessel owners did in fact refuse to provide the Petitioner with vessels solely on account of the query published by the Shipping Corporation of India. In fact, the reasons for non-supply of the vessels by the vessel owners to the Petitioner, appear to be the Petitioner's financial inability *(see the e-mail dated 10th May, 2018 and letter dated 30th July, 2018)*. In any event, whether or not the Respondent breached its obligations under the exclusivity clause of the Tender is an issue if decided in the Petitioner's favour, would entitle it to damages in the arbitration which would be an adequate remedy.

17. In so far as Mr. Jagtiani's submission that facilities at the site were not ready by the 4th of June, 2018 is concerned, I am of the view that whether the facilities were

available or not cannot and do not absolve the Petitioner of its obligations to have procured 2 vessels. On the contrary, had the Petitioner complied with all its obligations and kept the vessels ready irrespective of whether or not the facilities were available, this would have strengthened the Petitioner's case. It is an admitted position that the Petitioner had not procured signed charter party agreements for 2 vessels during the subject period. In any event, the records reflect, as argued by Mr. Khambata, that the Respondent's infrastructure was in fact ready by 30th May, 2018. It has been further demonstrated that there was necessary depth in order to berth the vessels. According to him, dredging work was only being carried out in the extremities of the navigational channel which does not hinder any movement of vessels in the navigational channel. It was further placed on record that the Petitioner does not dispute that dredging was complete by 4th June, 2018. There is further on record a letter dated 24th August, 2018 confirming that the port infrastructure was completed by 30th May, 2018. This letter of course, Mr. Jagtiani terms as *"entirely suspect" and "not credible"*. In my view, the authenticity or otherwise of this letter is also a matter of trial and cannot be adjudged in the absence of evidence. For the present proceedings, suffice is to say that this argument would not entitle the Petitioner for the reliefs it currently seeks.

18. It has also been argued that the time indicated for commencement of the Project is not the essence of the contract. In this context, reliance was placed on *Hind*

Construction Contractors vs. State of Maharashtra (supra). However, in my view, considering the nature of the Project, the terms of the Tender, the Letter of Award and the correspondence exchanged between the parties, it cannot be said that time was not the essence of the contract. At this stage, it would be necessary, at the cost of repetition, to reproduce Clause 7.6 of the Tender which reads as under:

> "*7.6 On accepting Letter of Award, the Successful Bidder will be required to sign an agreement for passenger ferry services, with the MMB.* ***The Ro-Pax Service is to be ready to start by March 2018****."*

Thus, right from the time of participating in the Tender, the Petitioner was admittedly put to notice that as per the terms of the Tender, the Project was to commence by March, 2018. This being so, the Petitioner ought to have ensured that it had the necessary wherewithal to commence the Project within the time reflected under the Tender. Furthermore, the Respondent has addressed a letter dated 23rd January, 2018 to the Petitioner *inter alia* stating "*It is once again brought to your kind notice that we are looking forward to start the Ro-Pax service on this route from 1st April, 2018. This is one of the ambitious projects of the Government and its progress is closely monitored, both from the State and Central level.*". The Respondent also addressed a letter dated 8th March, 2018 to the Petitioner recording that

> *"4. As the expected date of commencement of the service is barely a month away, it is expected from you that all-out efforts are made to meet the deadline of the project.*

5. In view of the above, it is, once again, requested that necessary actions be initiated on "war-footing" to make this prestigious venture successful."

In view thereof, the Petitioner was expected to procure or long term hire/charter 2 vessels for deployment within the time period indicated in the Tender and the Respondent's correspondence, both of which were to the Petitioner's express knowledge.

