(1995) 01 CAL CK 0016

In the Calcutta High Court

Case No : Special Suit No. 11 of 1994

Indian Charge Chrome Ltd. APPELLANT

Vs

Tata Iron and Steel Co. Ltd. RESPONDENT

Date of Decision : 20-01-1995

Acts Referred:

Arbitration Act, 1940 — Section 14, 20, 41
Specific Relief Act, 1963 — Section 38, 39, 40, 41, 42

Citation : (1996) 1 CALLT 214

Hon'ble Judges : Shyamal Kumra Sen, J

Bench : Single Bench

Advocate : Subrata Roy Chowdhury, B.K. Bachawat, Anindya K. Mitra, R.P. Mitra, Kaushik Mondol and Arijit Banerjee, for the Appellant;P.C. Sen, Hirak Mitra, Sudipta Sarkar and Monoj Roy, for the Respondent

Judgement

Shyamal Kumra Sen, J.—The facts in short in respect of the application u/s 41 of the Arbitration Act are that the petitioner company has its factory at Choudwar which is a 100% Export Oriented Unit. The petitioner Company is engaged in manufacture and sale of High Carbon Ferro Chrome/Charge Chrome. The licenced capacity of the petitioner''s unit was 50,000 tonnes per annum.

2. The respondent was at all material times operating a number of mines and its production was more than 6,00,000 tonnes per annum from the Sukinda Valley in the district of Cuttack. In fact the said 6,00,000 tonnes per annum can be and is being extracted from less than 200 hectares of mining lease area with the respondent. The respondent entered into agreement hereinafter mentioned to enable the petitioner to manufacture High Carbon Ferro Chrome/Charge Chrome and export the remaining excess Chrome Ore the value added product being the Charge Chrome.

3. Sometimes in March, 1990, it was agreed between the parties that the respondent would supply Chrome Ore to the petitioner, at its 100% Export Oriented Unit at Choudwar on a regular basis free of any cost which will be

converted into Charge Chrome/High Carbon Ferro Chrome and the said Charge Chrome would be thereafter exported by the respondent. In consideration of the above the respondent agreed to pay conversion charges to the petitioner. The said agreement between the parties was recorded in a memorandum of agreement dated 2nd April, 1990, Though the said agreement was for a period for one year the supply of ore deemed to have commenced from October, 1989 and subsequently on 30th March, 1991 the period was further extended for another 9 months with effect from Ist April, 1991. The unit of the petitioner commenced production only after entering into the said agreement with the respondent.

4. On March 1, 1992, The parties entered into a fresh agreement in writing whereby the petitioner agreed to dedicate its entire unit exclusively for the conversion of the respondent''s Chrome Ore Coke into charge Chrome for and on behalf of the respondent.

5. The said agreement dated march 1, 1992, provided for and contained, inter alia, the following terms and conditions:-

"Whereas TISCO and ICCL had entered into an Agreement on April 2, 1990, renewed and extended on March 30, 1991, the time limit of which Agreement having come to an end, it is desirous that TISCO and ICCL enter into a fresh conversion agreement and that ICCL has agreed and undertaken to earmark and reserve their full plant capacity for the conversion purposes. TISCO has agreed to make available the entire quantity of Chrome Ore and Coke required at this plant, free of cost to ICCL for conversion of the same into High Carbon Ferro Chrome on account of TISCO. ICCL will return the entire quantity of High Carbon Ferro Chrome produced at this plant from the said Chrome Ore and Coke to TISCO. In consideration thereof, TISCO will make payment of a mutually agreed Conversion Fee to ICCI :

1. TISCO shall make available following gradewise quantities of Chrome Ore and Coke at the plant site free of any cost of ICCL on a regular basis...

(i) Chrome Ore : 1,17,500 tonnes per year,

(ii) Coke : 28,800 tonnes per annum.

(iii) The above quantities of Chrome Ore and coke have been computed on the basis that production of High Carbon Ferro Chrome at the Plant will be 50,000 tonnes per annum. If the actual production is more or less than 50,000 tonnes per annum, the quantities of Chrome Ore and Coke will be increased or reduced correspondingly.

III. (j) Charge a lumpsum Convension Fee of Rs. 10,760/- per dry tonne (Rupees ten thousand seven hundred sixty only) of High Carbon Ferro Chrome delivered to TISCO conforming to the specifications as mentioned in para III (d) & (h) above. This conversion fee is based on exchange rate of up to Rs. 29.00 = One US Dollar. If and when this exchange rate is exceeded, the conversion fee will increase correspondingly. The exchange rate referred to here shall mean the highest rate applicable for exports, administered by the Reserve Bank of India.

The said Conversion fee will be revised from time to time to compensate ICCL on account of any escalation in the cost of electrode carbon paste, power, wages and certain other specified consumables as mentioned in Annexure "A".

VII. Duration

The duration of this Agreement shall be 5 (five) years from 1st April, 1992 or the date of actual commencement of conversion work under this Agreement whichever is later.

6. The said agreement was entered into by and between the parties at Calcutta office of the respondent at Tata Centre" No. 43, Jawaharlal Nehru Road, Calcutta-700071 within the aforesaid jurisdiction. A copy of the said agreement dated March 1, 1992 has been annexed hereto and marked with the letter ''A'' .

7. The said agreement dated March 1, 1992, also provided for and contained an arbitration clause to the following effect.

XIII. Arbitration:

Any dispute arising out of or touching upon any provision of this Agreement should be referred for Arbitration consisting of an arbitrator appointed by each party to this Agreement, and should the Arbitrators fail to come to an agreeable solution, then the matter should be referred to an umpire to be selected by the arbitrators so appointed before entering into arbitration. The arbitration would be governed by the provisions of the Indian Arbitration Act, 1940."

8. The said agreement also contained a forum selection clause to the following effect.

"XIV Jurisdiction

The jurisdiction for all purposes under this Agreement or any Security executed hereunder would be at Calcutta alone."

9. The said agreement became effective from 1st August, 1992. The parties began to act in pursuance of the said Agreement. During the execution of the aforesaid Agreement both the parties required certain clarifications and as such the said Agreement was amended on 30th January, 1993. The relevant terms and conditions of the said amendment are as under:

1. TISCO shall make available following chrome are and coke at the plant, free of cost to ICCL on a regular basis.

-- Type of Grade of Ore Quantity (in Minimum Chrome Ore dry tonnes) Cr. Fe (per year.) -- Triable +46/-50% (basis 48% Cr 203 scale prorata) 79000 2:4:18 Hard Lumpy +38/-42% (basis

40% Cr 203 scale prorata) 40000 2:4:1 ------- 119000 (ii) Coke Quantity : 28,580 tpa basis moisture 8%. --- "ICCL shall charge a lump sum conversion fee of Rs 10,160/- (Rupees ten thousand one hundred sixty only) per dry tonne of high carbon ferro chrome with minimum chromium content of 62% delivered to TISCO conforming to the specifications as mentioned in para (d) and (h).

For any tonnage of high carbon ferro chrome between 60-62% chromium content, TISCO will pay conversion fee to ICCL on prorata reduction basis. However, TISCO shall not accept high carbon ferro chrome with chromium below 60%.

The said conversion fee will be revised from time to time to compensate ICCL on account of any escalation in the cost of electrode carbon paste, power, wages and certain other specified consumables as mentioned in Annexure-A of the original MOA dated 1.3.92. The power required to manufacture 1 MT of high carbon ferro chrome with + 64% chromium including the power consumed for pollution control equipment is considered to be 4,300 KWH as against 4,150 KWH for high carbon ferro chrome with 62% chromium. Therefore, for the purpose of escalation on account of power, the consumption norm of power will be 4,150 KWH and not 4,300 KWH as mentioned in Annexure-A of the original MOA.

It is further agreed by and between TISCO and ICCL as follows:

1. all other terms and conditions of the agreement dated 1.3.92 shall remain unchanged and unaltered except to the extent of the amendments mentioned hereinabove."

10. A copy of the said amendment agreement dated January 30, 1993 has been annexed hereto and marked with the letter ''B''.

11. In pursuance of the aforesaid Agreement the respondent began to supply Chrome Ore and Coke to petitioner. The petitioner in turn manufactured charge Chrome and supply the same to the respondent. The respondent lifted the Charge Chrome from time to time and exported the same.

12. The details of the quantity of Chrome Ore supplied by the respondent to the petitioner from August, 1992, has been specifically set out in the petition.

13. The petitioner accordingly produced charge chrome from the entire raw material supplied by the respondent, in accordance with the specifications and directions from time to time given by the respondent. The petitioner has produced 27880.229 MT of charge chrome till 31st January 1994.

