

(2006) 10 OHC CK 0030

In the Orissa High Court

Case No : Arbitration Appeal No's. 12 and 13 of 2006

Bhanja Minerals Pvt. Ltd.

APPELLANT

Vs

Bihar Sponge Iron Ltd. and Technicast Engineers Ltd.

RESPONDENT

Date of Decision : 13-10-2006

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 36, 37, 9
Metalliferous Mines Regulations, 1961 — Regulation 106(2)
Mineral Conservation and Development Rules, 1988 — Rule 15, 16
Specific Relief Act, 1963 — Section 14, 14(1), 41

Citation : (2007) 1 ARBLR 116 : (2006) 102 CLT 657

Hon'ble Judges : B.P. Das, J

Bench : Single Bench

Advocate : Sanjit Mohanty, S. Palit, A.K. Mishra, A.K. Mohana, H.K. Ratsingh, D. Biswal and A. Mishra, for the Appellant; R.K. Rath S.S. Das, D. Tripathy, S.S. Pradhan, K. Behera and S. Modi, for the Respondent

Judgement

B.P. Das, J.—Both these appeals being Arbitration Appeal Nos. 12 and 13 of 2006 have been filed by M/s. Bhanja Minerals Pvt. Ltd. challenging separate orders dated 13.7.2006 passed by the District Judge, Cuttack, in Arbitration Petition No. 93 of 2006 and No. 92 of 2006 respectively. Both the appeals being inter-linked and common questions of facts and law being involved in the same, they were, with the consent of Learned Counsel for the parties, heard together and are being disposed of by this common judgment.

2. The appellant-M/s. Bhanja Minerals Pvt. Ltd. ("BMPL" in short), which is a company registered under the Companies Act, 1956, holds lease of an iron ore mines known as "Inganijharan Iron and Manganese Mines" in Keonjhar district granted by the Govt. of Orissa. On 21.2.2003, BMPL entered into an agreement/contract with M/s. Technicast Engineers Ltd., ("Technicast" hereinafter), which is also a company registered under the Companies Act, 1952 (sic.) having its registered office in New Delhi, for raising operation and maintenance of the aforesaid iron ore mines. On the same day, i.e., 21.2.2003, BMPL also entered

into another agreement/contract for sale of the lump iron ore raised from the aforesaid mines with another company, namely, M/s. Bihar Sponge Iron Ltd. ("BSIL" in short), which has its registered office and plant in Sarai Kela-Kharsawn district of Jharkhand State and requires iron ore as a raw material for manufacture of sponge iron in its plant. Disputes and differences arose between the parties to the aforesaid agreements/contracts and BMPL stopped Technicast from entering into the mines for carrying out the mining activities, and before the disputes were referred to arbitration, Technicast and BSIL moved the Learned District Judge, Cuttack, with two separate petitions u/s 9 of the Arbitration and Conciliation Act, 1996 (shortly "the Act") seeking interim protection and the aforesaid petitions were registered as Arbitration Petition Nos. 92 and 93 of 2006 respectively. Aggrieved by the orders passed by the Learned District Judge allowing the aforesaid petitions, BMPL has preferred these two appeals u/s 37 of the Act.

3. For the sake of convenience, let us deal with Arbitration Appeal No. 13 of 2006 first.

Arbitration Appeal No. 13/2006:

4. This appeal has been filed challenging the order dated 13.7.2006 passed by the Learned District Judge, Cuttack, in Arbitration Petition No. 92 of 2006 (Annexure-14) allowing the petition filed by the respondent-Technicast u/s 9 of the Act and directing both the parties to maintain status quo as per the terms and conditions of the agreement/contract dated 21.2.2003.

5. On 26.5.2006 Technicast, the present respondent, filed a petition u/s 9 of the Act before the Learned District Judge with the following prayers:

(a) to direct the opposite party to permit the petitioner to carry out the mining operations in terms of the agreement/contract dated 21.2.2003 and not to create any hindrance or interference with the operations of the petitioner;

(b) to restrain the opposite party from carrying out any mining activities of any nature whatsoever, in the said mine by itself or through any of its agents or third parties save and except the petitioner;

(c) to direct the opposite party to strictly comply with the terms and conditions of the agreement/contract dated 21.2.2003;

(d) to pass such order or orders as the Court may deem fit and proper.