18. An argument was also canvassed by the Petitioner that the obligations of the Respondent and the Petitioner under the Tender are reciprocal and sequential and that the Respondent's admitted delay in performance of its obligations delayed the commencement of the Project. In so far as this submission is concerned, under Clause 5 of the Letter of Award, the Petitioner was under an express obligation to furnish details of the procurement/leasing of the vessels as also the mobilization of suitably experienced staff thereon. I cannot agree with the submission that the procurement of the vessels was only required after the port infrastructure was complete. The Letter of Award expressly provides that the Petitioner is under an obligation to furnish details of vessel procurement, leasing and mobilization of suitably experienced staff with Ro-Pax/ passenger ferry experience, ***post which***, the contract will be signed by the Respondent. The sequential nature of the Letter of Award is in fact contrary to Mr. Jagtiani's submissions. It is his client who was under the primary obligation to furnish details of the vessels procurement etc. ***post which*** the contract was to be signed by the

Respondent. However, his client failed to do so and thus, the Respondent did not enter into an agreement with the Petitioner. In my view, the Petitioner having accepted the Letter of Award and the terms and conditions therein, cannot now contend that the Respondent is in default for not having entered into the agreement. In fact, the Respondent did not enter into an agreement with the Petitioner for the very fact that the Petitioner failed in procuring/hire-chartering 2 vessels and furnishing details thereof. In any event, in the facts of the present matter, the terms of the Tender read with the Letter of Award do not reflect that the readiness/procurement of the 2 vessels was to be only after the port infrastructure was complete. For the same reason, I also cannot subscribe to Mr. Jagtiani's submission that his client refused to pay the owners of the vessel *MV VOYAGE SYMPHONY* merely because it had not entered into an agreement with the Respondent. In my view, there was no impediment, in fact or in law, preventing the Petitioner from having entered into charter party agreements for 2 vessels. In this context, the following observations of the Apex Court in its decision rendered in *Inderchand Jain vs. Motilal (supra) is relevant:*

> *"15.Section 16(c) of the Specific Relief Act, 1963 mandates that the discretionary relief of specific performance of the contract can be granted only in the event the plaintiff not only makes necessary pleadings but also establishes that he had all along been ready and willing to perform his part of the contract. Such readiness and willingness on the part of the plaintiff is not confined only to the stage of filing of the plaint but also at the*

subsequent stage viz. at the hearing. It has been so held in Umabai v. Nilkanth Dhondiba Chavan [(2005) 6 SCC 243] in the following terms: (SCC p. 256, paras 30-31)

"30. It is now well settled that the conduct of the parties, with a view to arrive at a finding as to whether the plaintiff-respondents were all along and still are ready and willing to perform their part of contract as is mandatorily required under Section 16(c) of the Specific Relief Act must be determined having regard to the entire attending circumstances. A bare averment in the plaint or a statement made in the examination-in-chief would not suffice. The conduct of the plaintiff-respondents must be judged having regard to the entirety of the pleadings as also the evidences brought on records.

31. In terms of Forms 47 and 48 appended to Appendix A of the Code of Civil Procedure, the plaintiff must plead that 'he has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice' or 'the plaintiff is still ready and willing to pay the purchase money of the said property to the defendant'. The offer of the plaintiff in the instant case is a conditional one and, thus, does not fulfil the requirements of law."

16.Yet again in Sita Ram v. Radhey Shyam [(2007) 14 SCC 415 : AIR 2008 SC 143] while referring to Ardeshir H. Mama v. Flora Sassoon [(1927-28) 55 IA 360 : AIR 1928 PC 208] this Court opined as under: (SCC pp. 416-17, para 5)

"5. … '8. … the Privy Council observed that where the injured party sued at law for a breach, going to the root of the contract, he thereby elected

> *to treat the contract as at an end himself and as discharged from the obligations. No further performance by him was either contemplated or had to be tendered. In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part.' " [Ed.: As observed in Aniglase Yohannan v. Ramlatha, (2005) 7 SCC 534, at p. 537, para 8.]*

19. It is pertinent to note that whilst the Respondent had forwarded the draft agreement to the Petitioner on 15th February, 2018, the Petitioner only reverted with its changes on 6th April, 2018. It is also pertinent to note that the Respondent addressed reminder letters to the Petitioner calling upon it to revert with its changes to the draft agreement *(see letters dated* 8th March, 2018 *and* 2nd April, 2018 *reproduced hereinabove).* In my view, this delay of 2 months on the Petitioner's part along with its inability to procure 2 vessels negates the Petitioner's arguments. Whilst on this, an argument has also been canvassed by Mr. Jagtiani that the Respondent acted arbitrarily and in breach of the Tender in refusing to execute a formal agreement despite the Petitioner having tendered all necessary details. According to him, the Respondent's failure to execute a formal agreement is a repudiatory breach of a prior reciprocal obligation and therefore, the Respondent is precluded from arguing the Petitioner's readiness and willingness. These grounds raised by Mr. Jagtiani cannot in my view

