

(2004) 11 DEL CK 0030

In the Delhi High Court

Case No : OMP 159 of 2004 and I.A. 3016 of 2004

National Thermal Power Corporation Limited

APPELLANT

Vs

Bharat Aluminium Co. Ltd.

RESPONDENT

Date of Decision : 23-11-2004

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 16, 17, 28(3), 34, 36
Contract Act, 1872 — Section 56, 73, 74
Easements Act, 1882 — Section 13, 15, 4
Specific Relief Act, 1963 — Section 14(1)

Citation : (2004) 11 DEL CK 0030

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Milon K. Banerji, Attorney General of India and N.D.B. Raju, Gaurav Aggarwal and Prerna Kumar, for the Appellant; C.S. Sundaram and P.C. Sen and Rohini Musa, for the Respondent

Final Decision : Dismissed

Judgement

Vikramajit Sen, J.—This petition has been filed u/s 37(2)(b) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the A and C Act') assailing the Interim Orders passed by the learned Arbitrator, namely Justice K. Ramamoorthy (Retired) dated 28.4.2004. The following directions have been passed in the impugned Interim Award:

(1) I direct the Respondent to maintain the water supply facilities (mentioned in clause (c)(d)(e) of the Agreement dated 20.6.2002) including the supply of water through A-1, A-2, A-3, A-5, A-5A and A-6 on payment of Rs. 22.75 lakhs per month. The first such payment shall be made on or before 7.5.2004. For subsequent period on or before the 7th of every succeeding month the payment shall be made. If there is failure on the part of the Applicant to pay even for a month the Respondent shall be entitled to stop supply. The Respondent is directed to maintain the supply till the termination of the arbitral proceedings.

(2) The Respondent shall permit the Applicant to have access through the approach road. The Applicant is entitled to have access through the approach road as per clause 11.0 of the Agreement till the termination of the arbitral proceedings.

(3) With reference to other charges, the Claimant shall pay as per clause 12.0 (b) (i) and (iii) on or before 7.5.2004 and for the subsequent period on 7th of every succeeding month and the same is subject to the ultimate result in the arbitration proceedings.

(4) The payment made by the Applicant under clause 12.0 (b) in the month of April 2004, as noticed by the High Court, shall remain with the Respondent subject to the ultimate result in the arbitration proceedings.

2. The respondent Bharat Aluminium Company Limited (hereinafter referred to as 'BALCO'), as well as the National Thermal Power Corporation (hereinafter NTPC) were incorporated as Public Sector Undertakings (PSUs) in common parlance, the former for manufacture of aluminium and the latter for generation of power. Since considerable amounts of electricity are required for manufacturing aluminium, the Government of India decided to establish a captive Thermal Power Plant which came to be known as BCPP, and was owned by BALCO. It is not controverted that BCPP started generating the energy requirements of the parties. In 1999 BALCO was privatised by the sale of 51 per cent of its equity for Rs. 551 crores, and the ownership and control of BCCP also moved of BALCO with the disinvestment. An Agreement came to be executed in June 2002 whereby BALCO had agreed to create requisite facilities for transportation, township, coal and water by 31.3.2004, at its own expense. Avowedly, till this date NTPC was obligated to continue to provide all these services. Some of the covenants in the post disinvestment contract dated 20th June 2002, to which my attention has been directed by learned counsel for the parties, are reproduced for facility of reference:

2.0 ESTABLISHMENT OF INDEPENDENT FACILITIES BY BALCO FOR COAL, WATER AND TOWNSHIP.

(i) BALCO hereby agrees to establish their own independent facilities by 31.3.2004 as per detailed action plan submitted by BALCO vide letter dtd. 21.3.2002 enclosed at Appendix-I to cater to its requirement of coal, water and township infrastructure without any dependence on services to be provided by NTPC using Korba STPS facilities in any manner whatsoever.

(ii) NTPC shall provide the services to BCPP by using its existing facilities at Korba STPS based on the charges as mentioned in the Agreement subject to the following:

(a) NTPC shall have full discretion with regard to the extent to which services would be provided to BCPP from the above facilities of Korba STPS only after meeting its own requirements.

(b) BALCO accepts full responsibility for any loss or damage to their own operations on account of any limitation or non-availability of services from NTPC and/or the facilities at Korba STPS, for which BALCO shall not be entitled for any claim for damage or compensation of any kind whatsoever from NTPC.

(c) The services provided by NTPC will be progressively discontinued as and when relevant facilities are developed by BALCO pursuant to Appendix-I after giving one calendar month's notice to NTPC in this regard and NTPC shall forthwith discontinue the said services. Accordingly, the charges thereof shall be reduced by NTPC for relevant services under item ""B"" of Appendix-II.

(iii) It is clearly understood that NTPC shall not extend the services using the facilities at Korba STPS after 31.3.2004 irrespective of whether BALCO's own facilities are in place or not, unless otherwise agreed by NTPC for a maximum period of one year beyond 31.3.2004

3.0 SERVICES TO BE PROVIDED BY NTPC

NTPC shall provide the following services up to 31.3.2004 by using the existing facilities installed at NTPC's Korba STPS terms and conditions mentioned under these presents at the charges mentioned in the Agreement.

(a) Transportation of coal from Gevra silo loading point up to Korba STPS unloading point using existing MGR system.

(b) For coal crushing and conveying using existing coal handling plant facilities.

(c) Supply of the clarified water and DM water to BCPP using Pre-treatment and DM plants along with associated pumping and piping facilities.

(d) Supply of raw and drinking water.

(e) Services for township infrastructure for drinking water, electricity, sewerage, drainage and shopping facilities for BCPP employees.

(f) Use of common approach road to BCPP and Korba STPS township.