14. It has been contended on behalf of the petitioner that the respondent wrongfully and illegally began to raise false and frivolous disputes regarding the agreement with a view to wriggle out of the said agreement. It has also been

submitted on behalf of the petitioner that the respondent began to insist that since the agreement was for 5 years, without a termination clause, the agreement was invalid and when the petitioner pointed out the absurdity of the arguments of the respondent and submitted opinion of legal experts the respondent began to intermittently stop the supply of the raw material on some pretext or the other. The petitioner was forced to shut down its plant and again and re-heat after the raw material supply resumed with great persuation. The frequent shut down and recharging of the furnace has caused severe financial and other loss to the petitioner. It has also been alleged that since August 1992, the plant of the petitioner has been shut down for about 242740 minutes upto 5th December, 1993.

15. The details of the time for which the petitioner had to close down the plant and the loss caused on account thereof has also been alleged in the petition.

16. It has also been submitted that a detailed enquiry will be required for further necessary material losses that the petitioner has suffered including the effective life of the said internal lining materials reduced by about 2 years since the same was subjected to frequent thermal shook caused by frequent shut-downs.

17. On or about 15th November, 1993 the petitioner gave notice to the respondent alleging that the petitioner suffered all consequential losses due to the non-supply of raw materials. The respondent by its letter dated 26th November, 1993, threatened to cancel the agreement from 31st December, 1993. The said threatened cancellation it has been alleged is wrongful, illegal and malafide.

18. It has been submitted on behalf of the petitioner that the contract is valid and binding between the parties, and the petitioner is still now and at all material times was ready and willing to perform its part of the said agreement and, as such, the respondent was not justified in issuing the said letters threatening to terminate the contract.

19. It has further been submitted on behalf of the petitioner that the said agreement contained a negative covenant, express and/or implied and that the same cannot be determined by either of the parties at any time before July 31, 1997. The respondent represented that the said agreement would not be determined at any time before July, 31. 1997. The petitioner relied upon and acted on the basis of the said representation.

20. It has been alleged that the petitioner engaged a very large work force referred to hereafter solely and exclusively to perform its obligations under the said agreement, and since the said agreement does not contain any termination clause, the said agreement cannot be terminated before the expiry of 31st July, 1997.

21. It has been contended that the said agreement expressly provides that respondent shall supply the raw materials required for the petitioner''s plant and

additionally the said agreement also provides that the respondent shall lift all processed raw materials from the petitioner after paying the due conversion charges. The effect of this provision is that the said agreement contain a negative clause or provision that the petitioner shall obtain raw materials only from the respondent and that respondent was required to take or lift the entire quantity of processed raw materials from the petitioner.

22. It has been alleged that the respondent is in monopolistic position with regard to the supply of Ore. It has also been contended on behalf of the petitioner that since the said agreement provides for a fixed and certain period of its subsistence for five years, the petitioner did not make any alternative arrangement for obtaining such raw material and as such if the agreement is now terminated then it will not be possible for the petitioner to obtain such raw materials for the quantities, needed for its plant from any other source, and in that event the petitioner would suffer serious loss and prejudice and the damages that would be caused to the petitioner could not be properly assessed in terms of money.

23. Further it has been alleged if the said agreement is unilaterally or suddenly terminated the petitioner would be compelled to close/shut down the said unit. The re-heating of such plant after the same are closed/shut down will also not be prohibitively expensive and would be disastrously injurious and harmful to the plant and equipments.

24. It has also been alleged that about 600 officers and workers are directly engaged by the petitioners and more than 5,000 people are employed through contractors. The sudden and premature closing down of the plant will affect their livelihood and cause very serious industrial unrest.

25. It has further been submitted that the premature termination of the agreement would be totally unreasonable, utterly arbitrary and illegal.

26. It has further been alleged in the petition that the petitioner has repeatedly informed about the losses it was suffering due to wrongful acts of the defendant. In this connection the petitioner referred to its letter dated 15.11.93 and 18.11.93. It has also been alleged that the respondent''s allegations against the petitioner have no basis and that in the meeting both parties mutually settled the disputes as to the supply of raw materials not according to the specification and supply of finished products having more Carbon contents.

27. It has further been alleged in the petition that pursuant to the correspondence exchanged by and between the parties, in the month of November, 1993, and which culminated in the defendant''s issuance of the said letter dated November, 26, 1993, threatening to wrongfully and illegally terminate the said agreement, representatives of the parties met with a view to resolve the disputes and differences amicably. On December 28, 1993, representatives of the parties met and the petitioner requested the respondent to continue supply of raw materials as the petitioner would otherwise be forced to

shut down its said unit. It has been submitted that inasmuch as no working mines are available to the petitioner, the petitioner would be forced to shut down its unit should the respondent fail to make supply of raw materials as envisaged in the said agreement, to the petitioner. Further contention of that petitioner is that the respondent is a monopoly organisation, holding Chromite Mining Leases containing 60% of the deposits of the country in its control. The respondent is a very big company and is trying to misuse and exploit its economic wealth and power and the wrongful acts of the respondent, if allowed to continue, would ruin a small industry like that of the petitioner.

28. It has further been alleged that during the month of November, 1993 several meetings between the representatives of the petitioner and respondent were held to resolve the differences between the parties. The meeting held on 30th November, 1993 and 28th December, 1993 was attended by Dr. S. Panda, Chairman and Managing Director, Mr. Jay Panda, Joint Managing Director both representing the petitioner and Dr. Jamshed J. Irani, managing Director and Mr. Ramesh Bhasin, Executive Director (Raw Materials) of the respondent. Field Marshal Sam Manekshaw, who is a Director of the petitioner was acting a mediator between the parties at the instance of Mr. Nusli Wadia, Director of the respondent. Field Marshal Sam Manekshaw was also present at both the aforesaid meetings and in fact drew up the minutes of the said meeting held on 30th November, 1993. On 30th November, 1993 the respondent proposed that the existing agreement be curtailed by about two years, i.e. till the end of 1995 subject to the condition that the respondent would hand over approximately 350 hectares of chromite mining area subject to statutory approvals so that the petitioner can exploit and use the Chrome Ore for future. A minutes of the said meeting dated 30th November, 1993 was drawn up accordingly, by Field Marshal Sam Manekshaw and the said minutes was later, with the last paragraph thereof added in the handwriting of Dr. Jamshed J. Irani, Managing Director of the respondent and was signed by Dr. B. Panda, Chairman and Managing Director of the petitioner on 2,8th December, 1993. A copy of the said minutes has been annexed to the petitioner marked ''D''. This proposal was sought to be further amended by another offer and/or proposal of the respondent dated 10th January, 1994 which was rejected by the petitioner by its letter dated 4th February, 1994. The respondent has however, resiled from the proposal and has refused to transfer and/ or seek approval for the transfer of mining area by its fax dated 7.1.1994 which was sent in reply to fax/letter dated 29th December, 1993. The proposal contained in the minutes of 30th November, 1993 signed on 28th December, 1993 are ineffective and not binding on the parties. The said agreement dated Ist March, 1992 is still valid and continues to be binding on the parties.

29. By a fax dated 3rd February, 1994 Field Marshal Sam Manekshaw wrote to Dr. Jamshed J. Irani requesting him, inter alia, to pay the admitted outstanding amount of Rs. 4.32 crores due from the respondent to the petitioner and also to arrange to transfer 350 hectares in the light of the opinion of Mr. K.K. Venugopal,

Senior Advocate. An Officer of the respondent by his reply fax dated 4th February, 1994 informed the petitioner that the fax of Field Marshal Sam Manekshaw would be placed before Dr. J.J. Irani on his arrival from abroad on Monday the 7th February, 1994. Copies of the said fax dated 29th December, 1993, 7th January 1994, 10th January 1994 and 3rd and 4th February 1994 have been annexed to the petition marked ''C.

30. By letter dated 4th February 1994 and 7th February, 1994 the petitioner informed the respondent that as the respondent resiled from its proposal, the offer of the petitioner was being withdrawn and all existing rights of the petitioner under the agreement dated 1st March, 1992 would remain intact. Since the respondent has again started eratic supply of raw materials and threatened to immediately discontinue the supply, there was apprehension on the part of the petitioner that the respondent would upon receipt of letter dated 4th February, 1994, 7th February 1994 and 8th February 1994 discontinue the supply of raw materials, It has been alleged that from the conduct of the respondent it is manifest that the respondent has been trying to either twist the arm of the petitioner and/or induce the petitioner to wriggle out of its obligations under the existing contract dated 1st March, 1992 and wrongfully terminate the said contract between the parties.

