Ksl & Industries Ltd vs National Textiles Corporation Ltd on 14 August, 2012

Author: Vipin Sanghi

Bench: Vipin Sanghi

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 11.01.2012

% Judgment delivered on: 14.08.2012

\+ O.M.P. 581/2010

KSL & INDUSTRIES LTD ..... Petitioner
Through: Mr. Krishnan Venugopal, Sr. Adv. with Mr. Madhav Khurana & Mr. Siddartha, Advocates.

versus

NATIONAL TEXTILES CORPORATION LTD ..... Respondent
Through: Mr. Parag Tripathi, ASG with Mr. A.K.Singh, Mr. S.K.Singh, Mr. Sanjoy Ghosh, Mr. Vinod Sharma, Ms.Toshika Katare & Ms. Monisha Handa, Advocates.

\+ O.M.P. 586/2010

JAYBHARAT TEXTILES AND REAL ESTATE LTD ..... Petitioner
Through: Mr. Krishnan Venugopal, Sr. Adv. with Mr. Madhav Khurana & Mr. Siddartha, Advocates.

versus

NATIONAL TEXTILES CORPORATION LTD ..... Respondent
Through: Mr. Parag Tripathi, ASG with Mr. A.K.Singh, Mr. S.K.Singh, Mr. Sanjoy Ghosh, Mr. Vinod Sharma, Ms.Toshika Katare & Ms. Monisha Handa, Advocates.

\+ O.M.P. 587/2010

ESKAY K'N'IT (INDIA) LTD ..... Petitioner
Through: Mr. Krishnan Venugopal, Sr. Adv. with Mr. Madhav Khurana & Mr. Siddartha, Advocates.

versus

NATIONAL TEXTILES CORPORATION LTD ..... Respondent

Through: Mr. Parag Tripathi, ASG with Mr. A.K.Singh, Mr. S.K.Singh, Mr. Sanjoy Ghosh, Mr. Vinod Sharma, Ms.Toshika Katare & Ms. Monisha Handa, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

JUDGMENT

VIPIN SANGHI, J.

1. The present three petitions have been preferred by the petitioners KSL and Industries Ltd. (KSL), Jay Bharat Textile and Real Estate Ltd. (Jay Bharat) and Eskay K „n it (India) Ltd. (Eskay) under section 9 of the Arbitration and Conciliation Act, 1996 to seek the following reliefs:

> (a) Stay of the letter dated September 14, 2010 issued by respondent, terminating the MOU dated November 14, 2008 entered into between each of the three petitioners and the respondent National Textile Corporation Ltd. (NTCL).
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> (b) A direction to NTCL not to create any third party right/interest in, and not to dispose off any land machinery and/or any fixed assets of the 11 Textile Mills covered by each of the MOUs (5 covered by the MOU with KSL, 4 covered by the MOU with Eskay and 2 covered by the MOU with Jay Bharat)
>
> (c) Direct the NTCL to take all such steps that are necessary to preserve the value of the 11 textile Mills and to furnish a full and complete discharge of all its obligations under the MOU.

2. Since the facts of the three cases are identical; the respondent is common, and common arguments have been advanced in respect of them, I am disposing of these petitions by this common order. For the sake of convenience, I am dealing with, and would refer to the facts of KSL. The position, on facts, of the other two petitioners is no different. Case of the petitioner as pleaded

3. KSL, the petitioner claims to be a company engaged in the business of textiles and real estate. The respondent NTCL is a Central Public Sector Enterprise under the Ministry of Textiles, which was incorporated for managing the affairs of sick textile undertakings in the private sector, taken over by the Government. NTCL owned several textile mills for which proceedings before the Board for Industrial and Financial Reconstruction (BIFR) were pending. BIFR approved the restructuring scheme filed by NTCL, wherein BIFR had also, in principle, approved the revival of certain existing textile mills of NTCL through the joint venture route.

4. Pursuant to the mandate approved by the Government of India, a Request For Proposal (RFP) was issued by the NTCL on May 13, 2008 inviting bids for private participation to form a joint venture along with NTCL for reviving several textile mills located across India, wherein, NTCL was to hold 51% of the issued, subscribed and paid up equity share capital of such joint venture company. KSL along with other participants participated in the technical and financial bidding process held during June-July 2008. KSL along with two of its group companies, namely Eskay and Jay Bharat were declared as successful bidders for forming the joint ventures with NTCL for owning, operating and running of 11 textile mills. Out of these 11 textile mills, KSL was declared successful in respect of five textile mills. NTCL agreed to incorporate a joint venture company with KSL for revival of the said five mills. The details of the mills, in respect whereof each of the petitioners came out successful are as follows:

> i) KSL - RBBA Spinning & Weaving Mills, Savatram Ramprasad Mills, Chalisgaon Textile Mills, Dhule Textile Mills and Nanded Textile Mills;
>
> ii) Eskay - Swadeshi Cotton Mills, Laxminarayan Cotton Mills, Sodepur Cotton Mills, Orissa Cotton Mills;
>
> iii) Jaybharat - Parvathi Mills and Sri Sarda Mills.