5.0 WATER

(i) NTPC shall endeavor to supply water (Raw Clarified, DM and Drinking water) to BCPP depending upon the operational flexibility. However, BALCO shall promptly tie up and take all the necessary steps for their water allocation with appropriate State Authorities. Since the present Clarified water line requires replacement, BALCO will take immediate necessary action in this regard and in case of damage to it, NTPC shall not be responsible in any manner whatsoever.

(ii) The measurement of quantity of water supplied to BCPP shall be done inside the Korba STPS premises by the authorized representatives of NTPC in the manner as mentioned below:-

(a) DM water consumption will be calculated based on the level of identified DM

tank installed in Korba STPS premises. The difference of initial and final tank levels will be taken for the purpose of calculating the quantity pumped to BCPP. Monthly statement will be furnished by NTPC to BALCO.

(b) Raw water consumption will be calculated based on pump capacity and running hours of identified pump installed in Korba STPS premises. Monthly statement will be furnished by NTPC to BALCO.

(c) Quantity of clarified water will be calculated on the basis of pump capacity and running hours of identified pump which is installed in Korba STPS. Monthly statement will be furnished by NTPC to BALCO.

(d) Consumption of drinking water for BCPP will be calculated on proportionate basis i.e. 0.370 MCM for plant (30% of the total drinking water requirement of Korba STPS and BCPP together) and in proportion to quarters for the township.

(iii) Subject to other conditions mentioned in this Agreement, the quantity of water to be handled by Korba STPS (NTPC) for BCPP during a year will be limited to a maximum level as detailed below.

- DM water 0.086 MCM
- Raw water 5.360 MCM
- Clarified water 12.260 MCM
- Drinking water 0.370 MCM

8. LAND :

Till BALCO pays the cost of 171.44 acres of Korba STPS land for BCPP plant and ash dyke and ash pipe line corridor of BCPP as well as 34.74 acres of land of BCPP quarters as mentioned at 12.0 (c) and these lands are transferred in the name of BALCO, BALCO shall pay to NTPC the ground rent for the above lands on the basis of current cost of the land. The said ground rent shall be paid by BALCO to NTPC to the extent these charges are not included in the clause 12.0. BALCO agreed that it shall take necessary action to transfer 21.50 acres FCI land to BCPP plant in the name of BALCO.

11.0 PLANT APPROACH ROAD:

BALCO agreed that it shall construct a separate plant approach road at their own cost by 31.3.2004. However, for the intervening period suitable charges shall be paid by BALCO to NTPC, for use of the common approach road in the extent these charges are not included in clause 12.0.

12.0 CHARGES FOR SERVICES TO BE PROVIDED BY NTPC USING Korba STPS FACILITIES:

(a) For services provided up to 31.3.2004

BALCO agreed to promptly pay to NTPC the following charges towards the

services provided by NTPC by using Korba STPS facilities and towards payment of Management-

For the period from the Effective Date of this Agreement to 31.3.2003 @ Rs. 1.5437 Crs/month (details at Appendix-II)

For the period from 1.4.2003 to 31.3.2004 @ 1.7752 Crs/Month (details at Appendix-II)

In addition to above and as mentioned in other parts of the Agreement, BALCO would also pay to NTPC the following charges.

- (i) Cost of spares, major repair etc. at actuals for BCPP CHP portion.
- (ii) Actual insurance expenditure of Korba STPS allocable to BCPP.
- (iii) Any increase in the cost of diesel in excess of 10% over March, 2002 prices.
- (iv) Property tax and other charges for the BCPP quarters in the township at actuals.
- (v) Medical services if availed by BCPP employees would be additionally charged as per NTPC rules.
- (vi) Land rental charges payable to FCI will be settled directly by BALCO with FCI.
- (vii) Any increase in Electricity Duty and Cess applicable on electricity consumed in township and in auxiliary equipment over the rates prevailing in March, 2002.
- (viii) Any increase in water charges and coal and oil price over the prices prevailing in March, 2002 will be reimbursed by BALCO additionally to NTPC towards cost of water and power.
- (ix) Any other expenditure not included above but allocated to BCPP would be levied extra after mutual Agreement.

(b) For services provided from 1.4.2004 to 31.3.2005

Notwithstanding the provisions of this Agreement, in case NTPC is required to provide these services to BCPP on the written request of BALCO, NTPC may at their discretion extend such services to BCPP beyond 31.3.2004 for a maximum period of one year, i.e., up to 31.3.2005. In such event, BALCO would pay for the services to be provided by NTPC at the following rates.

- (i) Coal handling @ Rs. 175/- per Metric Tonne.
- (ii) Supply of Water @ Rs. 35/- per Cubic meter.
- (iii) In addition to charges mentioned at (i) and (ii) above the charges mentioned at 12.0 (a) (i) to (ix) would be paid by BALCO to NTPC.

(c) One Time Lump Sum Payment and Cost of Land payable by BALCO to NTPC:

The following charges shall be promptly paid by BALCO to NTPC in addition to the

charges mentioned in those Presents as part of the total package.

(i) One Time Lump Sum Payment:

One Time Lump Sum Payment of Rs. 3.60 crores shall be released by BALCO to NTPC in 18 (eighteen) equal monthly installments w.e.f. the date of management transfer of BCPP.

(ii) Price of Land:

BALCO shall pay to NTPC the cost of 171.44 acres of Korba STPS land for BCPP plant and ash dyke and ash pipe line corridor of BCPP as well as for 34.74 acres of land for BCPP quarters based on current market rate as determined by the State Revenue Authorities. BALCO shall thereafter take necessary action to get the said land transferred in the name of BALCO within six months of receipt of payment by NTPC, subject to approval of NTPC. BALCO shall bear all costs and expenses for transfer of the land such as stamp duty, registration charges etc.

