

(2010) 08 GAU CK 0060
In the Gauhati High Court
Case No : Criminal Appeal No. 247 of 2003

Tribal Cultivation and Harvesting Agencies	APPELLANT
Vs	
Dima Hasao Autonomous Council and Others	RESPONDENT

Date of Decision : 12-08-2010

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 21, 37, 9
Specific Relief Act, 1963 — Section 14, 14(3)(c)

Citation : (2012) 3 GLT 15

Hon'ble Judges : Arun Chandra Upadhyay, J

Bench : Single Bench

Advocate : B. Das, Mr. P. Kataki, Ms. S. Khataniar and Mr. D. K. Bagchi, for the Appellant; S.K. Medhi, SC, N.C. Hills, D.K Mishra, K. Goswami and Mr. R. Rajkaushik, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Upadhyay, J.—This appeal u/s 37 of the Arbitration and Conciliation Act, 1996, is directed against the impugned order dated 4.12.2010 passed by the Additional Deputy Commissioner, Dima Hasao, Halflong in Misc. Case No. 8/2010, whereby the interim injunction order was vacated. The facts leading to the filing of this appeal may be summarized, in brief, as follows-

The appellant as a partnership firm, having expertise in extracting/felling/handling and transporting raw materials for paper mills, entered into an agreement with the respondent No. 1, on 6.11.2008. In pursuance of the aforesaid agreement, the appellant, as a contractor, agreed to fell/extract/handle/transport and supply bamboos, for the Hindustan Paper Corporation (HPC). The said agreement agreed to continue the entrusted work in force and effect, for a period of 11 (eleven) years, with liberty to parties to terminate the agreement by serving three (3) months notice.

2. It is also stipulated vide clause 9.1 of the said agreement that in case of intended termination of contract, in the event of any dispute/controversy etc.

each party will appoint a representative within a period of 30 (thirty) days from the date of arising of the dispute. Thereafter, make an endeavour to resolve the dispute amicably within a period of 30 (thirty) days from the date of appointment of the representative or within such extended period, as may be amicably agreed to by the parties. It has also been agreed that no formal arbitration proceedings would commence, until internal dispute resolution procedure has been exhausted.

3. In terms of Clause 9.2 of the agreement, arbitration was agreed to be initiated in accordance with the provision of the Arbitration and Conciliation Act, 1996, by a sole, neutral arbitrator, agreed by the parties to the dispute, within 30 (thirty) days from the date of request by any party, to initiate arbitration or within such extended period agreed to by the parties to the dispute. However, in the case of failure to agree to appoint the sole arbitrator, it was agreed to be made in accordance with the provision of Arbitration and Conciliation Act, 1996 (hereinafter 1996, Act).

4. On 14.9.2010, the respondent No. 1 served a notice upon the appellant seeking an explanation as to why appropriate action should not be taken, for non-supply of bamboo to HPC Limited, as per the terms of the agreement. On receipt of said show cause notice, the appellant submitted reply on 22.9.2010, narrating detailed reasons, for non-performance of the terms of the contract with regard to the supply of bamboos. The appellant detailed the reasons, which included deteriorating road condition for movement of trucks in Meghalaya; Railway strikes from April, 2009 to May, 2009, and enormous extremist problems prevailing in the locality. However, work order bearing No. 2717-39 dated 7.8.2010, were issued in favour of the petitioner, for performance of the work in pursuance to the said agreement.

5. The appellant after having come to know from the reliable source that the respondent No. 1 is intending to terminate the agreement in order to engage a third party, in violation of clause 9.2 of the said agreement, preferred an application u/s 9 of the Arbitration and Conciliation Act, 1996, before the Court of Deputy Commissioner, Dima Hasao, being Misc. Case No. 8/2010, praying for execution of terms of the agreement aforesaid. The Additional Deputy Commissioner, Dima Hasao, Halflong, on consideration of the said application passed an order dated 2.11.2010, to show cause as to why prayer made by the applicant should not be granted to prevent the respondent No. 1 from violating the terms and conditions of the agreement and as an interim measure, the respondent No. 1 was restrained from doing any act in violation of the terms of the said agreement till the next date fixed for hearing i.e. on 2.12.2010.