31. It is the contention of the petitioner that since the respondent is seeking to escape and/or avoid its liability under the said agreement the respondent has raised several plea regarding the interpretation of the various provisions of the said agreement and as such disputes and differences have arisen between the parties relating to the terms and conditions of the agreement. The said alleged disputes according to the petitioner are the following:-

"(i) Is the respondent entitled to terminate the agreement dated 1st March, 1992 as amended by Memorandum dated 30th January, 1993?

(ii) Is the agreement not valid, subsisting and binding on your petitoner and the respondent until 31st July, 1977?

(iii) Is the respondent not bound and obliged to continue to fulfil its obligations under the said agreement dated 1st March, 1992 as amended by Memorandum dated 30th January, 1993 until 31st July, 1977?

(iv) Is your petitioner entitled to damages mentioned in paragraph 12 thereof?

(v) Is the petitioner also not entitled to damages if the respondent is permitted to terminate the agreement dated 1st March, 1992 as amended by Memorandum dated 30th January, 1993?

(vi) To what other reliefs your petitioner is entitled to?"

32. It has been alleged that the petitioner all along expressed its readiness and willingness to refer the said disputes to the arbitration but the respondent was never agreeable to refer the said disputes to arbitration. In that circumstances,

the instant application u/s 41 was moved along with an application u/s 20 of the Arbitration Act.

33. It has been further alleged that by letter dated November 26, 1993 and subsequent conduct in first week of February 1994 the respondent has threatened to terminate the said agreement without cause. It has also been alleged that the respondent is threatening to stop supply of the said goods to the petitioner forthwith. It has been accordingly submitted in the instant application on behalf of the petitioner that the respondent should be restrained from terminating the said agreement and/or suspending supply of raw materials and unless order is passed by this court the petitioner''s said factory would have to be shut down and the employees, working there, would be rendered jobless.

34. It has further been submitted that the said agreement is valid and binding between the parties and no default has been committed by the petitioner in terms of the said agreement and as such the respondent is under an obligation to supply raw materials and lift the finished products and pay for the conversion charges.

35. It has further been contended on behalf of the petitioner that the respondent is wrongfully and illegally, and in breach of the agreement, seeks to terminate the same.

36. It has also been averred in the petition that there exists on standard for ascertaining the actual damage caused or are likely to be caused by such invasion and the compensation in terms of money would not afford adequate relief to the petitioner.

37. It has also been stated in the petition that discussions and meetings took place between the Parties for the purpose of delivering accounts relating to conversion fee and as per the petitioner the petitioner is bound to pay a sum of Rs. 6,40,356/-. It is the contention of the petitioner that the respondent would pay at least the admitted sum of about Rs. 4.32 crores forthwith out of which the respondent has paid 1.30 crores on 3rd February 1993 and the balance amount has not been paid by the respondent. An ad interim order was passed on 3rd March 1994 to the following effect:-

"Both the parties have make extensive argument in support of the application for vacating the ad-interim order and also in support of the continuance of the order and in the meantime affidavit in opposition has also been made ready and filed in the court to the main application u/s 41.

Considering the balance of convenience it appears to me that the petitioner should be directed to file affidavit in-reply to the main application u/s 41 by next Tuesday and Section 41 application itself will be taken for hearing on 9.3.1994 at the top of the list. It is, however, made clear that the ad-interim order of status-quo is intended to protect the rights of both the parties under the contract. This order will continue subject to the clarification made to-day.

All parties concerned are to act on a signed copy of the minutes of this order on the usual undertaking."

38. After the affidavits are filed the instant application u/s 41 was taken up for hearing and the parties made extensive argument and hearing was completed on 29.7.94. and thereafter the parties submitted written submission notes on 12.8.94 and 2.9.94 respectively.

39. In the meantime, on 10.6.94. an order was passed u/s 20 of the Arbitration Act to the following effect:-

40. There will be an order in terms of prayer (a) directing the arbitration agreement to be filed in Court.

41. The petitioner has already nominated Mr. G.L. Oza, a retired Judge of the Supreme Court as its Arbitrator. The respondent will nominate their arbitrator within 15th July, 1994. Section 20 application is disposed of. Costs in the arbitration proceeding. The Arbitrators will make their award within four months from the date of commencement of the reference. The Arbitrators will adjudicate all disputes as referable under the arbitration clause."

42. The main contention of the respondent, however, is that the petitioner could not be supplied the materials as per terms of the contract and the respondent has no obligation to continue with the contract.

43. Elaborate submissions have been made by both the parties. The application has also been seriously opposed by the respondent on the ground that the interim order if granted in the matter as prayed for would result in specific performance of the contract which in the instant case is not permissible for the Court according to Specific Relief Act.

44. The contention of the Learned Advocate for the respondent is that the agreement relates to conversion of Chromium Ore and Coke to be supplied to TISCO at an agreed conversion charges. The Chromium Ore and Coke are to be supplied free of costs by TISCO to ICCL. The ownership of such materials and also the processed material therefrom shall always remain with TISCO.

45. It is the further case of the respondent that in terms of the said agreement and stimulations contained therein the obligations are to be fulfilled by the ICCL for the benefit of TISCO.

46. The Learned Advocate referred to the relevant portion of the contract which is set out herein below:-

"...... ICCL shall offer the entire quantity of High Carbon Ferro Chrome produced from TISCO''s Chrome Ore and Coke to TISCO at the plant for acceptance..."

47. It has, however, been submitted on behalf of the petitioner that the interim protection is necessary pending adjudication by the arbitrators for various reasons. It has been alleged that the agreement dated 1st March, 1992 provides

inter alia that TISCO has agreed to supply Chrome Ore and coke of the required specifications and ICCL has agreed to provide all other inputs and consumable including electricity which are more valuable than those supplied by TISCO and to convert the said Ore into charge Chrome according to the specification. ICCL is entitled to conversion charges and lien on the finished products in respect of such charges.

48. The main contention, however, of the Learned Advocates for the petitioner is that the said agreement dated Ist March, 1992, contains :

(i) Express affirmative covenants coupled with implied negative covenants and also

(ii) Express negative covenants to be fulfilled by the parties. 49. The portion referred to as affirmative and negative aspect of the agreement as submitted by the Learned Advocates are set out herein below:-

(a) "to make available the entire quantity of Chrome Ore and coke required at this plant, free of cost......"

This affirmative covenant necessarily implies a negative covenant i.e. that TISCO will not cease to make available the entire quantity of Chrome Ore and coke required at the plant, free of cost.

(b) TISCO shall make available 1.19.000 tonnes of Chrome Ore and 28,580 tonnes of Coke on regular basis.

50. This affirmative covenant also necessarily implies a negative covenant i.e. that TISCO shall not cease to make available the above quantities of Chrome Ore and coke on regular basis.

51. The agreement also contains the following affirmative covenants by ICCL:--

(a) ICCL "shall earmark" and "reserve" its full plant capacity for. conversion purposes of the Chrome ore of TISCO.

(b) It is the obligation of ICCL to ensure that the entire capacity of the plant will remains fully dedicated to TISCO during the period of the agreement.

The above affirmative covenant necessarily implies that ICCL shall not use its plant for conversion of Chrome Ore for anyone else other than TISCO.

(c) The agreement further contains express negative covenant in favour of TISCO by ICCL that it would "not receive, store or process any Chrome Ore and/ or pcoke from any other source (except TISCO) at their Choudwar Plant."

The portion of the contract providing for corresponding obligations of parties are set out herein below:-

riod of Agreement:

ration of the agreement being for 5 years from August 1, 1992, commencing from date of actual conversion, the aforesaid affirmative and negative covenants are for 5 years i.e. until July 31, 1997. It, therefore, follows that there is an implied negative covenant that none of the parties shall terminate the agreement during the said period of 5 years.

(ii) It must be noted that the parties intentionally did not incorporate and provide for termination clause in the said agreement. This statement in the letter dated February 4, 1994 was not denied in any contemporaneous or in any correspondence. And this also clearly demonstrates that the intention of the parties was to keep the said agreement alive upto at least 1997 because the entire plant of ICCL was dedicated, "earmarked" and "reserved" for the conversion of the Chrome Ore to be supplied by TISCO, that ICCL was not permitted to use Chrome Ore supplied by any one other than TISCO and ICCL was entirely dependent upon TISCO for the regular and uninterrupted supply of Chrome Ore and coke. The said plant was only for the purpose of conversion of Chrome Ore for TISCO and none else.

(b) Re: Regular supply of raw materials :

The aforesaid affirmative and negative covenants impose an obligation on ICCL that it would not convert any Chrome Ore at its said plant apart from those supplied by TISCO to it and the corresponding obligation on the part of TISCO that it would not discontinue supply of Chrome Ore and coke on regular basis for the purpose of conversion at the said plant for the duration of the agreement i.e. 5 years.