3. The reasoning of the learned Arbitrator can be gleaned from the following extracts of the Award after which the provisions of law have been dealt with. It is not possible to reasonably contend that the contract between the parties has been ignored by the learned Arbitrator.

106. The broad features to be noticed are:-

(a) The Agreement dated 20.6.2002 became necessary after disinvestment had taken place in the year 2001.

(b) The responsibility of the Respondent for operational management had come to an end.

(c) The BCPP shall continue to have the same infrastructure facilities for its sustenance.

(d) The land which belonged to NTPC has been transferred to BCPP and its land locked surrounded - three sides by the land of NTPC and on one side by the land of FCI.

(e) Therefore, the only way by which the Applicant could take water to the BCPP is through the land of the Respondent. Such water supply was being made to the BCPP through the pipeline made by NTPC at the cost of the BALCO. The Applicant has spent, as noticed above, about Rs. 30 crores in putting up the pump house. The plan referred to above shows the position on ground.

(f) There is no other approach road to go to BCCP.

107. By clause 2.0 of the Agreement the Applicant had undertaken to establish independent infrastructure facilities by 31.3.2004. Nowhere it is stated in the Agreement that such independent facilities could be only through NTPC land cannot be had by the Applicant. And nowhere it is stated in the Agreement that the water pipeline cannot be through the land of the NTPC. At the time of

disinvestment and the Agreement, the Respondent was aware of the facilities being provided to BCPP through NTPC land

Therefore, it is to be considered whether the Applicant is precluded from taking water pipeline through the land of the NTPC. The argument advanced by the learned senior counsel for the Respondent is that there are no express words in the Agreement enabling the Applicant to have water pipeline through the NTPC land. If there are words in either way there would have no scope for any dispute. The Applicant pegs the case on easement necessity. It is noteworthy that there are no words in the Agreement from which it could be even remotely inferred that the right of easement of necessity of the Applicant is extinguished.

4. I shall first consider the argument raised on behalf of NTPC that the learned Arbitrator does not possess u/s 17 of the A and C Act the powers vested in the Court under its Section 9 and for this reason was not competent to pass the impugned Orders. These provisions can be compared with each other in this juxtaposition:

9. Interim measures by court.--A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court:--

(i) for the appointment of a guardian for a minor or a person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of the following matters, namely:--

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.

17. Interim measures ordered by arbitral tribunal.--(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider

necessary in respect of the subject-matter of the dispute.

(2) The arbitral may require a party to provide appropriate security in connection with a measure ordered under sub-section(1).

5. The following pronouncement in M.D., Army Welfare Housing Organisation Vs. Sumangal Services Pvt. Ltd., have been referred to by the learned Attorney General. However, it may be noted that the Court had been called upon to interpret the provisions of the Arbitration Act, 1940, and thus reference the Section 9 and 17 of the A and C Act were made en passant. While even the obiter observations of the Apex Court are binding on all High Courts and other subordinate Courts, this distinction should indeed be kept in mind-

58. A bare perusal of the aforementioned provisions would clearly show that even u/s 17 of the 1996 Act the power of the arbitrator is a limited one. He cannot issue any direction which would go beyond the reference or the arbitration agreement. Furthermore, an award of the arbitrator under the 1996 Act is not required to be made a rule of Court; the same is enforceable on its own force. Even u/s 17 of the 1996 Act, an interim order must relate to the protection of the subject-matter of dispute and the order may be addressed only to a party to the arbitration. It cannot be addressed to other parties. Even u/s 17 of the 1996 Act, no power is conferred upon the Arbitral Tribunal to enforce its order nor does it provide for judicial enforcement thereof. The said interim order of the learned arbitrator, Therefore, being coram non judice was wholly without jurisdiction and, thus, was a nullity. [See Kiran Singh v. Chaman Paswan, Kaushalya Devi v. K.L. Bansl, Union of India v. Tarachand Gupta and Bros. (SCC at p. 496), Sushil Kumar Mehta v. Gobind Ram Bohra and Kanak v. U.P. Avas Evam Vikas Parishad].

Experience has shown that the intended automatic executability of an Award is a fiction or illusion and rather than accelerate recoveries/execution has worked as a severe setback thereto, since the mere filing of Objections to the Award results in a stay of the Award. Hopefully this lacuna shall be plugged if the recommendations of the Law Commission are introduced into the statute. Learned counsel have relied on the views of Dr. Peter Binder expressed in 'International Commercial Arbitration in UNCITRAL Model Law Jurisdictions' in which the differences in the two provisions is spelt out. The learned author however opines that ""it is in most cases surely far less complicated to convince the arbitral tribunal, which is solely devoted to the case at hand and which is familiar with the circumstances, to issue an interim measure, than a Court, which only plays the role of the safety net in the background. However, to preserve the integrity of the institution of arbitration general by and to aid it in its independence from the Courts, a provision like Section 17 is of considerable importance"". In Channel Tunnel Group Ltd. v. Balfour Beatty Ltd., [1993] 1 All 664, the House of Lords has cautioned against jural grant of interim measures on questions properly before the Arbitral Tribunals; primacy of the latter should Therefore be assiduously preserved and Courts may interfere only where there is

a severe, irreversible and irretrievable error of gargantuan proportions.