6. The appellant thereafter, on 2.11.2010, received a letter of termination of agreement, for non-supply of requisite quantity of bamboo, as per the terms of the agreement dated 6.11.2008. On 4.12.2010, an application was filed by the respondent No. 1 for vacation/modification of the exparte interim order dated 2.11.2010, passed by the Additional Deputy Commissioner, Dima Hasao, Halflong, in Misc. Case No. 8/2010. Accordingly, the learned Additional Deputy

Commissioner, Dima Hasao, Halflong, vide order dated 4.12.2010, vacated the order of injunction on the ground that Clause 6.3 of the agreement stipulated that both the parties had agreed that the contract can be terminated at any time by giving three (3) months notice. The operative extract of the impugned order dated 4.12.2010, reads as follows -

I have also read Clause 6.3, which shows that both parties agreed that the appointed can be terminated at any time by giving three months notice. I have also seen the termination notice. Since Dima Hasao Autonomous Council has terminated the agreement as per the terms and conditions of the agreement, the action of the applicant cannot be faulted with. The learned Advocate appearing for Council has also submitted that the interim order passed by this Court, if is allowed to continue, will cause severe revenue loss to the State. Since, the whole apprehension of Tribal Cultivation and Harvesting Agency was that the applicant is likely to terminate the agreement without giving them the requisite notice, I find that in view of the fact that the applicant has already terminated the agreement giving them the required notice under the terms and conditions of the agreement.

In fact, the two paper mills, being the Public Sector Undertakings, which concerns large scale functioning, are depending mainly on the appropriate, proper and regular supply of raw material i.e. bamboo. Hence, after careful consideration of the matter and after going through the papers submitted by both the party as well as after hearing of submission made by the learned Advocates of both the party, the Tribal Cultivation and Harvesting Agency was unable to fulfill the terms and conditions of the agreement and hence I find that there is no merit/ground for keeping further extension of injunction order passed by this Court dated 2.11.2010.

Therefore it is ordered that the injunction order dated 2.11.2010 passed by this Court stands vacated.

7. It has been submitted on behalf of the appellant that in terms of the Force Majeure clause in the agreement, even if the appellant Contractor failed to perform the contract, he would not be responsible and he would be exempted from performing the agreement during the Force Majeure period. Therefore, the termination of contract is being illegal, the vacation of the injunction by the learned Court below is liable to be set aside.

8. Learned counsel for the appellant vehemently submitted that different correspondences amongst the appellant, the respondent Council and the Paper Mills, clearly show that at the relevant period, the appellant was unable to supply required quantity of bamboo, due to insurgent activities prevailing in the District, leading to the disturbance in road and Railway communication. In reply to the show cause issued by the respondent Council, the appellant also stated to have informed by referring to different correspondences between the parties, contending inter-alia, that regular supply was disrupted due to the insurgent

activities and that the appellant would make best effort to continue the supply of bamboos as before. However, the respondent Council having been dissatisfied with the reply, terminated contract with the appellant by giving 90 days notice.

9. Learned counsel for the appellant emphasized on the fact that breach of any of the terms of contract during the continuance of Force Majeure Clause, could not have given rise to grounds for termination of the contract. Therefore, the termination of contract by the respondent being not valid in the eye of law, the appellant is entitled to interim relief as prayed for, to resume the work entrusted by the respondents

10. Mr. D.K. MKisra, learned counsel for the respondent No. 1 however, submitted that since the performance of the appellant in supplying the allotted quantities of bamboo was very poor in the Nagaon Paper Mill of Jagiroad and Cachar Paper Mill of Panchgram, the respondent No. 1 expressed their grave concern because of disruption in supply drastically affected their production process. Further more, poor supply of bamboo by the appellant simultaneously resulted into negative trend for the Council in accumulating revenue.

11. Learned counsel for the respondent No. 1 further submitted that the appellant had entered into an agreement with the respondents knowing fully well the prevailing situations and the disturbances in the locality. The decision to terminate the contract was taken after considering all these aspects of the matter in the Executive Committee Meeting of the respondent No. 1, since the Council failed to fulfill its demand for supply of bamboo to the Central Government Public Sector Units due to the failure of the appellant. Consequently, in terms of the provision of Clause 6.1 of the agreement, the respondent Council finally had to terminate their agreement with the appellant

12. Before we embark on to discussion of the issues raised by the learned counsel for the appellant as well as the respondents, it would be in fitness of things to extract herein below, the relevant terms and conditions of the contract signed between the parties, which read as follows -

TERM AND TERMINATION

6.1 Subject to the provisions of clause 8.1 below regarding gregarious flowering this agreement shall continue in forced effect for a period of 11 (eleven) years from the commencement date.