TISCO was, however, unable to supply the Chrome Ore and coke of the specifications mentioned in the said agreement. As a result it was not possible to maintain the required-specification of the charge Chrome for obviously the quality of finished product would depend upon the quality of Chrome Ore and coke supplied by TISCO. Accordingly, the said agreement dated March 1, 1992 was amended and modified to the extent mentioned in the agreement dated January 30, 1993.

TISCO, though obliged, refused to supply the raw materials on "regular basis". In consequence, ICCL was compelled to shut down its plant intermittently from March 1, 1993 upto December 5, 1993 and as a result it suffered loss of Rs.47,55,79,572/- for the said period.

TISCO by its letter dated November 26, 1993, threatened to terminate the said agreement with the expiry of December, 31, 1993.

(a) Thereafter the parties met on November 30, 1993, and the discussions were recorded in minutes, which were ultimately signed on December 28, 1993.

It was inter alia, suggested at the said meeting that ICCL was prepared to reduce the period of the agreement upto the end of 1995 and also the conversion charges subject to and in consideration of TISCO handing over of possession to ICCL of approximately 350 hectares of mining lease of Chrome Ore for ICCL''s independent working.

TISCO refused to transfer 350 hectares of the mining lease agreed to be transferred on the plea that it would constitute violation of order of Orissa High Court. This plea was, however, untenable as opined by senior Counsel like Mr. K.K. Venugopal and Mr. Soli Sorabjee, Senior Advocates.

(b) In the meantime, a further meeting of the parties was held on January 10, 1994 where it was expressly suggested that if TISCO could not transfer 350 hectares of mining lease because of the said Court proceedings, it would be relieved of its said obligations, but, if it succeeds in the said proceedings it would grant lease of the said area. It was further suggested that if TISCO lost the said Court case it would continue to supply Chrome Ore and coke on a cost plus ten percent basis for further period of 2 years ending 1995. The said minutes of the meeting dated January 10, 1994 was signed by the Managing Director of TISCO subject to acceptance by the Chairman and Managing Director of ICCL.

(c) From the aforesaid conduct of the parties subsequent to the letter dated November 26. 1993 by which TISCO threatened to terminate the agreement, it is quite evident that TISCO did not intend to terminate the said agreement but agreed to implement the terms thereof till its full term or at least upto 1995.

TISCO, however, began erratic supply of raw material and threatened to discontinue supply. TISCO also refused to transfer the said 350 hectares of mining lease to ICCL despite opinions of Senior Counsel that such transfer would not amount to violation of the said order of Court. Apprehending a termination, ICCL has approached this Court.

TISCO has also failed to pay the admitted dues of ICCL. The accounts as on November 30, 1993 was thoroughly reconciled between the accounts representatives of both TISCO and ICCL at TISCO''s office at Calcutta during 21/23rd December, 1993 when it was agreed that amount due to ICCL from the TISCO as per ICCL''s books of account was Rs. 6.40 crores out of which TISCO accepted claim of Rs. 4.32 crores (out of which TISCO paid Rs. 1.94 crores) resulting in a dispute of Rs. 2.08 crores raised by TISCO. After this High Court''s order dated February 9, 1994. ICCL has raised further invoices amounting to Rs. 6.59 crores against finished products in respect of which there is no dispute. This about Rs. 10.97 crores is payable by TISCO to ICCL as no March 29, 1994.

52. An affidavit was affirmed by Ravindra Kumar Harishchandra Suryavanshi dated 2nd March, 1994 being the affidavit-in-opposition (hereinafter referred to the said affidavit).

53. In the said affidavit the following pleas were raised:-

(i) ICCL failed to convert charge-Chrome of the agreed specification. In consequence TISCO was required to carry out further work.

(ii) The agreement is not in the interest of TISCO.

(iii) CCL used and utilised supply of Chrome Ore from other sources.

(iv) TISCO is entitled to terminate the agreement on reasonable notice.

(v) TISCO has accepted the breach alleged to have been committed by ICCL and "has terminated the contract".

(vi) Conversion charges payable under the agreement are high.

(vii) Circumstances have changed since the agreement was entered into. Charge Chrome is not acceptable to the buyers of TISCO.

(viii) TISCO is ready and willing to supply Chrome Ore to ICCL at market price.

It has been argued on behalf of the petitioner that it is the specific case of TISCO in the said affidavit that "under the contract, ICCL is not entitled to use any other Chrome Ore apart from that supplied by TISCO......"

54. It has been contended on behalf of the petitioner that from the said affidavit it would appear that TISCO insists that ICCL is not entitled to obtain Chrome Ore and Coke from any source, except TISCO. This being an express negative covenant to be performed by ICCL, it necessarily implies a corresponding covenant on TISCO to regularly supply the raw materials.

55. It has also been submitted by the Learned Advocate for the petitioner that the contention that the charge Chrome converted at the plant of ICCL was not according to specification, is untenable. Though on occasions such plea was raised, but TISCO had taken delivery of the entire quantity of charge Chrome converted at the plant of ICCL, sold and exported the same.

56. It has been pointed out that after my order dated 9th February, 1994 TISCO had been taking delivery of charge Chrome in fulfilment of its obligations under contract with foreign buyers entered earlier.

57. It has further been submitted on behalf of the petitioner that even the correspondence annexed to the affidavit-in-opposition, such as, letter dated February 4, 1994, Letter dated August 24, 1993, letter dated August 27/ September 1, 1993, letter dated March 25/26, 1993 clearly show that raw materials supplied by TISCO were not according to specifications. It is but natural that the quality of the raw materials if not upto standard, the charge Chrome (finished product) cannot be strictly according to specifications.

58. In this connection correspondence annexed to the affidavit-in-reply his also been referred.

59. The other main contention of TISCO in the said affidavit is that ICCL has obtained supply of Ore from other sources.

60. It has been submitted that it will be apparent from the correspondence annexed to the affidavit-in-reply of ICCL that ICCL was obliged to import lumpy ores from Turkey with the consent of TISCO only for the purpose of improving

the quality of the Ores to be used for conversion of the charge Chrome out of the raw materials supplied by TISCO.

61. It has also been contended that there is no such changed circumstances necessitating termination of Contract as alleged by TISCO.

62. It has further been submitted that even after the order dated March 17, 1994 TISCO had been exporting the finished products manufactured by ICCL.

63. It has been contended that the allegation made by TISCO that frice agreed to be paid by TISCO is high should not be accepted.

64. It has further been submitted on behalf of the petitioner that all the disputes between the parties are the subject matter of arbitration and unless the interim order of status-quo is maintained, the interim reference will be infructuous.

65. On legal aspect of the case it has been submitted on behalf of the petitioner that law on the point is very clear that if there is a negative covenant, injunction should be granted even though the contract is not specifically enforceable in terms of Section 41(e) of Specific Relief Act read with Section 42 thereof. Section 42 specifically provides that the circumstances in which the Court is unable to compel specific performance, the Court is nevertheless empowered to grant injunction to perform a negative covenant. This position is undisputed.

66. In the present case, the contract contains both affirmative covenants as also negative/covenants (express or implied). Even assuming, but not conceding, that the present contract is not specifically enforceable, it has been submitted that the Court should grant an injunction to prevent TISCO from Committing breach of such negative covenant and/or its obligation under the agreement.

67. It has been submitted that in each case the Court should examine the substance of the agreement and not its form to ascertain whether there is a negative covenant.

68. On this aspect of the case Learned Advocates for the ICCL relied upon the following decisions:-

1. Jairam Valjee Vs. Indian Iron and Steel Co. Ltd.,

2. Metropolitan Electric Supply Co. Ltd. v. Ginder reported in (1901) 2 CH. D. 799.

3. Burn & Co. Ltd. v. McDonald reported in 31 CWN 255-ILR 36 CAL 354.

4. Donnel v. Bennett reported in 22 CH. D 835.

5. Prestige Picture v. Shree Krishna Cinema Pvt. Ltd. reported in ILR 1970 (2) Cal. 109.

6. Subha Naidu and Anr. v. Haji Badsha Sahib and Ors. reported in ILR 26 Madras 168.

7. Renusagar Power Co. Ltd. Vs. General Electric Company and Another, .

8. The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath,

9. Spenborough Corporation v. Cooke Sons & Co. Ltd. reported in 1968-1 Ch. 139.

10. Raj Narain Pratap Narain Vs. U.P. State Electricity Board,

69. It has further been submitted on behalf of the petitioner that in a suit for perpetual injunction under Chapter VIII (Section 38-42) of the Specific Relief Act for an injunction to enforce a negative covenant u/s 42 of the Specific Relief Act, the fact that damages may afford adequate relief to the plaintiff is not a bar to an injunction being granted to restrain breach of a negative covenant.