6. The case of Technicast is that it entered into an Agreement/Contract with BMPL, which is nomenclated as AGREEMENT FOR OPERATION AND MAINTENANCE OF IRON ORE MINE, i.e., Inganijharan Iron and Manganese Mines, vide Annexure-1. Clause 2 of the aforesaid Agreement provides that the same shall be valid for a period of ten years from the date of the Agreement and may be renewed for further period at the option of BMPL. The said clause also provides that the Agreement can, however, be determined by BMPL without any

notice if and when commission of any illegality by the Raising Contractor, i.e., Technicast, comes to the knowledge of BMPL. Under Clause-6 Technicast gives guarantee to produce minimum quantity of iron ore. As per Clause-7, Technicast is liable for payment of penalty if it fails to produce the minimum guaranteed quantity. Clause-25 of the Agreement provides that the Agreement can be terminated by either party by giving 12 months' notice to other party. Clause 29 contains the arbitration clause saying that any dispute or difference arising in course of working of the Agreement between the parties shall be mutually resolved failing which the dispute is to be referred to arbitration by a retired High Court Judge to be nominated by BMPL.

According to Technicast, on the same day, i.e., 21.2.2003, BMPL also entered into another Agreement, namely, AGREEMENT FOR SALE OF LUMP IRON ORE, with BSIL, which is claimed to be a sister concern of Technicast, and is also the respondent in Arbitration Appeal No. 12 of 2006 arising out of Arbitration Petition No. 93 of 2006. The Agreement with BSIL is for sale of the entire quantity of the iron ore raised from the said mine to BSIL having its plant in the State of Jharkhand.

In the petition filed before the Learned District Judge, Technicast alleged that due to negligence of BMPL in handing over the site and getting forest clearance, there was a short-fall in the minimum guaranteed output and there were series of correspondence between the parties in this regard. But suddenly in the month of February/March, 2006, BMPL started creating hindrance in the work of Technicast and on enquiry Technicast could know that BMPL instead of handing over the mines to Technicast was selling iron ore to third parties, which was in gross violation of the Agreement made between BMPL and BSIL. According to Technicast, on further query it came to know that BMPL had sold 8576.720 MT. of iron ore extracted from the said mines to third parties in the market for which Technicast raised a bill amounting to Rs. 61,81,843/- against BMPL, which, instead of making payment of the aforesaid amount, continued to create hindrance in the operation of the mines. It is further alleged by Technicast that BMPL in collusion with one M/s. Maa Tarini Minerals, which is a contractor of Technicast, sold iron ore to third parties instead of BSIL for which Technicast cancelled the job order issued to M/s. Maa Tarini Minerals whereafter BMPL stopped Technicast from entering into the mines and carrying out its mining activities from 8.5.2006, which, according to Technicast, is in violation of the terms of the Agreement dated 21.2.2003 (Annexure-1). In contemplation of referring such dispute to arbitration in terms of the Agreement, Technicast filed the aforesaid petition u/s 9 of the Act before the District Judge seeking interim protection with the prayers stated hereinabove.

7. The Learned District Judge while issuing notice to the opposite party-BMPL on the aforesaid petition passed an ex parte interim order on 2.6.2006 directing both the parties to maintain status quo of the working operation as per the Agreement/Contract dated 21.2.2003.

8. BMPL appeared and filed its objection before the Learned District Judge refuting the allegations made by Technicast in the petition. It took a stand that the Agreement/Contract entered into between BMPL and Technicast and the Agreement entered into between BMPL and BSIL are two different and distinct Agreements and that Technicast could not achieve the target indicated in the Agreement because it had a licence for limited labour force, i.e., only for twenty workers and engaged one M/s. Maa Tarini Minerals, a third party to continue the mining operation. Despite persistent directives of BMPL in connection with procurement of labour licence and engagement of additional workers, Technicast ignored the same and insisted on engagement of casual labourers/unregistered labourers and committed various manipulations in the labour Register besides adopting illegal mining methods. There was also no long-term mining plan owing to which the Agreement could not be properly and successfully implemented. That too, it is alleged that there was violation of the statutory provisions governing the field, which led to gross violation of the terms of the Agreement and Technicast went on doing the mining operation by adopting all sorts of illegal methods thereby putting the mining lease of BMPL at stake and even at one point of time the State Govt. by letter dated 17.4.2006 issued a show cause notice to determine the mining lease granted in favour of BMPL, alleging therein that the boundary pillars were not being maintained properly and the village roads had been destroyed during the mining operations. Despite BMPL bringing all these illegalities to the notice of Technicast, when there was further violation of Rules 15 and 16 of the Mineral Conservation and Development Rules, 1988 (hereinafter "M.C.D. Rules") being apprehensive that the mining lease granted in its favour may be cancelled, BMPL stopped Technicast from entering into the mines from 8.5.2006 onwards. The further stand taken by BMPL was that much before the passing of the interim order, Technicast was ousted from the mines.