5. Considering the formalities to be completed before the execution of the Definitive Agreement for handing over the Textile Mills to the said Joint Venture Company, KSL and NTCL entered into a Memorandum of Understanding (MOU) dated 14th November, 2008, broadly setting out the respective obligations of the parties, along with the necessary steps to be taken by each of them to complete the transaction. Similar MOUs were executed by Eskay and Jay Bharat with NTCL. The relevant extracts of MOU are as follows:

> "WHEREAS:
>
> A. The Board for Industrial and Financial Reconstruction (BIFR) has approved the restructuring scheme filed by NTC, wherein it has also in principle approved the revival of certain existing textile mills of NTC located across India, through joint venture route.

B. Thereafter pursuant to the mandate approved by the Group of Ministers (GoM) appointed by the Government of India, a Request for proposal was issued by NTC on May 13, 2008 for inviting bids for private participation to form a joint venture along with NTC for reviving/modernizing the said textile mills, with NTC holding 51% of the issued, subscribed and paid up equity share capital of such joint venture company.

C. Based on the bids submitted by various private parties, the Strategic Partner, has on October18, 2008 been declared as the successful bidder for forming joint venture with NTC, holding 49% of the issued, subscribed and paid up equity share capital of the joint venture company, for owning, operating, running of the following mills (hereinafter individually and collectively, as the case may

be referred to as "said Textile Mill)):

1. RBBA Spg. & Wvg. Mills, Post Box No. 6, Hinganghat-442301

2. Savatram Ramprasad Mills, Tilak Road, Akola- 444001.

3. Chalisgaon Textile Mills, Chalisgaon-424101

4. Dhule Textile Mills, Dhule-424001

5. Nanded Textile Mills, Nanded-431601.

D. Accordingly, NTC has agreed to incorporate a company, which will act as the joint venture vehicle inter se between NTC and the Strategic Partner, which will in turn own, operate and run the said Textile Mill. E. However, pending execution of the necessary definitive agreements, including the Undertaking Transfer Agreement, Lease Deed and the Share Subscription and Shareholders Agreement (hereinafter collectively referred to as "Definitive Agreements"), the Parties wish to execute this MoU, which will broadly set out the respective obligations of the Parties and the steps necessary to complete the transactions contemplated herein.

F. Both Parties are now desirous of recording the terms and conditions of the broad agreement arrived at between them.

NOW THEREFORE THIS MOU WITNESSESTH AND IT IS HEREBY AGREED BETWEEN THE PARTIES AS FOLLOWS:

1. Object and Way Forward 1.1 Simultaneously with the submission of bids prior to the dae of execution of this MoU, the Srategic Partner has deposited an amount of Rs.25,00,000/- (Rs. Twenty Five Lakhs Only) for each Textile Mill, in the form of a bank guarantee, copy attached hereto and marked as Annexure I), as an earnest money deposit with NTC (hereinafter referred to as "EMD Amount"). Subject to the execution of the Definitive Agreements and the closing of the transactions contemplated under the Definitive Agreements, to the full satisfaction of NTC, the EMD Amount shall be returned by NTC to the Strategic Partner on the date of closing of the transactions contemplated under the Definitive Agreements. Notwithstanding any other term of this MoU, the Strategic Partner shall ensure that the bank guarantee issued for the EMD Amount is at all times during the term of this MoU and post the execution of the Definitive Agreements till the date of closing of the transactions contemplated under the Definitive Agreements, valid, binding and in force, to the full satisfaction of NTC.