6. The Statement of Claim has been filed by BALCO before the learned Arbitrator only in June 2004. It has been vehemently submitted that the Reply thereto has not been filed despite several opportunities granted for this purpose by the Arbitrator to NTPC. It is contended that this fact sufficiently illustrates the dilatory approach adopted after June 2002 by NTPC in an effort to claim large sums of money from BALCO. The Reply of BALCO to the application u/s 16 of the A and C Act has also been placed on record by Shri Raju, learned counsel for NTPC. As has already been seen, the impugned Orders had been passed in April 2004, before the Claims had been filed before the learned Arbitrator. Predicated on this sequence of events the Award has been assailed on the ground of its being coram non judice since the learned Arbitrator could not have assessed the boundaries or the subject matter of the dispute. A comparison of the two Sections will immediately reveal that the powers of the Court to pass interim orders/measures is of wider amplitude than those of the Arbitrator whose role is circumscribed to the subject matter of the dispute only. However, the powers ""in respect of the dispute"" are coextensive. So far as the present case is concerned, the parties have not directly approached the learned Arbitrator. BALCO had filed a petition praying for interim orders u/s 9 of the A and C Act which had been disposed of on 7.4.2004 by my learned Brother Mukundakam Sharma, J. directing inter alia that - ""The interim prayer which is made in this petition, namely, u/s 9 shall be treated as an application u/s 17 by the learned Arbitrator and, Therefore, a reply thereto shall be filed by the Respondent preferably on or before April 12, 2004 so that the plea of the interim relief sought for by the petitioner could be taken up by the learned Sole Arbitrator and decided before the end of the month."" The learned Arbitrator had thus not been presented with a clean slate. Even though the Statement of Claim had not been presented to him by that time, he would have become fully acquainted with the subject matter of the disputes, and this would indubitably have transpired upon learned Senior counsel addressing detained arguments before him. The learned Arbitrator has made a precise of the case of NTPC. It is evident that NTPC had not remonstrated before this Court that the Arbitrator should not pass interim Orders until the pleadings viz a viz the Claims had been completed; it is certainly possible that if this objection had been articulated, Justice Sharma may have himself passed interim orders pending the Reference. Section 19 of the A and C Act specifically empowers the parties and the Arbitrator to agree on the procedure to be followed in the proceedings. In paragraph 145, the learned Arbitrator has dealt with this question and his reasoning cannot be slated. Furthermore, Section 9 does not specifically empower the Court to pass interim orders in the absent of the Statement of Claim but this Court has nevertheless not felt inhibited or impeded in passing interim measures if circumstances necessitated it. I find no indication in the language of the two sections to the effect that an Arbitrator cannot also follow the same practice. All that is necessary is that the Arbitrator should have become broadly acquainted with the

subject matter of the dispute. I cannot Therefore accept the argument that the impugned Order is flawed on the ground that it preceded the filing of the Statement of Claim.

7. Although two score years have passed since the decision of Union of India (UOI) Vs. A.L. Rallia Ram, , the following observations of the Apex Court in this case have not been departed from.

""An award being a decision of an arbitrator whether a lawyer or a layman chosen by the parties, and entrusted with power to decide a dispute submitted to him is ordinarily not liable to be challenge on the ground that it is erroneous. In order to make arbitration effective and the awards enforceable, machinery is devised for lending the assistance of the ordinary Courts. The Court is also entrusted with power to modify or correct the award on the ground of imperfect form or clerical errors, or decision on questions not referred, which are severable from those referred. The Court has also power to remit the award when it has left some matters referred undetermined, or when the award is indefinite, or where the objection to the legality of the award is apparent on the face of the award. The Court may also set aside an award on the ground of corruption or misconduct of the arbitrator, or that a party has been guilty of fraudulent concealment or willful deception But the Court cannot interfere with the award if otherwise proper on the ground that the decision appears to it to be erroneous. The award of the arbitrator is ordinarily final and conclusive, unless a contrary intention is disclosed by the agreement. The award is the decision of a domestic tribunal chosen by the parties, and the Civil Courts which are entrusted with the power to facilitate arbitration and to effectuate the awards, cannot exercise appellate powers over the decision. Wrong or right the decision is binding if it be reached fairly after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement. But it is now firmly established that an award is bad on the ground of error of law on the face of it, when in the award itself or in a document actually incorporated in it, there is found some legal proposition which is the basis of the award and which is erroneous"".

8. Acknowledging that the Arbitrator is the final judge of facts, the Apex Court in State of Orissa and Another Vs. Kalinga Construction Co. (P) Ltd., held that the High Court erred in considering the matter as a court of appeal and in re-evaluating the evidence and that it further erred in recording a finding in reversal of the conclusions of the arbitrator. In Hindustan Tea Co. Vs. K. Sashikant Co. and Another, the Court held that the award of the Arbitrator ought not to be set aside for the reason that, in the opinion of the Court, the Arbitrator reached wrong conclusions or failed to appreciate the facts. That this was a well settled proposition of law was reiterated in the decision of the Apex Court in Coimbatore District Podu Thozillar Samgam Vs. Balasubramania Foundry and Others, where it has been opined that it is only an error of law and not a mistake of fact committed by the arbitrator which is justiciable in the application/objection