70. It has been submitted that this is clear from Section 42 itself which provides, inter alia, that "the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement."

71. It has been contended that disputes between the parties as mentioned in TISCO''s affidavit-in-opposition e.g. further performance of the contract has become impossible due to changed circumstances, are all disputes fully covered by the arbitration clause which is very wide indeed. All such disputes should therefore be referred to the Arbitrator for adjudication by arbitral forum.

72. It is the case of the petitioner that in the event if TISCO wants to contend that the said agreement for five years is terminable by TISCO despite the fact that there is no express termination clause, the onus is entirely on TISCO to sow that there is an implied term for termination in the instant case. It has been submitted that the substance of the contract is such that it is impossible to imply such a term.

73. Learned Advocate for the petitioner submitted that in the contract between ICCL and TISCO there is no express provision for termination of the agreement. On the contrary the agreement is for a fixed period of 5 years. If the agreement is read as a whole, it will clearly appear that there is a very strong presumption that the agreement will not be terminated either by TISCO or ICCL for the said defined period of 5 years.

74. The other submission made on behalf of the petitioner is that the petitioner has made out a prima facie case and since the Arbitrator has already started the reference, it will not be proper to refuse the prayer for injunction and atleast the interim order of status-quo passed by this Court should be directed to continue till the disposal of the arbitration.

75. Learned Advocate relied upon Russel on Arbitration 20th Edn. page 297 & 298 and submitted that Court has wide power to make order for the purpose of preserving the status quo pending arbitration.

76. It has been submitted on behalf of the petitioner that the balance of convenience also dictates that the status quo order should be continued till the

disposal of arbitration proceeding.

77. The submissions made on behalf of TISCO, on the other hand, may be summarised as under :-

(i) There is no express negative covenant in the agreement,

(ii) Negative covenant, if any, is in favour of TISCO.

(iii) Damages are adequate remedy.

It has been submitted on behalf of the respondent-TISCO that the only obligation of TISCO towards ICCL is to make payment at the agreed rate upon conversion of the materials and delivery of the same to TISCO. From the said obligation one cannot possibly imply a negative covenant in favour of ICCL at all. In case of any alleged breach ICCL can claim conversion charges.

78. It has been submitted that the above submission is fully supported by the notes of argument submitted on behalf of the petitioner. Particular reference may be made to clause (4) of the note which says "the Agreement further contains express negative covenant by ICCL that it would not receive store or process any Chromium Ore and/or Coke from any other source except TISCO at Chowdhar plant."

79. In this connection it has been submitted that so far as the Clause of Agreement which provides, inter alia, to the following effect"......TISCO has agreed to make available the entire quantity of Chromium Ore and coke required at this plant free of costs......" do not really contemplate any negative aspect of the covenant on the contrary there is a positive stipulation which cannot be enforced.

80. It has further been submitted that "if the said Agreement is now wrongfully terminated it will not be possible for the petitioner to obtain such raw-materials for the quantities needed for its plant from any other source. It is also alleged in paragraph 21 of Section 41 application that "the respondent is a monopoly organisation holding Chromium Mining Lease containing 60% of the deposits of the country in its control."

81. It has been the contention of the learned advocates for the respondent that the submission made on behalf of the petitioner to the effect does not appear to be correct.

82. In this connection it has been contended on behalf of the respondent that there are several other source VIZ. Orissa Mining Corporation, a Government Undertaking Mishrilal Mines Ltd., Mysore Minerals Pvt. Ltd., IMFA a sister concern of ICCL. It has also been, submitted that Orissa Mining Corporation has 20% more sales than that of TISCO. The said Factual statement in the affidavit-in-opposition has not been specifically denied in the affidavit in reply.

83. It has been contended on behalf of the respondent that the contention of the

petitioner that the contract contains a negative covenant by implication requiring TISCO to supply Chrome Ore and Coke during the subsistence of the agreement is exfacie not sustainable inasmuch as there is no negative covenant either express or by implication in favour of ICCL. On the contrary there is an express negative covenant following from ICCL in favour of TISCO as will appear from Clause III (i) of the Agreement which is set out below:-

"not receive, store or process any Chrome Ore and/or Coke from any other source (except TISCO) at their Choudhwar Plant. The entire capacity of the plant will remain fully dedicated to TISCO during the tenure of this Conversion Agreement.".

84. In support of the Contention, the learned Advocate for the respondents relied upon the following decisions on the question of granting an injunction for enforcement of the negative covenant.

Shree Ambarnath Mills Corporation Vs. D.B. Godbole and Another, Vinod Chandra Hiralala Gandhi Vs. Vivknanad Mills Ltd., Maheswari and Co. Pvt. Ltd. and Another Vs. The Corporation of Calcutta, Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others,

85. The learned Advocate for the respondent further submitted that the argument advanced on behalf of the petitioner that the contract material vis., Chrome Ore and Coke are not available from any other source, is factually incorrect. It will be evident also that the petitioner is guilty of ommitting breach of contract and failed to lift materials and deliver the charged Chrome to the respondent as will appear from the correspondence mentioned herein below:-

1st March Letter From TISCO to ICCL complaining about the inferior quality and requesting-

(a) to arrange for coke from their own resources; and

(b) in the alternative suspension of production for two months till commission of a new Briquenting plant.

March 25/26 1993

(a) Letter from TISCO to ICCL complaining that material produced so far contain carbon over 8% and

(b) requesting ICCL to procure some low reducibility Ore to prove the point and also to make a trial run for a period of one week.

July Telex from ICCL to TISCO in the Telex it is admitted that ICC: has procured refractory Ore from other sources and they also proposed to continue use of such refractory from other source.

July 19, 1993

Answer to the Telex by TISCO containing reiteration of the plaintiff regarding fluctuation of fixed carbon and that trial should be conducted for a period of one week in association with Mr, S.R. Agarwal, a TISCO officer.

August 5, 1993 Letter from TISCO to ICCL about the ratio to be maintained.

August 24, 1993. Letter from ICCL to TISCO admitting that ICCL was using additional quantity of refractory Grade Chromium from other sources.

August 27, 1993

(a) Letter from TISCO to ICCL acknowledging that ICCL was using refractory Grade Chromium from other sources;

(b) TISCO was only obliged to supply triable and limpy Ore and the use of Chromium Ore from other sources is the operation of ICCL should be ICCL''s costs.

November 16, 1993 Letter from TISCO to ICCL.

November 30, 1993 Minutes of the meeting relating to conversion Agreement between TISCO and ICCL held in Jamshedpur. December Letter from ICCL to TISCO regarding the possibility of transfer for part of the Mining lease.

January 7, 1994 Fax from TISCO to ICCL about the difficulty in transferring the Mining lease.

January 10, 1994 Further meeting between TISCO and ICCL regarding transfer of Mining lease.

February 3, 1994 FAX Message from Sam Manekshaw on behalf of ICCL to J.J. Irani of TISCO relating to-

(a) Handing over of 350 Hector of Mining areas to ICCL and

(b) Asking for payment of Rs. 4.31 crores besides further bills;

(c) "Delay of payment is causing severe distress to ICCL''s operation particularly on account of procuring Coke which responsibility we had agreed ICCL would take over, it is also specifically stated in the said message that-

(i) TISCO should release immediate over due payments and in view of legal opinion take steps for handing over the agreed area. Not a whisper of continuance of the Agreement dated 30th January 1993 of any negative covenant contained therein.

February 4, 1994. Fax Message from Mr. Ramkrishna on behalf of TISCO to Mr. R.K. Gupta of ICCL in answer to the massage dated 3.2.94 informing that Dr. Irani is on a short trip abroad and will be returning to station on 7th February, 1994k

February 4, 1994 Letter from TISCO withdrawing its offer of modification and the minutes dated 30th November, 1993 would be ineffective. It may be stated that the said letter was dispatched after receipts of the Fax Message from TISCO date 4.2.94 without waiting for the return of Mr. Irani and taking a complete reversal of stand as contained in the Fax message of Sam Manekshaw.

February 7, 1994 Fax Message from J. J. Irani to Nusli wadi a informing him about the progress relating to ICCL matter.

86. It has further been contended on behalf of the respondent that the application of the petitioner should be rejected on the, ground that in the garb of enforcing an alleged implied negative covenant, the petitioner is really seeking to enforce the affirmative part of contract which cannot be done in view of the provisions of Specific Relief Act. Reference is made to Section 14 Sub-clauses (a) and (d), of Section 42 which Clearly provide that the circumstances that the Court is unable to compel specific performance of the affirmative Agreement was not precluded from granting an injunction to perform the Negative Agreement. Section 42 itself contains a bar from compelling specific performance of the affirmative part of the agreement.