procure an order of injunction from this Court. In my view, the back and forth in respect of the availability and non-availability of vessels, the Petitioner's financial inability and the Petitioner's attempt at altering a fundamental clause of the draft agreement all appear to be reasons to justify the Respondent's apprehension from entering into a formal agreement with the Petitioner. As held hereinabove, the Letter of Award expressly provides that the Petitioner is under an obligation to furnish details of vessel procurement, leasing and mobilization of suitably experienced staff with Ro-Pax/ passenger ferry experience, ***post which***, the contract will be signed by the Respondent. In my view, the Petitioner having accepted the Letter of Award and the terms and conditions therein, cannot now contend that the Respondent is in default for not having entered into the agreement. In fact, the Respondent did not enter into an agreement with the Petitioner for the very fact that the Petitioner failed in furnishing details of the 2 vessels. It appears that the Petitioner is attempting at shifting the burden of its own failures upon the Respondent. The Petitioner also argued that on 23rd July, 2018, its CEO was present at the office of the Respondent for execution of the agreement. However, the agreement did not get executed. It is pertinent to note that as on 23rd July, 2018, the Petitioner had procured only 1 charter party agreement for *MV SYMPHONY VOYAGE* as the charter party agreement for *M.V. PROTOPORUS* had already expired. The addendum to the charter party agreement was submitted by the Petitioner only on 24th July, 2018. However, on the same date,

the Respondent received a communication addressed by the Petitioner to one Mr. Saigal recording that the Petitioner's financial investor had backed out thereby; raising a justifiable doubt in the Respondent's mind. All these facts coupled with the fact that the Petitioner admittedly defaulted in paying the owners of *M.V. SYMPHONY* due to which, this vessel departed on 7th August, 2018 reflect that the Petitioner was in no position to perform its obligations under the Tender and Letter of Award. In any event, if Mr. Jagtiani's submissions are upheld at the appropriate stage, his client would be entitled to damages which would be an adequate relief.

20. Lastly, in my view, irrespective of Mr. Khambata's reliance on the newly introduced Section 20-A of the Specific Relief Act, 1963, I am of the considered opinion that the commencement of the Project ought not to be delayed any further. In my view, a public contract, such as the present one, ought to commence at the earliest and ought to operate at its maximum capacity at all times irrespective of any disputes and claims that may have arisen between the contracting parties therein. An injunction restraining the commencement and/or continuance of such project will lay down a pitiable precedent. In this context the following observations of the Apex Court's decision rendered in *Raunaq International Ltd. v. I.V.R. Construction Ltd.,*[15] are relevant and therefore reproduced hereunder:

15 (1999) 1 SCC 492

"18. *The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders in appropriate cases should be asked to provide security for any increase in cost as a result of such delay or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.*

21. *It is unfortunate that despite repeated observations of this Court in a number of cases, such petitions are being readily entertained by the High Courts without weighing the consequences. In the case of Fertilizer Corpn. Kamgar Union (Regd.)v. Union of India [(1981) 1 SCC 568] this Court observed that if the Government acts fairly, though falters in wisdom, the court should not interfere. The Court observed: (SCC p. 584, para 35)*

"35. A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Articles 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangement … emerges. … The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This

function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration."