before the Court. If there is no legal proposition either in the award or in any document annexed with the award which is erroneous and the alleged mistakes or alleged errors, are only mistakes of fact and if the award is made fairly, after giving adequate opportunity to the parties to place their grievances in the manner provided by the arbitration agreement, the award is not amenable to corrections of the Court. Similar views were again expressed in *Indian Oil Corporation Ltd. Vs. Indian Carbon Ltd.*, ; *Jawahar Lal Wadhwa and Another Vs. Haripada Chakroberty*, ; *Puri Construction Pvt. Ltd. Vs. Union of India (UOI)*, ; *M/s. Sudarsan Trading Co. v. Government of Kerala and Anr.*, (1989) 2 SCC 30 ; *Food Corporation of India Vs. Joginderpal Mohinderpal*, where even a plausible view taken by the Arbitrator was held not to be open to Court interference. In *Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another*, the Court held that if the reasons appear per se to be not unreasonable and irrational the Court ought not to reappreciate the evidence. In *M/s. Hind Builders Vs. Union of India*, the Court cautioned that where two views were possible it could not be predicated that there was an error apparent on the face of the award. In *Bijendra Nath Srivastava (Dead) through LRs. Vs. Mayank Srivastava and others*, the view was expressed that the reasonableness of reasons given by the arbitrator were not open to challenge and that the proper approach would be for the Court to support the award. Similarly, in *The Hindustan Construction Co. Ltd. Vs. Governor of Orissa and others*, it was repeated that the Court cannot reappreciate the material on the record. In *Trustees of The Port of Madras Vs. Engineering Constructions Corporation Limited*, the decision of a Division Bench of the High Court of Madras, which reversed the Award on a question of fact and not a question of law, was set aside by the Supreme Court. After considering its previous decisions, the Apex Court in *B.V. Radha Krishna Vs. Sponge Iron India Ltd.*, again held that the Court could not substitute its own view in place of that of the Arbitrator. In *Army Welfare Housing Organisation Vs. M/s. Gautam Construction and Fisheries Ltd.*, the Court declined to vary an award for the reason that without re-appreciating evidence to would not be possible to fault the quantum awarded towards anticipated expenses. The very recent judgment in *Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd.*, , shall be dealt with below. If the Courts should abjure interference with an Award, a fortiori, it should be most reluctant to vary interim measures of protection passed by Arbitrators. One of the bulwarks against the routine exercise of jurisdiction by Courts is the manifest and expressed proscription of the A and C Act in this direction.

9. The next assault is founded on the learned Arbitrator's decision to defer the consideration of the Specific Relief Act to the stage of the final disposal of the arbitration. The stand of BALCO is that after expending a sum of Rs. 551 crores if the NTPC demand is to be met it may result in the entire project becoming commercially enviable, thereby making compensation in money an inadequate relief. The contract has already worked for over two years and it would be difficult to sustain the view that it belongs in that genre where, owing to it running into such minutes details it cannot be specifically performed. The

controversy essentially centres on the NTPC demand in monetary terms for continuing the arrangement prevailing prior to 31.3.2004. There is a sharp escalation in the rate of payments after March 2004, as also a discretion to NTPC to carry on the arrangement even for this period. A reading of the impugned Order leaves no manner of doubt that the learned Arbitrator had formed the opinion that delay was attributable to NTPC who would thus be profiting for its own defaults. For this very reason I am unable to detect any aspect of the obligations that the Court or the Arbitrator would be required to constantly supervise. So far as the determinable character of the contract is concerned no doubt a date had been stipulated by which alternate arrangements should have been in place. But this was dependent on bona fide performance of stipulations cast on NTPC. Moreover contract itself contained at least one extension thereby making it arguable that time was not of the essence. In *D.R. Sondhi and Ors. Versus Hella KG Hueck and Co. and Ors.* 2002 .L.R. 502 , a learned Single Judge had arrived at the conclusion that if on of the parties to the contract was in material breach of its obligations, then the contract was determinable by the issuance of a notice. Therefore an injunction had been declined. The learned Attorney General has also drawn attention to the opinion of the Apex Court in *Saw Pipes case (supra)*, inter alias to the effect that the Court can interfere with an award if it is contrary to substantive provisions of law or against the terms of the contract which have to be gathered from the words used in the agreement. The Court had been called upon to construe the phrase `public policy of India` which it did in these words-

31. Therefore, in our view, the phrase ""public policy of India"" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term ""public policy"" in *Renusagar case* it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

- (a) fundamental policy of Indian law; or
- (b) the interest of India; or
- (c) justice or morality, or
- (d) in addition, if it is patently illegal.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the

court. Such award is opposed to public policy and is required to be adjudged void.

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40. It cannot be disputed that for construction of the contract, it is settled law that the intention of the parties is to be gathered from the words used in the agreement. If words are unambiguous and are used after full understanding of their meaning by experts, it would be difficult to gather their intention different from the language used in the agreement. If upon a reading of the document as a whole, it can fairly be deduced from the words actually used therein that the parties had agreed on a particular term, there is nothing in law which prevents them from setting up that term (*Re; Modi and Co. v. Union of India.*) Further, in construing a contract, the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, there is very little the court can do about it. (*Re; Provash Chandra Dalui v. Biswanath Banerjee.*)

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52. Firstly, it is to be stated that in the aforesaid case the Court has not referred to the earlier decision rendered by the five-Judge Bench in *Fateh Chand* case or the decision rendered by the three-Judge Bench in *Maula Bux* case. Further, in *H.M. Kamaudding Ansari and Co. v. Union of India* a three-Judge Bench of this Court has overruled the decision in *Raman Iron Foundry* case and the Court while interpreting similar term of the contract observed that it gives wider power to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time may become due to the contractors under other contracts and the Court observed that clause 18 of the standard contract confers ample powers on the Union of India to withhold the amount and no injunction order could be passed restraining the Union of India from withholding the amount.

53. In the light of the aforesaid decisions, in our view, there is much force in the contention raised by the learned counsel for the appellant. However, the learned Senior Counsel Mr Dave submitted that even if the award passed by the Arbitral Tribuna is erroneous, it is settled law that when two views are possible with regard to interpretation of statutory provisions and/or facts, the court would refuse to interfere with such award.

54. It is true that if the Arbitral Tribunal has committed mere error of fact or law in reaching its conclusion on the disputed question submitted to it for adjudication then the court would have no jurisdiction to interfere with the award. But this would depend upon reference made to the arbitrator; (a) if there is a general reference for deciding the contractual dispute between the parties and if the award is based on erroneous legal proposition, the court could interfere; (b) it is also settled law that in a case of reasoned award, the court can set aside the same if it is, on the face of it, erroneous on the proposition of law or its application; and (c) if a specific question of law is submitted to the arbitrator, erroneous decision in point of law does not make the award bad, so as

to permit its being set aside, unless the court is satisfied that the arbitrator had proceeded illegally.