87. It has been submitted on behalf of the respondent that on a plain reading of the prayers and the arguments made on behalf of the petitioner it is clear that the petitioner is seeking only to direct the respondent to go on supplying coke Chrome during the subsistence of the Agreement. It has further been submitted on behalf of the respondent that the application, if at all, to supply Chrome and Coke by the respondent to the petitioner is an affirmative part of the Agreement and there is nothing negative about, it, Therefore, in the garb of enforcing a negative covenant, the petitioner is seeking, in fact, to under no circumstances can be done.

88. It has been submitted on behalf of the respondent that Section 42 also contains a proviso which provides that the negative, covenant may be enforced if the plaintiff has not failed to perform the contract so far as it is binding on him. From the correspondence referred to above it will be clear that the petitioner has failed to perform the contract so far as it is binding on him and thus is not entitled to take the aid of Section 42 of the Specific Relief Act.

89. The learned Advocate for the respondent sought to distinguish the cases cited on behalf of the petitioner and submitted that the said decisions cannot be of any assistance to the petitioner. The learned Advocate for the respondent also referred to Russel on Arbitration Act page 297 relied upon by the learned Advocate for the petitioner and submitted that the principles laid down therein is not disputed and the Arbitration Court has the power to pass order for injunction and status-quo but the same has to be read in the light of the provisions of the Specific Relief Act and the various decisions cited. Finally it has been contended on behalf of the respondent that in the instant case no specific performance of the contract can be order because of the specific provisions u/s 14 of the Specific Relief Act which are summarised below:-

(a) Contract for the non-performance of which compensation of money is an adequate relief;

(b) Contract runs into such minute details which the Court cannot enforce specific performance of its material terms and;

(c) A contract, the performance of which involves the performance of a continuance duty which the Court cannot supervise.

90.. Further it'' is also the contention of the learned Advocate for the respondent on the question whether damages are adequate if the contract is broken. The only loss which the petitioner may suffer is conversion charge which the petitioner would have earned. This is clearly ascertainable from the contract itself.

91. The petitioner, however has claimed that as the Chrome Ore and Coke are not available in the market its plant will have to be shut down for want of such materials. It has been on behalf of the respondent however, that the said contention is factually incorrect.

92. It has been submitted that in paragraph 14 of the affidavit of in opposition affirmed by one Ravindra Kumar Harischandra Suryavanshi on 2nd March, 1994, it has been pointed out that there are four organisations from which such Chrome Ore can be obtained. It has also been contended that similar coke is also available in the market.

93. The learned Advocate for the respondent accordingly submitted that the application of the petitioner should be rejected on the ground that in guise of enforcing an implied negative stipulation the petitioner is seeking to enforce the affirmative one.

94. I have considered the respective submissions of the parties and decisions cited from the bar.

95. The application was opposed mainly on the ground that the Court cannot pass the order of injunction since an affirmative covenant cannot be enforced in law or in other words, the prayer of the petitioner if allowed will amount to specific performance of the contract which is not permissible under the provisions of the Specific Relief Act and, as such, the injunction as prayed for cannot be granted.

96. It cannot be disputed that if there is a negative covenant, injunction should be granted even though the contract is not specifically enforceable Section 41(e) of Specific Relief Act read with Section 42 thereof), Section 42 specifically provides that the circumstances in which the Court is unable to compel specific performance, the Court is nevertheless empowered to grant injunction to perform a negative covenant. This position is undisputed.

97. In the present case, the contract contains both affirmative covenants as also negative/covenants (express or implied).

98. It is well-settled that in each case the Court should examine the substance of

the agreement and not its form to ascertain whether there is a negative covenant.

99. I may now take note of the following decisions relied upon on behalf of the petitioner:

(1) Jairam Valjee v. Indian Iron & Steel Co. Ltd. reported in AIR 1940 Cal. 466-

100. Facts of this case are similar to the instant case. Defendant ISCO, was a manufacturer of steel, plaintiff, a lessee of mines, was raising dolomite/ limestone, commonly known as flux. Defendant agree to buy its "total" "all" "entire" requirements of flux from the plaintiff. Defendant complained that price charged by the plaintiff was high and therefore, it threatened to terminate the agreement. The plaintiff then filed suit for specific performance and injunction restraining the defendant from buying flux from anyone else.

101. Following the full bench decision in Burn & Co. Ltd. v. Mc. Donald reported in ILR (1909) 36 Cal. 354-13 CWN 255 -9CLJ 190, it was held that there was an implied negative covenant and injunction was granted. All contentions raised by the defendant were considered and rejected.

(ii) Metropolitan Electric Supply Co. Ltd. v. Ginder reported in (1901) 2 Ch. D 799 -Buckley J. HN 805/812 :

102. Defendant agreed to take whole of electric energy from the plaintiff for a period of not less than five years. Defendant sought to back out.

103. It was held that the contract was in substance not to take electric energy from anyone else. It was also held that there was a negative covenant.

104. Both Buckley J. in this case and Maclean in 9 CLJ 190 followed and quoted in extenso the following passages from judgment of Lord Selborne in wolverhampton''s case (Which it submitted is fully applicable to the facts of the instant case in respect of the contract between TISCO and ICCL).

"with regard to the case of Lumley v. Wagner, to which reference was made, really when it comes to be examined it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between the parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground, and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance; the technical distinction being made, that if you find the word ''not'' in an agreement ''I will not do a thing'' as well as the words ''I will'' even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative, will act on the expression of it. I can only say that I should think that it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of negative rather than an affirmative form of expression."

(iii)Burn & Co. Ltd. v. McDonald. reported in 13 CWN 225: ILR 36 CAL 354

Defendant agreed to serve the plaintiff for a number of years. Defendant in breach of the agreement joined another concern. Thereafter the plaintiff instituted suit for damages and injunction restraining the defendant from working with anyone else.

It was held that there was negative covenant and injunction was granted even though it was a contract of personal service and even though damages were claimed and continuance of contract was dependent on the volition of the defendant.

Mclean, Co speaking on behalf of the Special Bench quoted in extenso Lord Selbourne as above and then observed:

"If it has been necessary, I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on this subject is codified ...... by Section 57 of the Specific Relief Act (Corresponding to Section 42 of the 1963 Act)... The language of that section is reasonably clear and it appears to give legislative sanction in India to the view expressed by Lord Selbourne in the passage I have read ...... Now, can we in the present case properly say that a negative covenant is implied. I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability devote himself to the duties as a draftsman and general assistant. Surely when a man says that he will devote himself during a period of years to a business of a particular firm, it does imply that he will not give his service during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort, damages which perhaps will never be recovered - will be a very small consolation to the plaintiff."

(iv)Donnel v. Bennett reported in 22 CH D835HN/840

105. Defendant a fish monger agreed to sell all his fish to the plaintiff, a manure manufacturer and not to anyone else. It was held that there was a negative covenant and injunction was granted.

106. Ery-J. at P. 840 observed-

"I have come to the conclusion, therefore, upon the authorities, which are binding upon me, that I ought to grant this injunction. I do so with considerable difficulty, because I find it hard to draw any substantial or tagible distinction between a contract containing an express negative stipulation and contract containing an affirmative stipulation which implies a negative."

107. The law is well-settled that in a suit for perpetual injection under Chapter

VIII (Sections 38-42) of the Specific Relief Act and for an injunction to enforce a negative covenant u/s 42 of the Specific Relief Act; the fact that damages may afford adequate relief to the plaintiff is not a bar to an injunction being granted to restrain breach of a negative covenant.

108. This is clear from Section 42 itself which provides, inter alia, that "the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement." For this ICCL relies on the following cases.

109. In this Connection the following decisions may be considered, (i) Prestige picture v. Shree Krishna Cinema Pvt. Ltd. reported in ILR 1970 Cal. 109

T. K. Basu-J: observed as follows:-

"The fact that damage may afford adequate relief to the plaintiff in the present case is not a bar to an injunction being granted to enforce the negative covenant."

(ii) Subba Naidu and Anr. v. Halt Badsha Sahib and Ors. reported in ILR 26 Madras 168.

110. In this case the defendant agreed to sell all its Mica from its Mines to the plaintiff. In breach of such agreement the defendant offered to sell Mica to a third party. Th plaintiff filed a suit for specific performance of the agreement and for an injunction restraining the defendant from acting in violation of the terms of the agreement. In the context of Section 57 of the Specific Relief Act 1877 which is identical with Section 42 of the Specific Relief Act 1963 the Appeal Court upheld the order of the injunction granted by the Trial Court.