22. *In Tata Cellular v. Union of India [(1994) 6 SCC 651] this Court again examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power. Of course, if this power is exercised for any collateral purpose, the exercise of that power will be struck down: (SCC p. 675, para 71)*

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters … and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

After examining a number of authorities, the Court concluded (at pp. 687-88) as follows:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4)The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

23. The same view has been reiterated in Asia Foundation & Construction Ltd.v. Trafalgar House Construction (I) Ltd. (1997) 1 SCC 738 the Court observing that judicial review of contractual transactions by government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. This Court added a further dimension to the undesirability of intervention by pointing out that where the project is a high-cost project for which loans from the World Bank or other international bodies have been obtained after following the specifications and procedure of such a body, it would be detrimental to public interest to interfere. The same principles have also been reaffirmed in New Horizons Ltd. v. Union of India (1995) 1

SCC 478 with this Court again emphasising the need to allow for certain flexibility in administrative decision-making, observing that the decision can be challenged only on the Wednesbury principle of unreasonableness, i.e., unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. In Delhi Science Forum v. Union of India (1996) 2 SCC 405, this Court once again observed that if a reasonable procedure has been followed, the decision should not be challenged except on the Wednesbury principle of unreasonableness.

24. Dealing with interim orders, this Court observed in CCE v. Dunlop India Ltd. (1985) 1 SCC 260 : 1985 SCC (Tax) 75 : (1985) 2 SCR 190 : SCR 190 p. 196 that an interim order should not be granted without considering the balance of convenience, the public interest involved and the financial impact of an interim order. Similarly, in Ramniklal N. Bhutta v. State of Maharashtra (1997) 1 SCC 134, the Court said that while granting a stay, the court should arrive at a proper balancing of competing interests and grant a stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a stay. Therefore, in granting an injunction or stay order against the award of a contract by the Government or a government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost.

> ***25.*** *Therefore, when such a stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counterproductive.* **"**

21. Independent of Mr. Khambata's reliance on the newly introduced Section 20-A, I am disinclined, in the facts and circumstances of the present case, to grant an injunction in favour of the Petitioner for in my view, such injunction will delay the Project which has in any event been delayed for a considerable amount of time. In my view, the Petitioner's reliance on the decision the Supreme Court in the case of *M/s Umesh Goel vs. Himachal Pradesh Cooperative Group Housing Society Ltd.*[16] would not assist its case for the reasons set-out herein and for the reason that I have already held that the Respondent has not acted in a manner that is unjust, unfair or arbitrary. Whilst the Petitioner has attempted at making a telling argument relying upon the decisions rendered in *Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt.*

16(2016) 11 SCC 313

Ltd.[17]*, Old World Hospitality Pvt. Ltd. vs. India Habitat Centre*[18]*, Shrilekha Vidyarthi (Kumari) vs. State of U.P. (supra), KSL & Industries vs. National Textiles Corporation Ltd. (supra) , ARETPL-AT (JV) vs. Central Coalfields Ltd.*[19], the Petitioner's inability to be ready and willing to perform its obligations under the Tender and Letter of Award cannot go unnoticed and therefore, the reliance on these judgments cannot in law, further the case of the Petitioners. On the contrary, I agree with Mr. Khambata's reliance on the following findings from the decision in *Assistant Excise Commissioner & Ors. vs. Issac Peter & Ors. (supra):*

> ***"26.*** *Learned counsel for respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory — at least to the extent of previous year's supplies — by applying the said doctrine. It is submitted that if this is not done, the licensees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is sought to be imported into the contract to modify and alter its*

17 (1983) 3 SCC 379

18 1996 SCC Online Del. 580

19 2018 SCC Online Jhar 178

terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract — or rather more so. It is one thing to say that a contract — every contract — must be construed reasonably having regard to its language. But this is not what the licensees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in converse case, i.e., where the State has abundant supplies and wants the licensees to lift all the stocks. The licensees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned counsel for the licensees do not support their proposition. In Dwarkadas Marfatia v. Board of Trustees of the Port of Bombay[(1989) 3 SCC 293] it was held that where a public authority is exempted from the operation of a statute like Rent Control Act, it must be presumed that such exemption from the

statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the appellant in that case. Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212 : 1991 SCC (L&S) 742] was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms 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. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the

contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein."