55. In the facts of the case, it cannot be disputed that if contractual term, as it is, is to be taken into consideration, the award is, on the face of it, erroneous and in violation of the terms of the contract and thereby it violates Section 28(3) of the Act. Undisputedly, reference to the Arbitral Tribunal was not with regard to interpretation of the question of law. It was only a general reference with regard to claim of the respondent. Hence, if the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere with the same.

56. Dealing with the similar question, this Court in *Alopi Parshad and Sons Ltd. v. Union of India* observed that the extent of jurisdiction of the court to set aside the award on the ground of an error in making the award is well defined and held thus: (At p.592, para 16)

""The award of an arbitrator may be set aside on the ground of an error on the face thereof only when in the award or in any document incorporated with it, as for instance, a note appended by the arbitrators, stating the reasons for his decision, there it found some legal proposition which is the basis of the award and which is erroneous-*Champsey Bhara and Co. v. Jivraj Balloo Spg. And Wvg. Co. Ltd.* If, however, a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point of law, does not make the award bad on its face so as to permit its being set aside - In the matter of an arbitration between King and Duveen, Re and Govt. of Kelantan v. Duff Development Co. Ltd.

Thereafter, the Court held that if there was a general reference and not a specific reference on any question of law then the award can be set aside if it is demonstrated to be erroneous on the face of it. The Court, in that case, considering Section 56 of the Indian Contract Act held that the Indian Contract Act does not enable a party to a contract to ignore the express provisions thereof and to claim payment of consideration for performance of the contract at rates different from the stipulated rates on some vague plea of equity and that the arbitrators were not justified in ignoring the expressed terms of the contract prescribing the remuneration payable to the agents. The aforesaid law has been followed continuously. (*Rajasthan State Mines and Minerals Ltd. v. Eastern Engg. Enterprises, Sikkim Subba Associates v. State of Sikkim and G.M., N. Rly v. Sarvesh Chopra.*)

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68. From the aforesaid discussions, it can be held that:

(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/ compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

(3) Section 74 is to be read along with Section 73 and, Therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of a contract.

(4) In some contracts, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

In these circumstances, and at this stage of the proceedings, I am unable to perceive any provision of the Specific Relief Act including Section 14(1) prohibiting the passing of interim measures of protection of the character of the impugned interim orders.

10. The question to be answered is this - was it impossible for the learned Arbitrator to interpret the contract between the parties and arrive at the conclusion that a rate other than Rs. 35/- per cubic meter could be ordered for supply of water. My opinion is that on a holistic reading of the contract it is prima facie evident that the agreement, aspirations, expectations and understanding between the parties was that consequent upon the privatisation of BALCO it would, with the active and bona fide cooperation of NTPC, become an independently functioning entity. Obligations rested on both parties, and the above objective could palpably not have been attained unless both worked honestly and harmoniously and in tandem. The dates which had been specified were predicated on a reasonable prognosis, and may not have been indicative of an intractably definite determinative date. There can be no gainsaying that in building contracts or any others requiring complex actions, the Court will not rigidly enforce the date on which the project is to be completed. This is especially so where one party has allegedly contributed towards the delay and seeks to profit from its default/conduct. Even if I were to come to a conclusion contrary to that of the learned Arbitrator it would be impermissible for me to substitute mine for plausible conclusion of the latter. This was not expected in the old legal regime of the 1940 Act and is certainly censured by the present A and C Act. I would be loathe to metamorphise or transform the consideration of objections to an award into a full blown appeal against it. The dicta in *Wander Ltd. and Anr. v. Antox India P. Ltd.*, 1990 SCC 727 applies a fortiori to the present jural exercise. The assault to the award on this ground is not accepted.

11. The learned Attorney General has drawn my attention to the decision in BALCO Employees Union (Regd.) Vs. Union of India and Others, wherein it has been observed that BALCO has been categorised as a non-core group industry. It has also been contended that NTPC, which has produced power for the country over the years, and continues to perform this duty, can command preferential considerations. Assuming this to be so, such preference cannot prevail upon a statutory right such as an easement. This subject has been argued in great detail, and shall now be dealt with.

12. In order to effectively decide the conundrum which has manifested itself in this dispute, the concept of an "easement of necessity" has to be understood in all its complexities and manifestations. Section 4 of the Easement Act, 1882 defines it as

""...a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own"". The statute thereafter clarifies that "" the land for the beneficial enjoyment of which the right exists is called the dominant heritage, and the owner or occupier thereof the dominant owner; the land on which the liability is imposed is called the servient heritage, and the owner or occupier thereof the servient owner"". The Section further explains that the expression ""beneficial enjoyment"" includes also possible convenience, remote advantage, and even a mere amenity; and the expression ""to do something"" includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage, or anything growing or subsisting thereon"". The Illustrations first gives the instance of an easement as that A, as the owner of a certain house, has a right of way thither over his neighbour B's land for purposes connected with the beneficial enjoyment of the house. Thereafter, Section 13 defines easements of necessity and quasi easements thus-

""13. Easements of necessity and quasi easements.-- Where one person transfers or bequeaths immovable property to another--

(a) if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b) if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or lessee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or

(c) if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement; or

(d) if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied be entitled to such easement.""

13. The decisions rendered in England around the time of the enactment of the Easement Act should be discussed as they will disclose the legal ethos which led to the enactment of the statute. *Pearson v. Spencer*, 1861 Q.B.1B. and S. 569 sets down that even if a particular passage has been enjoyed for a considerable period, upon a change in content or ownership of the entire property this right must be mentioned in the conveyance with the exception of land-locked property where it continues as a necessity. In *Wheeldon v. Burrows*, [1874] All 669 these principles had been expressed - ""On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed there will pass by implication to the grantee all those continuous and apparent easements and quasi easements which are necessary to the reasonable enjoyment of the property granted and have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant, save in the case of an easement of necessity the reservation of which will be implied. Otherwise no implication can be made of the reservation of an easement to the grantor"".