111. In the instant case it appears to me that the arbitration Clause is wide enough to cover all the disputes between the parties as mentioned on behalf of the petitioner as also on behalf of the respondent.

112. In this connection two decisions have been relied upon on behalf of the petitioner which are as follows:-

i) Renusagar Power Co. Ltd. Vs. General Electric Company and Another,

It was held in this case that expressions such as arising out of or ''in respect of ''in connection with or ''in relation to'' or ''in consequence of or ''concerning'' or ''relating to'' (he contract are of the widest amplitude and content and include even questions as to the existence, validity and effect (scope) of the arbitration agreement.

113. It is submitted that the instant arbitration clause uses similar words of the widest amplitude, such as ''any dispute arising out of or touching upon any provisions of this agreement should be referred for arbitration ......''

(iii) The Naihati Jute Mills Ltd. Vs. Khyaliram Jagannath,

114. It was held in this case that in case of frustration of contract it is the performance of the contract which comes to an end but the contract would still be in existence for the purposes, such as, resolution of disputes arising under of in connection with it. The question'' as to whether the contract became impossible of performance and was discharged under the doctrine of frustration would still have to be decided under the arbitration clause which operates in respect of such purposes.

115. Hence TISCO''s contention that the contract with ICCL has become impossible of performance, raises a dispute which is squarely covered by the wide arbitration clause in the instant case.

116. There is no express termination clause in the contract in question duration of which is five years. There is nothing to show that it can be implied from the terms of the contract that the contract is terminable prior to the expiry of five years. In this connection the judgment and decision in the case of Spenborough Corporation v. Cooke Sons & Co. Ltd. (1968) 1 Ch. 139 relied upon by the Id. Advocate for the petitioner. In that case there was an agreement between the plaintiff local authority and the defendant for regulating the discharge of the defendant''s trade effluents into the public sewer belonging to the plaintiff. The agreement authorised the plaintiff to terminate the same immediately on breach, but contained no express provision for determination on notice. For various reasons the plaintiff decided to determine the agreement and gave 12 months'' notice. The defendant contended that the agreement could not be unilaterally determined otherwise than for breach. The plaintiff took out a summons seeking, inter alia, a declaration that on its true construction, the agreement was determinable at any time by either party upon reasonable notice. It was held by Buckley J. that on the facts of the case, on a consideration of various factors as also the Public Health (Drainage of Trade Premises) Act 1937 the said agreement was terminable by reasonable notice. However at p. 147 it was observed as follows:-

"An agreement which is silent about determination will not be determinable unless the facts of the case, such as the subject matter of the agreement, the nature of the contract or the circumstances in which the agreement was made, support a finding that the parties intended that it should be determinable but there is, in my judgment, no presumption one way or the other"

117. On a perusal of the contract in question it appears that there is no express provision for termination of the agreement; on the contrary the agreement is for a fixed period of five years. If the agreement is read as a whole, it will appear that there is very strong presumption that the agreement will not be terminated either by TISCO or ICCL for the said defined period of five years.

118. The question is if the petitioner has made out a strong prima facie case for injunction. In this connection the judgment and decision in the case of Raj Narain Pratap Narain Vs. U.P. State Electricity Board, may be taken note of. In

paragraph 6 of the said judgment at page it was observed as follows:

"It may be stated here that at this stage I am not concerned with the ultimate decision on merits of the rival claims, but I have to confine myself to the question whether there existed good prima facie ground for granting temporary injunction to the revisionist or not. It is to that extent alone that I propose to examine the legality of the impugned order. It is a settled principle that to entitle any party to an ad-interim injunction, it must not only satisfy the Court about its prima facie right but also that refusal to grant injunction would result in inseparable injury and that balance of convenience lay in favour of granting the injunction rather than in refusing it. It is also well settled that in order to find out whether there exists any prima facie case in favour of party or not, it would be enough if it could be established that there was really a seriously arguable question and it is not necessary that the point be proved to the hilt at stage. Showing a fair chance of success is good enough."

119. In the instant case the petitioner has shown that serious arguable question is involved and the petitioner has a fair chance of success in the adjudication before the Arbitrators and that refusal to grant an interim order particularly if the ad-interim order of status quo which has already been granted is discontinued will cause serious prejudice to the interest of the petitioner pending adjudication by the Arbitrator.

120. It cannot be disputed that the court has got wide power both in England and in this country to order Status quo during the pendency of the arbitration. In this connection reference may be made on Russel on Arbitration 20th Edn. pg. 297, 298 which is as follows :

Court has wide power to make order for the purpose of preserving the status quo pending arbitration.

"The court, in order to preserve the status quo in a case where ''one of the parties to a contract had given a notice purporting to dismiss the contractors restrained the party from acting on the notice until judgment or further order, or until a reference to arbitration provided for by the contract had been held ''Foster v. Hastings Corporation (1903) 87 LT 736."

121. It has been argued, however, on behalf of the respondent TISCO that there is no express negative covenant in the agreement, and negative covenant, if any is in favour of TISCO and further damages are adequate remedy and, therefore, no order of injunction should be passed.

122. With regard to the first submission of TISCO it cannot be disputed that there are not only express negative covenants but also affirmative covenants coupled with implied negative convenants. Affirmative covenants in the agreement shown above necessarily implied negative covenants against TISCO. Section 42 of the Specific Relief Act provides for the circumstances wherein the Court cannot compel specific performance of affirmative agreement. It further

Provides that the affirmative agreement to do certain acts coupled with negative agreement the Court though unable to compel specific performance would grant injunction to perform the negative covenants in the agreement.

123. It appears from the agreement in question that the affirmative covenant to the effect that the duration of the contract of 5 years necessarily implied in the absence of providing operation to the parties to terminate the contract earlier that the contract cannot be put to an end without any valid and Justified reason.

124. Mr. P.C. Sen Ld. Counsel of the respondent-TISCO relied upon the judgment and decision in the case of Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others, .

125. In the aforesaid decision there was an agreement of distributorship. There was no express clause in the said agreement providing for termination of the agreement by thirty days'' notice. Indian Oil Corporation Ltd. The appellant determined the distributorship agreement. The plaintiff distributor filed a Special Suit Section 20 of the Arbitration Act. The disputes were referred to arbitration. The Arbitrator found that the contract was determinable. However, he found that the termination was not in terms of the contract. The Arbitrator directed restitution of the distributorship.

126. Supreme Court held that on the basis of the findings that the contract was determinable, no specific performance could be granted.

127. The aforesaid case is distinguishable from the present case on at least three points as follows :-

(i) That was a case u/s 14(1)(c) of the Specific Relief Act, whereas, the present case is u/s 42 of the Specific Relief Act. Therefore, different considerations will apply and u/s 42 even if, assuming but not admitting, that specific performance of the affirmative agreement cannot be granted, the Court is still empowered to enforce a negative covenant by an order or injunction.

(ii) That was a case where the contract contained an express termination clause. In the present case termination clause has been, designedly omitted. In the premises the onus is on TISCO to show that it is entitled to terminate the contract following (1968) 1 Ch. D. 139 (Buckley J.).

(iii) In that case the Arbitrator held that the agreement was revocable and/or determinable by nature. Given such finding of the Arbitrator, Supreme Court held that the Arbitrator could not order restitution of the distributorship. In the present case the Contract is not revocable or determinable during the subsistence thereof.

128. The judgment and decision in the case of Maheswari and Co. Pvt. Ltd. and Another Vs. The Corporation of Calcutta, has been relied upon by the Ld. Advocate for the Respondent. In the aforesaid decision. There was a contract for supply of pipes according to specification. The defendant Corporation determined

the contract on the ground that the plaintiff was not supplying the goods according to specifications. The disputes were referred to Arbitration. The plaintiff u/s 41 of the Arbitration Act prayed for injunction restraining the defendant from buying pipes from anyone else. It was held that it was a simple contract of sale and purchase of ordinary articles of commerce and therefore, on injunction should be granted. The aforesaid decision is clearly distinguishable for the following reasons.

(i) The aforesaid case was not one where the contract contained a negative covenant. In the present case the contract contains negative covenant.

(ii) In the case the contract was for sale and purchase of ordinary articles of commerce. In the present case the contract is in the nature of a joint venture involving, inter alia, supply of special articles by TISCO and conversion thereof by ICCL.

S. Mukherji J. as he then was in the above case referred to the vide powers of Court u/s 41 of the Arbitration Act even in the case where there is no application under Section. 20 of the Act if the facts and circumstance of the case so Justify, (para 4 of the Judgment).