22. In any event, the paramount intent leading to the introduction of Section 20-A appears to be to prevent injunctions in relation to public projects arising from contractual disputes such as the present one. Further and in any event, the question as to whether or not the principles under the Specific Relief Act, 1963 and the tests laid down therein apply while granting reliefs under Section 9 of the Arbitration and Conciliation Act, 2015 is no longer *res integra*. In this context, the decision of the Apex Court in *Arvind Constructions Co. (P) Ltd. v. Kalinga Mining Corpn.*[20] is relevant and paragraphs 16, 17, 18, 20 and 21 of the said decision are reproduced hereunder :

"*16. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of*

20 (2007) 6 SCC 798

specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be "an Act to define and amend the law relating to certain kinds of specific reliefs". Specific relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his Tagore Law Lectures on Specific Relief, the remedy for the non-performance of a duty are (1) compensatory, (2) specific. In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in Part III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction, temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly Clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant.

Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

17. In Nepa Ltd. v. Manoj Kumar Agrawal [AIR 1999 MP 57] a learned Judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. Under Section 28 of the Act of 1996, even the Arbitral Tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim reliefs.

18. *The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In Siskina (Cargo Owners) v. Distos Compania Navieria SA (The Siskina) [1979 AC*

210 : (1977) 3 WLR 818 : (1977) 3 All ER 803 (HL)] Lord Diplock explained the position: (All ER p. 824f-g)

"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

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

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

20. *No special condition is contained in Section 9 of the Act. No special procedure is indicated. In American Jurisprudence, 2nd Edn. it is stated:*

"In judicial proceedings under arbitration statutes ordinary rules of practice and procedure govern where none are specified; and even those prescribed by statute are frequently analogous to others in common use and are subject to similar interpretation by the courts."

21. *It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject-matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject-matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to OMM Private Limited for a period of 10 years and its attempted abrupt termination by OMM Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of OMM Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by OMM Private Limited or the termination of the contract by OMM Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well-settled principles for the grant of an injunction. Therefore, on the whole, we feel that it*

would not be correct to say that the power under Section 9 of the Act is totally independent of the well-known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the case."

23. The above decision of the Apex Court clearly lays down that the power under Section 9 cannot be read as independent of the Specific Relief Act. In my view, it cannot be contended that the restrictions placed by the Specific Relief Act, 1963 cannot control the exercise of the power under Section 9 of the Arbitration and Conciliation Act, 2015.

24. Mr. Jagtiani sought to place reliance on the Delhi High Court's decision in *KSL & Industries vs. National Textiles Corporation Ltd. (supra).* However, in addition to the facts of the said case being at contrast to the present matter, the termination in the said case appeared to be without any justification which is not so in the present case. This can be seen from paragraph no.100 of the said case which reads as under:

"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."*
>
> *(emphasis supplied)*

25. Similarly, the Petitioner's reliance on *Gujarat State Financial Corporation vs. M/s. Lotus Hotels Pvt. Ltd. (supra)* and *Old World Hospitality Pvt. Ltd. vs. India Habitat Centre (supra)* to submit that damages are not an adequate or complete remedy in lieu of specific performance cannot be accepted. The facts in the said cases are at stark variance from the present matter. In the present case, as I have held herein, the commencement of an arbitration between the parties and the commencement of the Project would serve the interest of all concerned including members of the public who are awaiting the commencement of the Project.

26. Lastly, having held as aforesaid, the question of staying the New Tender does not arise. Mr. Jagtiani raised a series of arguments contending that the New Tender is vitiated by *mala fides*. However, in my view, the New Tender is a fresh tender published after the termination of the Letter of Award. The Tender and New Tender are contracts independent to one another. The Petitioner's grievance *qua* the New Tender cannot in my view, entitle the Petitioner for the reliefs as sought for presently

by it. The Petitioner can always avail its remedy of challenging the New Tender before the appropriate forum.

27. In any event, the Petitioner's appropriate remedy lies in its claim for damages in the arbitration, if commenced between the parties. I make it clear that the observations made herein are on the basis of the arguments canvassed before me and the material currently placed before me. Needless to add, the arbitration, if commenced between the parties ought to be proceeded with on the basis of such and further evidence as the parties may produce and the arbitrator/s who shall finally hear and dispose of the matter shall do so uninfluenced in any manner with the observations that may have been expressed herein at this interlocutory stage.

28. For the reasons aforesaid, the present Arbitration Petition is dismissed. In the circumstances, there shall be no order as to costs.

(S.J.KATHAWALLA, J.)