BMPL further alleged that Technicast indulged in under-invoicing of ore removed from within the leasehold area of BMPL in connivance with the transport contractor and the buying company, i.e., BSIL.

9. The Learned District Judge by the impugned order in Annexure-14 held that the questions whether the contract has been terminated or not and whether the contract is determinable or not, will be adjudicated by the Arbitration Tribunal. But as the parties have worked on the terms and conditions of the contract/agreement, according to the Learned District Judge, the rights of the parties should be protected and interest of justice would be served if an order of status quo is passed. The Learned District Judge taking recourse to Section 9 of the Act passed the impugned order vide Annexure-14 directing both the parties to maintain status quo till the matter is referred to the Arbitration Tribunal on the terms and conditions of the agreement/contract dated 21.2.2003 (Annexure-1).

10. BMPL, which was the opposite party before the Learned District Judge in the proceeding u/s 9 of the Act, challenges the aforesaid order of the Learned District Judge in this appeal, inter alia, on the following grounds:

(a) The impugned order is against the mandate of the provisions of the Specific Relief Act, 1963, more specifically Section 14(1)(c), Section 14(1)(d) and Section 41(e). According to Shri Sanjit Mohanty, Learned Senior Counsel appearing for the appellant-BMPL, Section 14(1)(d) mandates that no contract, the performance of which involves performance of a continuous duty which the Court cannot supervise, can be enforceable, nor a contract, which is in its nature determinable, can be enforceable, as provided u/s 14(1)(c) of the Specific Relief Act. According to Shri Mohanty, the contract between BMPL and Technicast is in consonance with the provisions of Clauses (c)(d) of Sub-section (1) of Section 14 of the Specific Relief Act, hence as per Section 41(e) of the Specific Relief Act, the Learned District Judge should have refused to grant injunction. It is further argued that there was continuous violations committed by Technicast in mining operations culminating in the letter dated 17.4.2006 issued by the State Govt. for determination of the mining. lease for which there has been complete break down of the contractual relationship between BMPL and Technicast which resulted in permanent ouster of Technicast from the mines on 8.5.2006, i.e., much before the date on which the interim order was passed by the Learned District Judge, i.e., 2.6.2006.

(b) The Learned District Judge has failed to assess the comparative mischief in granting the injunction inasmuch as he has failed to appreciate the fact that by continued illegal operation of mines by Technicast, the very mining lease of BMPL was faced which threatened determination. Consequent upon the order of the Court below, as passed in this case, directing maintenance of status quo in terms of the agreement, the mining lease granted to BMPL stood exposed to the real danger of determination. According to the Learned Counsel for BMPL. the damage cannot be restituted by any Court of law and the Learned District Judge has failed to appreciate the fact that it is BMPL which is to suffer irreparable loss and not Technicast.

(c) The relief granted by the Learned District Judge being the main relief sought for by Technicast, it should not have been granted by way of interim measure.

(d) The Learned District Judge failed to take note of the fact that Arbitrator has already been appointed on 12.6.2006, which is apparent from the impugned order dated 13.7.2006 passed by the Learned District Judge.

11. The Learned Counsel for the appellant argued that on the face of the aforesaid, the Learned District Judge could not have passed the impugned order of status quo till the appointment of Arbitration Tribunal. Basing upon all these grounds the Learned Counsel for the appellant-BMPL submitted that in the event the injunction or status quo order is vacated, Technicast would not suffer any irreparable loss as the entire loss, as worked out and admitted by Technicast can be quantified in money value. Hence, there would be no irreparable loss on the part of Technicast whereas it is BMPL which shall suffer irreparable loss in the event Technicast is allowed to continue in the field as per the agreement and any violation of the statutory provisions shall lead to cancellation of the mining lease

granted to BMPL and in the aforesaid eventuality, the loss BMPL would suffer cannot be restored or restituted by anybody, not even by the Court.