6.2 Either party shall have right to renew this agreement on such terms and conditions which shall be mutually agreed. However, if the Council decided to make fresh agreement upon expire of this agreement, it shall give the first preference to the Contractor and only after obtaining refusal (which refusal shall be communicated within 30 days of the Council expressing of this nature with another party).

6.3 That the parties shall have the right to terminate the agreement with 3 (three) months notice. The rights and obligations of the parties on such

termination shall be determined mutually, failing which, it shall be determined by arbitration as stated later in this agreement.

9.1 In the event of any dispute, controversy or claim arising out of or relating to this agreement including, without limitation, the breach, intended termination performance, validity or invalidity, interpretation or application of this agreement or as to the rights duties or liabilities of the parties hereunder (each a "Disputer") each party will appoint a representative for the purpose of endeavouring to amicably resolve such dispute. The representative shall be appointed within a period of 30 (thirty) days from the date of occurrence of the dispute. The parties shall endeavour to resolve such dispute amicably within 30 (thirty) days from the date of appointment of the last of the representatives or within such extended period as may be mutually agreed to between the parties to the dispute. No formal arbitration proceedings shall commence until this internal dispute resolution procedure has been exhausted.

9.2 The arbitration shall be in accordance with the provision of the Arbitration and Conciliation Act, 1996 by a sole, neutral arbitrator agreed by the parties to the dispute within 30 (thirty) days from the date of a request by any party to initiate arbitration (or such extension period agreed by the parties to the dispute). In case there is no agreement on sole arbitrator shall be made in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The venue of the arbitration shall be at Halflong. The decision of the Arbitrator shall be final and binding.

FORCE MAJEURE

10.1 The Contractor shall not be held liable for non performances and/or any losses if the fulfillment of any term and provision of this agreement are delayed or prevented or failed owing to any act of nature or act of law full Government, revolution, direct or indirect consequences of war, declare or undeclared, hostilities, national emergency, flood, riot, strikes, civil or military commotion, lockouts, fire, earthquake or other cases, including insurgency related activities which are prevailing in the entire North East India at present, not within the control of the Contractor. If the Contractor is constrained to invoke this Force Majeure clause then it will inform the Council immediately about the reasons of invoking the Force Majeure clause and the Contractor will be exempted from performing the agreement during the Force Majeure period and the Council will not lodge and any claim nor will demand nor be entitled to any royalty during the period.

10.2 NOTICE

Any notice or the order communication required to be given here under shall be in writing and given by post or facsimile at the addresses contained in this agreement or such other address as shall be notified by either party to the other for the purpose of this agreement.

13. On plain reading of the aforesaid terms and conditions of the agreement, it is apparent that the contract was for a period of 11 years and both the parties had the right to terminate the contract by giving 90 days notice. In terms of the clause 4, the Contractor is exempted by the respondent Council from performing the contract, on the ground of Force Majeure and during the Force Majeure period, the respondent Council would not lodge any claim, nor demand royalty.

14. Learned counsel for the appellant submitted that parties were well aware of the disturbed political situation attended by insurgent activities in the surrounding areas of operation, disrupted supply of bamboo, thereby, frustrate the contract, but for no fault of the Contractor. It is in these circumstances, with a view to avoid the change and to protect the interest of both the parties, Force Majeure clause was incorporated in the contract, under which parties agreed to exempt, the Contractor from performing the contract during the period of Force Majeure. Learned counsel for the appellant further pointed out that it was clear in the mind of the parties that contract is to continue its full term i.e. for the period of 11 years and the failure to perform the contract in between, for any ground specified in Force Majeure clause of the agreement, would not stand in the way.

15. According to the appellant it is not conceivable that the agreement, which was executed with a precondition of protecting non performance of the contract, on the ground of Force Majeure, could have been applied as an weapon to terminate the contract.

16. Learned counsel for the appellant submitted that the object of the contract and the surrounding circumstances, ascertain with certainty that the intention of the parties was not to exercise the right to terminate, even if there is violation, in terms of Clause 6.3 of the contract during continuance of Force Majeure, as detailed in clause 10.1.