129. The judgement and decision in the case of Dowty Bolton Paul Ltd. v. Wolver Hampton Corporation reported in (1971) 2 AER 277, was also relied upon by the Ld. Advocate for the respondent. In the aforesaid decision in that case the defendant Corporation granted the Plaintiff the right to use an airfield as airfield for 99 years. Under the contract, the Corporation was required to maintain the airstrip as an air strip. The corporation thereafter wanted to convert the land into housing estate. The plaintiff thereupon applied for injunction.

130. Injunction was not granted because it would required constant supervision for a long period of sixty years.

131. That case is distinguishable from the present case inasmuch as the contract in that case did not contain a negative covenant. Further constant supervision is not required in the present case and the contract in the present case is only for a further period of about 3 years compared to 60 years in that case. The judgment and decision in the case of Shree Ambarnath Mills Corporation Vs. D.B. Godbole and Another, was also relied upon by the Ld. Advocate for the respondent.

132. In the aforesaid decision in the above case it was argued by the plaintiff that under an Agreement the defendant custodian agreed to sell certain goods to the plaintiff and such an Agreement implies negative covenant that the defendant will sell the goods to nobody else.

133. It was held by the Division Bench that the Agreement relied upon by the plaintiff was indefinite in the matter of the price, the period after which the Agreement was to become enforceable, the properties in respect of which it was to operate in favour of the plaintiff and the person to whom the properties were to be sold. It was held that the Agreement was incapable of specific performance

and further on the facts of the case there was no negative covenant. In the Course of the Judgment the Division Bench observed as follows:-

"But the covenant to be negative, must be one by which a party to the Agreement undertakes either expressly or by necessary implication not to act in a particular manner, whether an Agreement is affirmative or negative is a matter of substance and not of mere from........."

134. It has been submitted on behalf of the petitioner that the said case has no application whatsoever to the facts of the instant case for the following reasons:-

(a) The Agreement between the Custodian on Evacuee Property and the plaintiff was so uncertain in several respects that it was incapable of specific enforcement. On the other hand, the Contract between ICC1 and TISCO does not suffer from any such uncertainty or infirmity whatsoever and is a full and complete Contract in all respects and there can be no bar to the grant of interlocutory relief as prayed for by ICCL;

(b) On the facts of that case the Court concluded that looking into the substance of the Agreement, there was no implied negative covenant. On the other hand, as submitted earlier, ICCL contends that looking into the substance of the present Agreement, there are express and implied negative convenience binding respectively upon ICCL and TISCO.

135. The judgment and decision in the case of Lalbhai Dalpatbhai and Co. Vs. Chittaranjan Chandulal Pandya, (Bhagwati J.) was also relied upon by the Ld. Advocates for the Respondent. In the aforesaid decision, this was a case involving a Contract of service between the plaintiff company and its engineer. Despite an express provision that during a period of 3 years the engineer would not take any other employment, he tendered resignation which the plaintiff company refused to accept. The Court refused to grant an injunction against the Engineer in a suit by the plaintiff company on the ground that public Policy and consideration of reasonableness required that no such injunction should be granted.

136. The case is fully distinguishable from the instant case because:-

"(i) The Contract between ICCL and TISCO is a Contract in the nature of a Joint Venture for the supply of raw materials by TISCO and conversion thereof into finished products and export of such finished products to international buyers by TISCO. Such a Contract is not a Contract of personal service at all; %

(ii) It is unfortunate that the Special Bench decision of the Calcutta High Court in Burn & Company Ltd. v. McDonal reported in 13 CWN 255 was not cited at all before the Gujarat High Court that was a case of personal service contract and injunction was granted looking into the substance of the Contract as otherwise the plaintiff would be seriously prejudiced and the ends of justice would be defeated.

137. The judgment and decision in the case of Vinod Chandra Hiralala Gandhi Vs. Vivknanad Mills Ltd., has also been cited, by the Ld. Advocate for the respondent. In the aforesaid decision the point involved was how far a negative stipulation can be implied in a Contract of personal service. The Division Bench held as follows:-

"The negative stipulation cannot be implied merely from the existence of the affirmative stipulation; the affirmative stipulation does not of itself imply a negative stipulation to do anything inconsistent with it. There must be something in the Contract apart from the affirmative stipulation from which the negative stipulation can be spelt out. by necessary implication." (para 4)

138. It was held that on the facts of the case there was nothing in the Contract from which a negative stipulation could be spelt out and accordingly Section 42 of the Specific Relief Act did not come into play.

139. That case is fully distinguishable from the instant case for the following reasons:-

(i) That was another case where unfortunately the Special Bench decision of the Calcutta High Court in Burn & Co. Ltd. v. McDonald reported in 13 CWN 255 was not cited before the Gujarat High Court;

(ii) ICCL relies upon the observations in paragraph 4 quoted above and submits that there is "something" more in the Contract between ICL and TISCO apart from the affirmative stipulation which by necessary implication impose a negative covenant on TISCO not to stop supplies and not to terminate the Agreement during the subsistence thereof. Very briefly, the formula of "something more" in the instant Contract is as follows :-

(a) ICCL''s earmarking and reserving its full plant capacity for the conversion of TISCO''s Chrome Ore only.

(b) ICCL''s undertaking not to receive, store or proces any Chrome Ore or coke from any other source except TISCO.

(c) ICCL''s undertaking that the entire capacity of the plant will remain fully dedicated to TISCO during the tenure of the Agreement.

(d) TISCO shall regularly supply raw materials of the agreed specification to ICCL.

(e) TISCO''s undertaking to make available the entire'' quantity of Chrome Ore and coke required at ICCL''s plant free of cost.

(f) The Agreement between ICCL and TISCO contains no termination Clause.

140. The judgment and decision in the case of Rajasthan State Electricity Board, Jaipur Vs. Hindustan Brown Boveri Ltd., Bombay, was also relied upon by the Id. Advocate of the respondent. In the aforesaid decision the Respondent company''s tender for supply of Aluminium conductors was accepted by the petitioner Board. Thereafter disputes arose and the Company filed an application u/s 20 of the

Arbitration Act before the Additional District Judge, Jaipur. In an application u/s 41 of the Arbitration Act, the Additional District Judge passed an order of temporary injunction restraining the Board from making purchases of materials of the specifications for which order had been placed with the Company from any other party till the matter was disposed of through arbitration. Such order was passed on the basis that the contract between the Board and the Company contain a negative covenant.

141. The Board appealed to the High Court against such order. The High Court held that on the facts of the case there was no express or implied negative covenant in the contract and that it was nobody''s case that there was such a negative covenant. It was held that the Additional District Judge''s entire approach was wrong in thinking that a negative covenant will have to be imported.

142. The High Court further held that on the facts of the case damages would be an adequate remedy and, therefore, no order of injunction should have been passed.

143. The above mentioned case has no application to the present case for the following reasons :-

(i) That was another case in which the Special Bench decision of the Calcutta High Court in Burn & Company Ltd. v. McDonald reported in 31 CWN 255, was not considered by the Learned single Judge of the Rajas than High Court;

(ii) On a construction of the particular Contract in that case, the Court came to the conclusion that there was no negative covenant. In the instant case looking into the substance of the entire Contract between ICCL and T1SCO one cannot escape the inevitable conclusion that there are both affirmative and negative covenants-express and implied-binding on TISCO and on ICCL;

(iii) In that case, none of the parties contended that there was any negative covenant at all and accordingly the High Court observed that the Additional District Judge''s entire approach was wrong in thinking that a negative covenant would have to be implied. In the instant case the case is exactly the reverse.

144. Pursuant to the order passed by me on 10th June 1994 the parties have nominated their respective arbitrators being Mr. G. L. Oza retired Judge of the Supreme Court and Mr. J.B. Dadachanji respectively. The said arbitrators held several sittings in the meantime and the arbitrators have proceed considerately in the matter. The matter in issue before the arbitrators, in my view, will be rendered nugatory if the interim order is vacated at this stage. There is nothing on record to show that the parties have suffered any prejudice in the meantime by the interim orders passed by me. The balance of convenience dictates that the order passed by me on 3rd March 1994 should continue since, by the said order, I have directed the parties to maintain status-quo without in any way infringing the rights of the parties under the contract in question, and it was made clear in

the said order that the ad-interim order of status quo was Intended to protect the rights of the parties under the contract and accordingly in my view the said order, if allowed to continue, will serve the interest of the parties until the entire disputes between the parties are adjudicated by the arbitrators.

145. This application is accordingly disposed of with the direction that the interim order passed by me on 3rd March 1994 will continue till the disposal of the arbitration proceeding.

All parties are to act on the signed copy of the operative part of the judgment on the usual undertaking.