Shri Sanjit Mohanty, Learned Senior Counsel for the appellant-BMPL, placed reliance on a decision of this Court in *National Highway Authority of India v. Bumithiway DDB Ltd. (JV)*, 2004 (II) OLR 664 wherein it was held that the agreement in its very nature being terminable, even if it is presumed that the N. H. Authority committed breach of the agreement by prematurely cancelling the same, the Firm's remedy could only be to claim damages, if any, and it could not seek an injunction for restraining the N. H. Authority to cancel the agreement. It was also held that even if a reference was made to arbitrator, the final relief granted could not be re-entrustment or continuation of the contract and a party to the agreement which committed breach could only be liable to compensate the other to the extent of loss or prejudice caused. Shri Mohanty also drew my attention to paragraph 48 of the judgment of the Apex Court in *Transmission Corporation of A.P. Ltd. and Others Vs. Lanco Kondapalli Power Pvt. Ltd.*, wherein it was observed that, "The interim direction ordinarily would precede finding of a prima facie case. When existence of a prima facie case is established, the Court shall consider the other relevant factors, namely, balance of convenience and irreparable injuries." Relying upon the said decision, Sri Mohanty submitted that in the case at hand the Learned District Judge might have found a prima facie case but he completely lost sight of the other aspects, i.e., balance of convenience and irreparable loss at the time of passing the interim order as well as the final order making the interim order absolute. Relying upon the decision in *Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others*, the Learned Counsel for the appellant-BMPL further submitted that if ultimately it would be found that the termination of the contract is bad in law or contrary to the terms of the agreement, or of any understanding between the parties or for any other reason, the remedy would be to seek compensation for the wrongful termination but not to claim for specific performance of the agreement and, therefore, there could be no injunction. According to him, restoration of contract can also not be granted by the Arbitrator but the aggrieved party would only be entitled to damages for the notice period.

Shri Mohanty then placed reliance on the decision in *Kiran Mohanty v. Woodburn Developers and Builders Pvt. Ltd.* 2005 (Supp.) OLR 987, and submitted that law is well settled that three factors, namely, prima facie case, balance of convenience and irreparable loss, as well as comparative mischief and inconvenience have also to be considered while granting order of injunction.

12. On the face of such arguments, Shri R.K. Rath, Learned Senior Counsel appearing for the respondent-Technicast along with Shri S. S. Das, submitted that the impugned order is quite in conformity with the law. There is no application of Specific Relief Act to the facts and circumstances of the present case. According to Shri Rath, the impugned order has been passed in terms of Section 9(ii)(e) of the Act, which is not an order of injunction but an interim

measure of protection as appeared to the Court to be just and convenient. According to him, Section 14 of the Specific Relief Act, more particularly Section 14(1)(c) is not applicable to the present case. He also submitted that Section 9(ii) (e) of the Act has given wide power to the District Judge, which cannot be throttled by Section 14(1)(c) or Section 41(e) of the Specific Relief Act.

Section 41(e) of the Specific Relief Act provides:

41. An injunction cannot be granted:

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

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Perusal of the provisions of Section 41 of the Specific Relief Act makes it clear that it specifies circumstances under which injunction cannot be granted. According to Sub-section (e) of Section 41, injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Sub-section (1) of Section 14 of the Specific Relief Act provides that a contract, which is in its nature determinable, cannot be specifically enforced. So, when the argument of the Learned Counsel for the appellant-BMPL was that this is a determinable contract and an injunction cannot be granted u/s 41(e) of the Specific Relief Act, the argument of Shri Rath for the respondent-Technicast is that the order of status quo has been passed in accordance with Section 9(ii)(e) of the Act.

Shri R.K. Rath, Learned Senior Counsel for the respondent-Technicast, relied upon a decision of the Apex Court M/s. Sundaram Finance Ltd. Vs. M/s. NEPC India Ltd., , and drew my attention to the difference between the provisions in the new Act, i.e., Arbitration and Conciliation Act, 1996, and the old Act, i.e., Arbitration Act, 1940. It is purely academic and there is no dispute that the provisions contained in the new Act are completely different from the provisions contained in the old Act, so also the powers conferred on the District Judge u/s 9 of the new Act. Shri Rath then referred to the decision of the Apex Court in Firm Ashok Traders and Another etc. Vs. Gurumukh Das Saluja and Others etc., , and drew my attention to the following observations made in paragraph 15 thereof:

The most basic principle governing the discretion of the Court in appointing a receiver is whether it is "just and convenient" to do so....

According to Shri Rath, the Learned District Judge has passed the impugned order as an interim measure of protection as appeared to him to be just and convenient in the facts and circumstances of the case. In support of such submission, he relied upon the decision of the Apex Court in Transmission Corporation of A.P. Ltd. v. Lanco Kondapalli Power (P) Ltd. (supra), which was also relied upon by the Counsel for the appellant-BMPL. Shri Rath, however, drew my attention to paragraph 42 of the judgment and submitted that the Court u/s 9 is only formulating interim measure so as to protect the right under

adjudication before the Arbitration Tribunal from being frustrated. Further, the Apex Court in paragraph 43 observed as follows:

We have referred to the case Firm Ashok Traders not because we agree with the principle laid down therein but only to suggest that Section 9 of the 1996 Act should be applied so that status quo may be directed to be maintained having regard to the fact that the parties understood the workability of the agreement in a particular manner.