17. M.B.C. Das, learned senior counsel appearing for the appellant, submitted that a harmonious interpretation of the term leads to the conclusion that the contract could not be terminated by invoking clause 6.1, since the intention of the parties was not to terminate the contract on the plea of failure to perform the contract if such failure was due to the insurgency etc. covered by Clause 10 of the contract. Mr. Das, learned senior counsel pointed out that from the clause of the agreement, it is well nigh clear that the contract, may be liable to be terminated only on reasonable ground beyond Force Majeure.

18. The term Force Majeure is a French version of relative expression Vis-Major, but its wider connotation and analysis would reflect that where reference is made to Force Majeure, the intention is to save the performing party, from the consequences of anything, over which he would have no control. The concept of Force Majeure is a device by which even continuance of business does not get frustrated, if it is beyond control of the parties. Therefore, as a logical conclusion, Mr. Das, learned senior counsel submitted that it was the intention of the parties to save the contract at all cost, any termination on any of the grounds caused by

Force Majeure will be arbitrary and not sustainable in law.

19. Learned counsel for the appellant pointed out section 9 of the Arbitration and Conciliation Act, 1996, provides for interim protection to a party in respect of a dispute, which is subject to arbitration. Therefore, interim relief is available from the Court even before the commencement of the arbitration proceedings. The only condition which is required to be satisfied is existence of a valid arbitration agreement and the intention of the appellant to carry the dispute to arbitration. The Section 9 of the Arbitration and Conciliation Act, 1996 provides as follows -

9. Interim measures, etc. 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 authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing 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.

20. Learned counsel for the appellant further submitted that the appellant has a very good case for setting aside the termination of the contract by the Arbitrator since he has invested a huge amount of money besides men and material. Over and above the termination of the contract would cause irreparable loss to injury. Further more; the balance of inconvenience is in favour of the appellant for grant of interim order in his favour. In support of his contention, learned counsel for the appellant has relied on the decision reported in (2009) (5) SCC 313 : Bank of India Vs. K. Mohandas, the Hon"ble Supreme Court held in Para 28 and 31 is as follows -

28. The true construction of a contract must depend upon the import of the

words used and not upon what the parties choose to say afterwards. Nor does subsequent conduct of the parties in the performance of the contract affect the true effect of the clear and unambiguous words used in the contract. The intention of the parties must be ascertained from the language they have used, considered in the light of the surrounding circumstances and the object of the contract. The nature and purpose of the contract is an important guide in ascertaining the intention of the parties.

31. It is also a well-recognized principle of construction of a contract that it must be read as a whole in order to ascertain the true meaning of its several clauses and the words of each clause should be interpreted so as to bring them into harmony with the other provisions if that interpretation does no violence to the meaning of which they are naturally susceptible,

21. Mr. D.K. Mishra, learned senior counsel appearing for the respondents in reply to the contention made by the learned counsel for the appellant submits that in a contract between the parties, when a clause for termination of contract is incorporated, it would imply that failure of any of the parties would result in termination of contract. More so, although the contract was signed for a period of 11 years from the date of commencement, never the less, either party was given the option to terminate the agreement with three (3) months notice. The right to terminate the contract was made available in the agreement, on the teeth of the Force Majeure clause, which therefore, clearly indicated that despite Force Majeure, the parties were at liberty to terminate the contract.

22. Mr. Mishra, further contended that no such intention as emphasized by the learned counsel for the appellant has been inserted in any of the clauses of the agreement between the parties, to save the contract arbitrarily, despite failure of the parties to carry out the terms of the contract. Learned counsel for the respondent pointed out that had the parties been having intention not to terminate the contract for any of the reasons indicated in Force Majeure then it would have received some consideration and in that case it would have been definitely reflected somewhere in the termination clause of the contract. Apparently there is no indication of any restrictions in the termination clause of the contract to save termination during the period of Force Majeure. The clause Force Majeure incorporated in the agreement is meant to save the parties from the liability, which could entail on the failure of any of the parties to execute the contract. The clause Force Majeure brought forth does not steal away the right of the parties to terminate the agreement with three (3) months notice. Learned counsel for the respondent pointed out that it was due to miserable performance of the appellant. Consequent failure to meet the requirement of supply and especially loss of revenue compelled the respondent to terminate the agreement.

23. In the case of *Dhanrajamal Gobindram Vs. Shamji Kalidas and Co.* reported in (1961) SC 1285, the Apex Court held that the "expression "force majeure"" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could

legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties."