14. The foregoing decision was analysed in *Brown v. Alabaster*, (1886 B. 3051] 490 Chancery Division Vol. xxxvII. It seems to me to be of importance to underscore that the "back-way" was already in existence when the property was conveyed/demised in this case before the Chancery Division, which crystalised the law in this passage--

In *Wheeldon v. Burrows* (1), as is well known, the Court of Appeal drew a distinction on the much-contested question what rights were reserved to a grantor, and the distinction, as taken in the language of Lord Justice Thesiger, which has been much considered and approved of by other Judges, and which has been often quoted since, is this (2): ""We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean uasi-easements)""-- and the interpretation there interposed is necessary, because, where the owner of two tenements grants one of them, there can be no easement at the moment of the grant over the other tenement, the two tenements having belonged to one and the same person, and an easement being a right over the land of somebody else --""or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the

owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." That is the broad distinction which has been recognized, as far as I know, ever since, between the implied grant of an easement and the reservation of an easement.

15. In *Pwllbach Colliery Co., Ltd. v. Woodman*, [1914] All 124, the House of Lords has encapsulated the facts in these words - "By a lease of certain lands and premises dated Sept. 28, 1907, and made between F.G. and the Y. company, the Y company were authorised to put up works and erections and to carry on the trade of mining. By a sub-lease dated Aug. 8, 1908, the appellants became sub-lessees of the premises on the terms of the lease of Sept. 28, 1907. In 1909 F. G. demised to the respondent adjoining land on which the Respondent erected buildings which he used as a slaughterhouse, sausage factory, etc. In 1912 the appellants erected on their land buildings in which they broke, screened, and washed coal, thereby creating dust which the respondent alleged penetrated his buildings and damaged his meat and sausages therein. In an action by the respondent for an injunction restraining the appellants from continuing this course of action the jury found that what the appellants had done amounted to a nuisance, but that they had carried on their operations in a way which was reasonable and customary in the neighborhood". The following passage from the speech of Lord Atkinson justifies extraction-

Sir James Ingram in *Blakesley v. Whieldon* (6) founding himself on these two cases, laid down the law thus (1-Hare, at p.180):

"The general principle of law, that, where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principal subject effectual, does not admit of dispute."

In *Hinchiffe v. Earl of Kinnoul* (7) which was a case concerned with a right of way in which the jury had returned a special verdict, TINDAL, C.J., in delivering the judgment of a court composed of VAUGHAN, BOSANQUET, COLTMAN, JJ., and himself, said (5 Bing. N.C. at p.24):

"We are of opinion on the facts found in this special verdict, such right [i.e., the right of way] did pass as a necessary incident to the subject-matter actually demised."

He then cites the passage from PLOWDEN's COMMENTARIES already referred to, and says:

"TWISDEN, J., in *Pomfret v. Ricroft* (4) lays down the rule of law to be "when the use of a thing is granted everything is granted by which the grantee may have and enjoy such use. As if a man gives me a license to lay pipes of lead in his land to convey after to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me."

The special verdict had found that the right of way was not only convenient but

necessary for the use of the lessee's premises.

From these authorities it is, I think, clear that what must be implied is, not a grant of what is convenient, or what is usual, or what is common in the district, or what is simply reasonable, but what is necessary for the use and enjoyment, in the way contemplated by the parties, of the thing or right granted. Three cases, however, were cited by counsel for the appellants in support of their contention on this point. First, *Hall v. Lund* (1). In that case a lessee of a mill carried on for a number of years on the premises demised the trade or business of a bleacher. In the course of this business he discharged into a certain watercourse, the property of his Lesser, about seven times each fortnight, water used, and in the using fouled, in his works, thereby polluting the water in the watercourse. The lessee surrendered his lease, and a new lease was made by this same Lesser to a lessee described in it as a "bleacher," the premises demised being themselves described as the premises late in the occupation of the former lessee. By the last clause of the new lease it was provided that all buildings erected by the lessee for the purpose of carrying on the bleaching business should at the end of the term belong to the Lesser. It was held that there was an implied grant to the lessee of the right to use this watercourse, as the former tenant had used it, for the purpose of carrying on the bleaching business. That case, however, was wholly different from the present. Here the works causing the nuisance were erected and worked during the term. There was no user antecedent to the grant of the lease of any portion of these premises for a business such as the appellants carried on in them. The ground of the decision, as stated by MARTIN, B., shows that the case had no application to the present case. He said (1 H.C. at p. 681):

"In ascertaining what passes by a conveyance evidence may be given as to the state of the property at the time and the mode in which it was enjoyed."

16. It would be of advantage to refer the decision of the Privy Council, of over a century's vintage, in *Sultan Nawaz Jung versus Rustomji Nanabhoy Byramji Jijiboy*, 2nd 24 PC 156 where the provisions of the Easement Act came to be considered and interpreted as follows:

The Indian Easements Act, 1882, section 15, enacts that "where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, without interruption, and for 20 years... the right to such access and use... shall be absolute," and Explanation I says "nothing is an enjoyment within the meaning of this section when it has been had in pursuance of an agreement with the owner or occupier of the property over which the right is claimed, and it is apparent from the agreement that such right has not been granted as an easement." It was contended for the appellant that the matter here rested in negotiations and there was no agreement. Their Lordships do not agree to this; they think the fair inference from the letter of the 17th May 1865, is that the respondent accepted the promise in the letter of the 11th May, 1865, but wished for some alterations in the form of it which be left to the option of