Basing upon the aforesaid observations, Learned Counsel for the Technicast submitted that here is a case where appropriately an order of status quo has been passed as the parties have understood the workability of the agreement. According to Shri Rath, this is a composite arrangement and is beneficial to both the parties; otherwise Technicast will be deprived of the award if the interim order is vacated and cannot be compensated in any manner whatsoever.

Learned Counsel for the appellant-BMPL submitted that there is no termination of the agreement, but Clause 2 of the agreement says that without any notice the agreement can be determined by BMPL, the action of BMPL in restraining the Technicast from entering into the mines amounts to determination of the agreement.

13. On the background of the aforesaid arguments advanced by the Learned Counsel for the parties, both on fact and law, it would be proper for this Court first to examine the relevant covenants in the agreement entered into between the appellant-BMPL and the respondent-Technicast. The Agreement, which is annexed to the memo of appeal as Annexure-1, was entered into between the parties on 21.2.2003 for operation and maintenance of the iron ore mines. Clause 2 of the Agreement provides :.

This agreement shall be valid for a period of 10 years from the date of this agreement and may be renewed for further periods at the option of BMPL. It can however be determined by BMPL without any notice if and when commission of any illegality by the Raising Contractor comes to the knowledge of BMPL.

Clause 25 of the Agreement provides:

This agreement can be terminated by either party by giving twelve months notice to the other party.

Clause 29 provides:

Any dispute or differences arising in course of working of this agreement between the parties shall be mutually resolved failing which the dispute is to be referred to the Arbitration by retired High Court Judge to be nominated by BMPL. The provisions of the Arbitration and Conciliation Act, 1996 and amendment if any thereafter shall apply to the Arbitrations proceedings;

From the aforesaid recitals, it transpires that the agreement can be determined by BMPL without any notice if commission of any illegality by the raising

contractor, i.e., Technicast, comes to its knowledge and the agreement can also be terminated by either party by giving 12 months" notice to the other party. Fact remains that BMPL is the lease-holder of the mines and the lease and operation of the mines is governed by certain statutory provisions, like the Mineral Concession Rules, 1960 and there are certain statutory obligations to be performed by the lease-holder of the mines violation of which may ultimately lead to cancellation of the mining lease. The allegation of BMPL is that there has been violation of several statutory provisions and regulations like the Contract Labour (Regulations and Abolition) Act, Rules 15 and 16 of the M.C.D. Rules pertaining to conservation of minerals as well as Regulation 106(2)(b) of the Metalliferous Mines Regulations, 1961 coupled with violation of the terms of the agreement, which, according to BMPL, exposed the lease-holder to the danger of cancellation of the mining lease for which BMPL restrained the respondent-Technicast from entering into the mines from 8.5.2006, As stated earlier, Technicast alleged that BMPL sold 8576.720 MT of iron ore extracted from the mines to third parties in the market and out of the said sale proceeds, the share of the Technicast, which had extracted the said material, would have come to Rs. 61,81,843/-. The action of stopping Technicast from carrying out the mining operations also led to stoppage of supply of iron ore to BSIL, with which BMPL has entered into an agreement, which is a sister concern of Technicast, and the agreements entered into between BMPL and Technicast and BMPL and BSIL are related to each other and would ultimately lead to closure of the factory of BSIL. The petition filed u/s 9 of the Act would show that the loss Technicast is claiming for a particular period has been assessed at Rs. 61,81,843/- for extraction and sale of 8576.720 MT. of iron ore. That means the loss can be converted into money value and can be compensated.

14. Let us see whether the impugned order passed by the Learned District Judge is an order of injunction or is an arrangement coming within the purview of Section 9(ii)(e) of the Act, i.e., such other interim measure of protection before or during the arbitral proceeding. I would like to make it very clear that the contention of the Learned Counsel for Technicast is that the parties have understood the workability of the agreement for which this interim measure of protection has been passed. But a reading of Section 9(ii)(e) of the Act would show that an interim measure of protection, as may appear to the Court to be just and convenient, can be passed. Let me see whether the order passed by the Learned District Judge is just and convenient. At the cost of repetition, I may say that BMPL is the lease-holder. As a lease-holder, BMPL has certain statutory obligations, as discussed above. Now, if the order of the Learned District Judge is allowed to be continued, the same would definitely mean that the Court is forcing BMPL to allow Technicast to operate the mines despite allegation of BMPL that Technicast has violated certain rules and statutory provisions detailed in the foregoing paragraphs. The words "just and convenient" do not mean that the Court is to pass orders as an interim measure simply because it thinks it just and convenient. It should pass the order for the protection of rights or for prevention

of injury according to legal principles.