24. Therefore, contemplation of the parties entering into contract is essential element to discern the relationship. If existence of such a situation of deemed violation of the terms of contract is disputed or questioned or is doubtful "Force Majeure" cannot be applied unilaterally, by either party. If dispute is raised regarding existence or applicability in a given situation of "Force Majeure", the same will have to be decided in accordance with law.

25. The Supreme Court in the case of Arvind Constructions Co. (P) Ltd. Vs. Kalinga Mining Corporation reported in (2007) 6 SCC, held that:

the power u/s 9 of the Act is independent of the Specific Relief Act or that the restrictions placed by the Specific Relief Act cannot control the exercise of power u/s 9 of the Act cannot prima facie be accepted. The reliance placed on Firm Ashok Traders v. Gurumukh Das Saluja(Supra) in that behalf does not also help much, since this Court in that case did not answer that question finally but prima facie felt that the objection based on Section 69(3) of the Partnership Act may not stand in the way of a party to an arbitration agreement moving the court u/s 9 of the Act. The power u/s 9 is conferred on the District Court. No special procedure is prescribed by the Act in that behalf. It is also clarified that the court entertaining an application u/s 9 of the Act shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it. Prima facie, it appears that the general rules that governed the court while considering the grant of an interim injunction at the threshold are attracted even while dealing with an application u/s 9 of the Act. There is also the principle that when a power is conferred under a special statute and it is conferred on an ordinary court of the land, without laying down any special condition for exercise of that power, the general rules of procedure of that court would apply. The Act does not prima facie purport to keep out the provisions of the Specific Relief Act from consideration.

26. In the case of 2004 (2) GLT 165 in AIA Enterprise & 0 Anr. Vs. Guwahati Metropolitan Development Authority & Ors. it has been observed that when a contract between the parties for a specified period is made terminable on the happening of certain events, without any clause for termination such a contract is not determinable in nature. The relevant extract of the decision reads as

follows -

The rival submission advanced on behalf of the parties has been duly considered. In *Indian Oil Corporation Vs. Amritsar Gas Service* (1991) 1 SCC 537. There were two clauses in the agreement which visualized cessation thereof. Under Clause 27, the contract was terminable on the happening of certain contingencies whereas under Clause 28, the contract was terminable at the volition of either party by giving 30 days notice. The Indian Oil Corporation had terminated the contract with Amritsar Gas Service by invoking Clause 27. The Arbitrator to whom, a reference of the dispute was made, held clause 27 to be not applicable as the occurrence of the contingencies for application of Clause 27, was held by the learned Arbitrator to have been wrongly decided by the Indian Oil Corporation. On that basis, restoration of the contract was ordered by the Arbitrator. A careful perusal of the judgment of the Apex Court in the above case reveals that the Apex Court held that restoration of the contract could not have been ordered as Clause 28 provided for termination of the contract between the parties merely by giving of 30 days notice by either party. It is, by relying on the aforesaid law laid down by the Apex Court, that the rationale behind the statutory bar imposed by section 14 of the Specific Relief Act was sought to be understood by this Court in *Star India - Vs - Arup Bora* (supra). In the said case also, the contract was terminable on the happening of certain contingencies or by giving of requisite notice by either side without any such contingency occurring.

27. In the instant case, the contract between the parties was made terminable at the option or wish on violation of either of the parties. In the absence of disagreement to continue the contract was to run for its full duration of 11 years. But, when there is a provision in the contract agreement, for its termination at the volition of the parties, there cannot be forcible continuance of such contract when the option for termination of the contract has been exercised by one of the parties in terms of the agreement.

28. In the case of *Syed Khursed Ali Vs. State of Orissa and Another*, it has been held as follows -

12. It is clear from the facts of the case that the agreement entered into between the parties became impossible to perform as well as unlawful and, thus, amounted to frustration of the same. No doubt provisions of Section 56 of the Contract Act, 1872, as quoted above, does not cover every case of frustration but it applies to a subsequent unforeseen event or contingency for which, neither of the parties is responsible. Giving regard to the nature and circumstances of the transaction and implied terms, no doubt is cast in the present case that the performance of the contract on the part of the petitioner became impossibility and such impossibility can be brought within the fold "Force Majeure".

In the case of *Sundaram Finance Ltd. Vs. NEPC India Ltd* reported in (1999) 2 SCC 479, an important question which arises for consideration in these cases is whether u/s 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred

to as

the 1996 Act"), the court has jurisdiction to pass interim orders even before arbitral proceedings commence and before an arbitrator is appointed.