Rustomji (165) Jamsetji Jijibhoy. This is confirmed by the letter on 4th September 1867, in which he refers to the correspondence and says that Rustomji Jamsetji Jijibhoy had agreed to throw no obstacle or hindrances of any kind whenever he required the windows to be blocked up. (This is not accurate, as the promise only related the respondent building his house higher, but it is probably what was meant.) Then he says that in his letter of the 17th May 1865, he asked for a more particularised paper to the above effect. This shows he considered that he had accepted the promise in substance, but wanted it to be in a different form. He then asked for an agreement or writing binding the appellant himself to block up the windows. This would be a different action from what is mentioned in the letter of 11th May, but having the same result. If this had been agreed to, it might have been contended that it was to be substituted for the other agreement, but it was not agreed to. The Appeal Court has found that there was an agreement in pursuance of which the appellant is allowed to enjoy the access of light and air through the windows on the south side of his house in return for which he promises that he will not raise any objection to those windows being blocked when the respondent should rebuild and raise his house, and the Judges say they were informed that the learned Judge at the trial in his oral judgment treated the letter of the 11th May as an agreement between the parties. Their Lordships are of this opinion, and they see no reason for holding that the respondent when he asked for the other agreement waived the performance of the promise in the letter of the 11th May 1865, or intended to abandon that agreement. Such negotiation as there was, related to the other proposed agreement. It appears to their Lordships that there was an agreement between the parties which prevented the enjoyment by the appellant of the access of light and air through the windows u/s 15 of the Easements Act, giving a right to an easement, and they will humbly advise Her Majesty to affirm the decree of the High Court in the appeal to it, and to dismiss this appeal. The appellant will pay the costs of it.

17. In *Daroga Lal and Others Vs. Devi Lal*, it has been observed that the principle established inter alias in *Wheeldon v. Burrows*, viz., "'when the property cannot be used at all and not where it is merely necessary to the reasonable enjoyment of the property'" has been incorporated into the Easement Act. The Court dismissed the plaintiff's suit because of the finding that the plaintiff could have opened a door towards the north for access to his share and hence an easement of necessity did not exist. In *Morla Gangulu and Another Vs. Thata Jagannatham and Others*, the DB discussed the same English precedent and held in favor of the plaintiff since it found sufficient evidence of an apparent, continuous and necessary easement. Thereafter, in *Hindusthan Co-operative Insurance Society Ltd. Vs. Secy. of State*, , the Division Bench has opined that in order to claim an easement of necessity the land conveyed should be surrounded on all sides by lands belonging to third persons, the only ingress and egress being through the contiguous land of the grantee.

18. The comparatively recent decision of the Court of Appeal in *Wong v.*

Beaumont Property Trust, [1964] 2 All 119. is also apposite and illuminating, and the following passage is worthy of reproduction--

""The question is: Has the tenant a right to put up this duct without the landlords' consent? If he is to have any right at all, it must be by way of easement and not merely by way of implied contract. He is not the original lessee, nor are the defendants the original Lessors. Each is a successor in title. As between them, a right of this kind, if it exists at all, must be by way of an easement. In particular, an easement of necessity. The law on the matter was stated by Lord Parker of Waddington in *Pwllbach Colliery Co., Ltd. v. Woodman*, where he said, omitting immaterial words:

""The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted ... is to be used ... But it is essential for this purpose that the parties should intend that the subject of the grant ... should be used in some definite and particular manner. It is not enough that the subject of the grant ... should be intended to be used in a manner which may or may not involve this definite and particular use.:

That is the principle which underlines all easements of necessity. If you go back to Rolle's Abridgment you will find it stated in this way:

""If I have a field inclosed by my own land on all sides, and I alien this close to another, he shall have a way to this close over my land, as incident to the grant; for otherwise he cannot have any benefit by the grant.""

I would apply those principles here. Here was the grant of a lease to the lessee for the very purpose of carrying on a restaurant business. It was to be a popular restaurant, and it was to be developed and extended. There was a covenant not to cause any nuisance; and to control and eliminate all smells; and to comply with the food hygiene regulations. That was ""a definite and particular manner"" in which the business had to be conducted. It could not be carried on in that manner at all unless a ventilation system was installed by a duct of this kind. In these circumstances it seems to me that, if the business is to be carried on at all--if, in the words of Rolle's Abridgment, the lessee is to ""have any benefit by the grant"" at all--he must of necessity be able to put a ventilation duct up the wall. It may be that in Mr. Blackaby's time it would not have needed such a large duct as is now needed in the tenant's time; but nevertheless a duct of some large kind would have had to be put up the wall. The tenant may need a bigger one. That does not matter. A man who has a right to an easement can use it in any proper way, so long as he does not substantially increase the burden on the servient tenement. In this case a bigger duct will not substantially increase the burden.""

19. It cannot possibly be contended that the learned Arbitrator could not have subscribed *prima facie* to the opinion that an easement of necessity existed in

favor of BALCO. There is more than merely an arguable case that unless the existing arrangements are continued the aluminium plant of BALCO would be brought down to its knees and that an easement of necessity has evolved, which is statutorily available, unless expressly excluded in the contract. It is not possible to accept the argument that the learned arbitrator would not have applied the law pertaining to easement of necessity. The jural approach on this point must be similar to that adopted on other issues, namely, that if the Arbitrator has arrived at a conclusion which is possible and permissible in the factual matrix then it would be inappropriate for the Court to foist another opinion in substitution to that of the Arbitrator. Therefore, I would decline to interfere with the interim measure of protection even in the content of the view on this subject which commended itself to the learned Arbitrator.

20. The petition and application are Therefore dismissed and all interim Orders are recalled.

21. The conclusions arrived at by me are founded only on a prima facie consideration and would not be relevant when the learned Arbitrator finally disposes of the dispute before him. The petition is dismissed but the parties shall bear their respective costs.