In the case of Grid Corpn. of Orissa Ltd. Vs. M/s. Indian Charge Chrome Ltd., , the Apex Court held that balance of convenience would be taken into consideration in granting the application for interim measure of protection and where grant of interim measure of protection is opposed to the rule of balance of convenience, it should not be granted.

Even for a moment and for the sake of argument, if we accept the plea of Technicast that the order of the Learned District Judge is u/s 9(ii)(e) of the Act, which has wide power, and the provisions of Section 14 and 41 of the Specific Relief Act are not bar, but while granting an order u/s 9(ii)(e) of the Act, the Court has first to take into consideration the balance of convenience. In the case at hand, the impugned order passed by the Learned District Judge is opposed to the rule of balance of convenience, because if the order is allowed to continue and Technicast while operating the mines violates any rules/regulations/statutory provisions, it would ultimately lead to cancellation of the mining lease of BMPL, which in my view, would be an irreparable loss for BMPL, which even the Court cannot restitute. That would result in irretrievable injustice. On the other hand, from the own statements of Technicast, it is clear that the extracted minerals can be valued. In the event Technicast succeeds in the arbitration, it can compute the value of the mineral and can claim compensation from BMPL. The submission of the Learned Counsel for Technicast that the loss that would be suffered by Technicast if the order of the Learned District Judge is vacated cannot be quantifiable in money value is not correct. That apart, the minerals extracted and dispatched requires permission from the Mines Department and every permission contains the particulars of tonnage and grades of ore and the price for the relevant period. So, there would be no difficulty on the part of the Arbitrator to quantify the same in money value to be made good by BMPL. In the application u/s 9 of the Act, it is stated by Technicast that BMPL is not allowing it to enter into the said mines or to carry out the said mines from 8.5.2006. BMPL has stated that it is in possession of the mines. From the narration of facts made above, it appears that Technicast has not been able to prove that the loss that may be sustained due to its ouster/determination of agreement cannot be compensated in money value. Moreover, the balance of convenience leans in favour of BMPL.

15. Therefore, the order of status quo passed by the Learned District Judge is liable to be set aside and I accordingly set aside the same. I may make it clear that the maximum relief that can be granted by the Arbitrator in the event the Arbitrator comes to a conclusion that the ouster of Technicast is illegal is one of damages, which can be quantified, and it can only be for a maximum period of 12 months, i.e., notice period.

Arbitration Appeal No. 12/2006:

16. This appeal pertains to the agreement entered into between the appellant-

BMPL and the respondent-BSIL on 21.2.2003 (Annexure-1) for sale of lump iron ore by BMPL raised from Inganijharan Iron and Manganese Mines, lease of which has been granted by the Govt. of Orissa in favour of BMPL. The terms and conditions of the aforesaid agreement are different from the agreement entered into between BMPL and Technicast.

The covenants contained in Clauses 1, 2, 3, 5, 8, 14, 15 and 19 of the aforesaid Agreement in Annexure-1, which are relevant for the purpose of adjudication of the dispute involved in the present appeal are quoted as hereunder:

1. it is agreed to by and between the parties that all the rights, title and interest that BMPL has over the said Mines and the Iron Ore raised therein shall remain absolutely with BMPL.

2. BMPL having absolutely authority and every right over the said mine and being fully possessed of the Iron ore produced from the said mine shall sell the entire quantity of crude iron ore in run of mine form produced from the said mine to BSIL and BSIL agrees to purchase the entire quantity of such crude iron ore.

3. BMPL shall deliver the crude iron ore to BSIL in run of mine form at the mine stack. The buyer shall lift the ore after determination of grade.

5. In case of failure in the part of BSIL to lift the iron ore BMPL shall be free to sell the same to outside parties. Any deficit in sales realization and compared to OMC rates will be reimbursed to BMPL by BSIL.

8. BSIL shall pay 25% of the invoice value to BMPL before the dispatches are effected. The balance amount of 75% of the total invoices raised during a calendar month shall be paid by 7th day of subsequent month.