The Supreme Court held as follows -

13. Under the 1996 Act, the court can pass interim orders u/s 9. Arbitral proceedings, as we have seen, commence only when the request to refer the dispute is received by the respondent as per Section 21 of the Act. The material words occurring in Section 9 are "before or during the arbitral proceedings". This clearly contemplates two stages when the court can pass interim orders, i.e., during the arbitral proceedings or before the arbitral proceedings. There is no reason as to why Section 9 of the 1996 Act should not be literally construed. Meaning has to be given to the word "before" occurring in the said section. The only interpretation that can be given is that the court can pass interim orders before the commencement of arbitral proceedings. Any other interpretation, like the one given by the High Court, will have the effect of rendering the word "before" in Section 9 as redundant. This is clearly not permissible. Not only does the language warrant such an interpretation but it was necessary to have such a provision in the interest of justice. But for such a provision, no party would have a right to apply for interim measure before notice u/s 21 is received by the respondent. It is not unknown when it becomes difficult to serve the respondents. It was, therefore, necessary that provision was made in the Act which could enable a party to get interim relief urgently in order to protect its interest. Reading the section as a whole it appears to us that the court has jurisdiction to entertain an application u/s 9 either before arbitral proceedings or during arbitral proceedings or after the making of the arbitral award but before it is enforced in accordance with Section 36 of the Act.

19. When a party applies u/s 9 of the 1996 Act, it is implicit that it accepts that there is a final and binding arbitration agreement in existence. It is also implicit that a dispute must have arisen which is referable to the Arbitral Tribunal. Section 9 further contemplates arbitration proceedings taking place between the parties. Mr. Subramaniam is, therefore, right in submitting that when an application u/s 9 is filed before the commencement of the arbitral proceedings, there has to be manifest intention on the part of the applicant to take recourse to the arbitral proceedings if, at the time when the application u/s 9 is filed, the proceedings have not commenced u/s 21 of the 1996 Act. In order to give full effect to the words "before or during arbitral proceedings" occurring in Section 9, it would not be necessary that a notice invoking the arbitration clause must be issued to the opposite party before an application u/s 9 can be filed. The issuance of a notice may, in a given case, be sufficient to establish the manifest intention to have the dispute referred to an Arbitral Tribunal. But a situation may so demand that a party may choose to apply u/s 9 for an interim measure even before issuing a notice contemplated by Section 21 of the said Act. If an application is so made, the court will first have to be satisfied that there exists a

valid arbitration agreement and the applicant intends to take the dispute to arbitration. Once it is so satisfied, the court will have the jurisdiction to pass orders u/s 9 giving such interim protection as the facts and circumstances warrant. While passing such an order and in order to ensure that effective steps are taken to commence the arbitral proceedings, the court while exercising jurisdiction u/s 9 can pass a conditional order to put the applicant to such terms as it may deem fit with a view to see that effective steps are taken by the applicant for commencing the arbitral proceedings. What is apparent, however, is that the court is not debarred from dealing with an application u/s 9 merely because no notice has been issued u/s 21 of the 1996 Act.

29. Therefore, a party may choose to apply u/s 9 of the Arbitration and Conciliation Act for interim measure even before issuing notice contemplated u/s 21 of the said Act, if the Court is satisfied that there is a valid arbitration agreement and the parties intend to take the dispute to arbitration.

30. Learned counsel for the respondent pointed out that the terms of the agreement allowed the respondent Council an exclusive right to terminate the agreement by giving three months notice, without giving any reasons whatsoever. However, the Council afforded adequate opportunity to the appellant to show cause the reasons, for miserably failing to supply the requisite quantity of bamboos to the two mills of HPC. After issuing the aforesaid show cause the respondent Council came to know that the two mills of HPC, are on the verge of closure due to non-supply of bamboo by the appellant thus compelling the respondent Council to take appropriate action against the appellant,

31. Learned counsel for the respondent Council submitted that the respondent Council was under an obligation in terms of the agreement with HPC, to supply requisite quantity of bamboo and in the event of failure penalty was stipulated. Considering the miserable performance by the appellant and the consequences thereof, especially the loss of revenue, the respondent Council as per clause 6.3, decided to terminate the agreement with the appellant.

32. Learned counsel for the respondent submitted that under clause 6.3 of the agreement, the rights and obligations of the parties, on such termination, would be determined mutually, failing which, it shall be determined by arbitration as stated in clause 9. Therefore, the party who approaches the Court for interim protection u/s 9 of the Act, before the commencement of the arbitral proceedings, must show and satisfy the Court, its manifest intention to invoke the arbitration clause. As pointed out on behalf of the respondent in the instant case, interim order is sought for the appellant only to protect the termination of the contract under the protective umbrella of Force Majeure. However, the respondent could not afford to remain dormant and loose its revenue.

33. Section 9 of the Act, empowers the Court to grant interim measures only to prevent a party to arbitration proceedings wasting the properties involved in the arbitration proceedings and defeating any award passed therein. The right of the

parties under the said agreement is determinable and the issue of intended termination or the termination itself is the subject matter of reference under arbitration. In case the appellant proves that the termination is bad, he can be adequately compensated, therefore, no interim protection can be justified. Since the loss is not irreparable and/or immeasurable. Further, u/s 9, the Court cannot grant interim orders restraining the Council to continue with contractual agreement despite allegations of total failure to carry out the terms of the agreement by the appellant due to incapacity and loss of manpower and resources. If there is any violation, it is within the realm of the Arbitral Tribunal to decide on merit. Apparently, the Council acted in terms of the agreement.

34. There is no scope to order for continuance of a contract, which is determinable in nature when, the loss, if any that may be sustained by the appellant, can be calculated in terms of money, since Section 14(3)(c) of the Specific Relief Act, 1963 prohibits an order as prayed for by the appellant.

35. As rightly pointed out by the learned counsel for the respondent Council, if the application of Force Majeure clause in the agreement is required to be considered to determine the issue of termination of contract, the immediate issue for consideration would be, whether during the subsistence of the agreement, at any point of time the appellant was prevented to perform his part of the contract, due to any act of insurgency related activities. Obviously by showing one or two documents the appellant cannot discharge or escape its burden to prove that it was due to insurgency related activities, he was prevented from supplying requisite/adequate number of bamboo to the papers mills of HPC.

36. Since the respondent Council on the contrary alleged that the contractor could not make the requisite supply and miserably failed to perform its commitments due to its lack of resources, infrastructure and inefficiency, the question of application of Force Majeure clause to save the contract is apparently a disputed fact.

37. Therefore, the aforesaid disputed facts cannot be the subject matter before this Court. In order to consider such questions, this Court cannot venture to go into the merit of the respective claims made on factual back ground. Such an exercise at this stage of the proceedings would not be appropriate and legal.

38. Apparently, on careful reading of the clause 10, of the agreement it appears that if the Contractor desires to invoke Force Majeure clause it would inform the respondent immediately about the reasons for invoking the Force Majeure and the Contractor will be exempted from the performing the agreement during the Force Majeure period and the Council would not lodge any claim nor will demand nor be entitled to any royalty during the period.

39. On a plain interpretation of the Force Majeure in the agreement, it appears that the Contractor has to invoke the Force Majeure clause. The reasons so shown by the Contractor apparently will have to be accepted by the respondent No. 1 Council. When the reasons are not accepted by the respondent Council, on

definite ground of failure of the Contractor to perform his part of the contract, the obvious outcome would be dispute and dissidence between the parties, which resulted in termination of contract. In facts asserted by one party to the agreement is disputed by the other, such dispute has to be resolved either by amicable settlement or by adjudication by Arbitral Tribunal.

40. Upon careful analysis of the entire facts and circumstances as discussed above, it appears that the contract between the appellant and the respondent has been terminated by the respondent No. 1 by exercising his right under Clause 6.3 of the agreement, after having considered the show cause submitted by the appellant, therefore, there is no scope to set aside the termination of the agreement to put in place and restore the contract between the parties, in terms of the provision of Section 9 of the Arbitration and Conciliation Act.

41. In my considered view the agreement being determinable and the respondent Council having terminated the agreement as per the procedure contemplated in the agreement, the interim order passed is not liable to be vacated. In fact an application u/s 9 of the Act seeking interim direction is wholly misconceived and not maintainable in law in view of the fact that the subject agreement is determinable and therefore no interim direction, for continuance of the contract under the agreement can be ordered. In view of the above discussion, I am of the considered view that the appeal is devoid of merit, accordingly, it is dismissed. There shall be no order as to costs.