14. The agreement shall be valid for the period of 10 years from the date of this agreement and may be renewed for further periods at the option of BMPL.

15. Either party shall have the option to terminate this Agreement upon 12 months written notice in that behalf being given to the other party.

19. Any dispute or differences arising in course of working of this agreement between the parties, shall be mutually resolved, failing which the dispute is to be referred to the arbitration by retired High Court Judge of Local High Court to be nominated after mutual consent. The provisions of the Arbitration and Conciliation Act, 1996 and amendment if any thereafter shall apply to the Arbitration proceedings.

17. It is worthwhile to mention here that BMPL has entered into two agreements on the same date, i.e., on 21.2.2003, one with Technicast and the other with BSIL. The agreement with BSIL contains a covenant in Clause 15 that either party shall have the option to terminate the agreement upon 12 months' written notice in that behalf being given to the other party. BSIL approached the Learned District Judge u/s 9 of the Act on the ground that a dispute has arisen between the parties since BMPL completely stopped Technicast from entering into the

mines for carrying out the mining activities on and from 8.5.2006. Besides, BMPL verbally told that it has stopped supplying iron ore since there were certain dues payable by BSIL to BMPL, which, according to BSIL, is absolutely wrong. Rather, an excess amount of Rs. 30 lakhs is lying with BMPL. In the said application, it was also alleged that BMPL is liable to pay a sum of Rs. 61,81,843 to Technicast against the iron ore sold by BMPL to third parties. According to BSIL, as Technicast and BSIL are sister concerns, Technicast is entitled to receive Rs. 91 lakhs from BMPL. Further, it is claimed that BSIL and Technicast are seeking nothing but strict compliance of the terms of the agreements/contracts entered between the parties thereto, i.e., between BMPL and Technicast and between BMPL and BSIL. It was also alleged that BMPL has raised frivolous disputes with a view to wriggle out of the binding contracts/agreements between the parties. According to BSIL, when disputes and differences arose between the parties and as BSIL was taking steps to refer such disputes for arbitration in terms of the agreement/contract dated 21.2.2003, BSIL moved an application u/s 9 of the Act before the Learned District Judge praying for interim protection. The Learned District Judge after hearing the petitioner, i.e., BSIL, on 2.6.2006 issued notice on the opposite party-BMPL and passed an ex parte interim order directing both the parties to maintain status quo as per the terms of the agreement dated 21.2.2003 till appearance of the opposite party, vide Annexure-4, which has ultimately been made absolute by the final order passed on 13.7.2006, vide Annexure-9. The aforesaid order in Annexure-9 is under challenge in this proceeding.

18. In the background of the aforesaid facts, Learned Counsel for the appellant, i.e., BMPL, argued before this Court that till date no step has been taken by BSIL for appointment of Arbitrator and that ouster of Technicast would in no way be construed to be a dispute between BMPL and BSIL. It was further contended that BSIL filed the application u/s 9 of the Act despite the fact that there was no dispute and obtained the interim order, which is continuing till date and no steps have been taken by BSIL for referring the disputes to arbitration. Learned Counsel for BSIL strenuously refuted the allegation made by BMPL and submitted that the order passed by the Learned District Judge is correct and justified in the facts and circumstances of the case. and the direction to maintain status quo in terms of the agreement entered into between the parties has been given, as the parties understood the workability of the agreement in a particular manner. It was further argued that if the iron ore/mineral over which BSIL depends for running its sponge iron plant, is not supplied to it. the plant of BSIL would be shut down leading to various legal consequences and liabilities which would be irreparable.

19. The order u/s 9 can be passed by way of an interim measure of protection before or during the arbitral proceeding or at any time after making of arbitral award but before it is enforced in accordance with Section 36 of the Act. So, it is an interim measure of protection. The Act is implicit that the dispute must have arisen, it is referable to Arbitration Tribunal and when an application u/s 9 is filed

before commencement of the arbitral proceeding, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceeding if at the time when application u/s 9 is filed, the proceeding has not commenced u/s 21 of the Act. While exercising the jurisdiction u/s 9, the Court should satisfy itself that effective steps have been taken to commence the arbitral proceeding. The Court could also pass a conditional order to put the applicant to such term as it may deem fit with a view to see that steps are taken by the applicant for commencing the arbitral proceeding. See *Sundaram Finance Ltd. v. NEPC India Ltd.* (supra). In the case at hand, it is an admitted fact that till date no effective steps have been taken for appointment of an arbitrator and Learned Counsel for BSIL submits that this Court may appoint an arbitrator in this proceeding, which I am not inclined to do. But fact remains that since the filing of the appeal on 14.7.2006 till its hearing, no effective steps has been taken by BSIL for appointment of an arbitrator. BSIL is enjoying the interim order without discharging the obligation of appointing an arbitrator. The impugned order is also silent regarding the steps taken by BSIL for appointment of an Arbitrator. In *Ashok Traders* (supra) the Apex Court, while interpreting Section 9 of the Act, held that an interim measure of protection is not a permanent protection and stated in paragraphs 17 and 18 as follows:

17...Section 9 permits application being filed in the Court before the commencement of the arbitral proceedings but the provision does not give any indication of how much before. The word "before" means, inter alia, ahead of; in presence or sight of; under the consideration or cognizance of; The two events sought to be interconnected by use of the term "before" must have proximity of relationship by reference to occurrence, the later event proximately following the preceding event as a foreseeable or "within sight" certainty. The party invoking Section 9 may not have actually commenced the arbitral proceedings but must be able to satisfy the Court that the arbitral proceedings are actually contemplated or manifestly intended...and are positively going to commence within a reasonable time. What is a reasonable time will depend on the facts and circumstances of each case and the nature of interim relief sought for would itself give an indication thereof. The distance of time must not be such as would destroy the proximity of relationship of the two events between which it exists and elapses. The purpose of enacting Section 9 read in the light of the Model Law and UNCITRAL Rules is to provide "interim measures of protection". The order passed by the Court should fall within the meaning of the expression an interim measure of protection" as distinguished from an all time or permanent protection.

18...The party having succeeded in securing an interim measure of protection before arbitral proceedings cannot afford to sit and sleep over the relief, conveniently forgetting the "proximately contemplated" or manifestly intended" arbitral proceedings itself. If arbitral proceedings are not commenced within a reasonable time of an order u/s 9, the relationship between the order u/s 9 and the arbitral proceedings would stand snapped and the relief allowed to the party shall cease to be an order made "before", i.e., in contemplation of arbitral

proceedings. The Court, approached by a party with an application u/s 9, is justified in asking the party and being told how and when the party approaching the Court proposes to commence the arbitral proceedings. Rather, the scheme in which Section 9 is placed obligates the Court to do so. The Court may also while passing an order u/s 9 put the party on terms and may recall the order if the party commits breach of the terms.

20. On perusing the impugned order, I do not find anything to show that the Learned District Judge was satisfied that there was a manifest intention and proximate contemplation of arbitral proceeding. The impugned order is also not a conditional order. The Learned District Judge has simply directed both the parties to maintain status quo as per the terms and conditions of the contract/agreement dated 21.2.2003. This being the position and as till date no effective steps have been taken for commencement of arbitral proceedings, in my considered opinion, there is no justification in allowing the unconditional order of status quo passed by the Learned District Judge in Arbitration Petition No. 93 of 2006 to continue any further. However, as I have already indicated, the agreement entered into between BMPL and BSIL, unlike the other agreement, does not contain a covenant for unilateral determination of the agreement by BMPL and the agreement can only be terminated by either party giving 12 months' notice to other party and as Clause 2 of the agreement provides that BMPL having absolute authority and every right over the mines and being fully possessed of the iron ore produced from the said mines shall sell the entire quantity of crude iron ore in run of mine form produced from the said mine to BSIL and BSIL agrees to purchase the entire quantity of such crude iron ore, in my view, there is some force in the argument of the Learned Counsel for BSIL that unless iron ore is supplied to BSIL, the plant of BSIL shall be closed down.

21. In the facts and circumstances of the case, I am inclined to give a chance to BSIL to take effective steps for appointment of an arbitrator but with certain terms and conditions. It is evident from the memo, filed jointly by BSIL and Technicast that BSIL is to pay Rs. 11,32,72,800/- to BMPL whereas Technicast is to receive an amount of Rs. 11,20,49,285/- from BMPL. In, this appeal this Court is in no way concerned with the amount claimed by Technicast against BMPL as the disputes between BMPL and Technicast have already been referred to the Arbitrator. So far as the present appeal, i.e., Arbitration Appeal No. 12/2006, is concerned, taking all the aspects into consideration, I dispose of this appeal with the direction that BMPL shall supply iron ore to BSIL as per the Agreement subject to BSIL, the respondent herein, taking all steps to refer the disputes to arbitration including appointment of arbitrator in terms of the Agreement, Annexure-1, within a period of two months from to day and paying the sum of Rs. 11,32,72,800/- to BMPL, as has been admitted in the memo.