1.2 Within 180 (One Hundred and Eighty) days of the date of execution of this MOU:

(a) NTC will apply and obtain the necessary approval of the Board of Industrial and Financial Reconstruction (BIFR) for transfer of the undertaking i.e. the said Textile Mill, as a going concern on an "as is where is basis", in favour of the JVC (as defined in Article 1.3 below) in the manner contemplated in the Undertaking Transfer Agreement;"

"1.3 Subject to the terms and conditions of this MoU and subject to NTC obtaining the necessary approvals from the BIFR and the relevant government authorities in the matter specified in Article 1.2 above, NTC will within 20(Thirty) days from the date of obtaining the necessary approvals from the BIFR and the relevant government authorities in the matter specified in Article 1.2 above, to its full satisfaction, incorporate a special purpose vehicle under the provisions of the Companies Act, 1956, as its wholly owned subsidiary, which will act as the joint venture company inter se between NTC and the Strategic Partner (hereinafter referred to as "JVC"). The name of the JVC will be the existing name of the said Textile Mill and will be approved by NTC. Initially, the Memorandum and Articles of Association ("MoA and AoA") of the JVC will be in the standard form of MoA and AoA prescribed by NTC for its subsidiary companies. Costs payable specifically in relation to the incorporation of the JVC, including stamping of the Memorandum of Association and Articles of Association of JVC, will be borne in equal proportion between NTC and the Strategic Partner.

1.4 Upon incorporation of the JVC in the matter specified above, NTC, the Strategic Partner and the JVC will take and complete at the following steps, to the full satisfaction of NTC:

(i) Within 30 (Thirty) days of the date of incorporation, execute the Undertaking Transfer Agreement for each Textile Mill in the form attached hereto as Annexure 3:

(ii) Simultaneously therewith execute the Lease Deed for each Textile Mill in the form attached hereto as Annexure 4:

(iii) Simultaneously therewith execute the Share Subscription and Shareholders Agreement in the form attached hereto as Annexure 5;

(iv) Subject to the terms and conditions of the Undertaking Transfer Agreement, lease Deed and the Share Subscription and Shareholders Agreement, within 45 (Forty Five) days of the date of incorporation of the JVC;

(a) NTC will transfer the licences, if any, which had been issued in relation to the said Textile Mill, in favour of the JVC;

(b) NTC will obtain the necessary approval from its Board of Directors approving the transaction contemplated under the Definitive Agreements;

(c) The Board of Directors of the JVC will approve the transactions contemplated under the Definitive Agreements; offer equity shares constituting 49% of the issued, subscribed and paid up equity share capital of the JVC to its promoter, being NTC with the right to relinquish such offer, and upon NTC relinquishing its rights to subscribe to such equity shares in the matter specified in the Share Subscription and Shareholders Agreement, issue such equity shares to the Strategic Partner such that post such issue the share capital of the JVC shall be held 51:49 inter se between NTC and the Strategic Partner.

(v) Post completion of the steps specified in Articles 1.4(i), (ii), (iii) and (iv) above, to the full satisfaction of NTC, the closing of the transaction contemplated under the Undertaking Transfer Agreement and separately the Share Subscription and Shareholders Agreement will take place on such date, place and time as may be intimated by NTC to the Strategic Partner and the JVC, which shall in any event take place on or before 240(Two Hundred and Forty) days from the date of execution of this MoU."

"1.5 Each Party shall use its best efforts so far as is within its control to procure at the earliest the completion of the steps referred to in Articles 1.2, 1.3 and 1.4 above. The Parties shall cooperate and coordinate with each other for timely and efficient fulfillment of all the steps specified above, to the full satisfaction of NTC."

"2.1 This MoU shall come into force on the date of execution hereof and shall be valid for a term of 240 (Two Hundred and Forty) days from the date of execution hereof unless mutually extended or till the execution of the Definitive Agreements, whoever is earlier. It is clarified that this MoU shall be superceded by the Definitive Agreements."

"IV. Representation and Warranties

41. Each of the Parties represents and warrants that:

(i) it is duly organised and validly existing under the laws of India, and has full power and authority to enter into this MoU and to perform its obligations under this MoU;

(ii) the execution and delivery of this MoU and the performance by it of its obligations under this MoU have been duly and validly authorized by all necessary corporate actions on the part of it. This MoU constitutes a legal, valid and binding obligation on its part enforceable against it in accordance with its terms;

4.2 The Strategic Partner has prior to the date of execution of this MoU (i) undertaken and satisfactorily completed a business, technical, financial and legal due diligence of the said Textile Mill; (ii) been satisfied with the completion of legal documentation in relation to the transaction contemplated herein; and (iii) been satisfied that no material adverse change to NTC and applicable law has occurred.

V. Termination 5.1 NTC shall have the right to terminate this MoU forthwith upon serving written notice on the Strategic Partner in the event the Definitive Agreements are not executed, to the full satisfaction of NTC, within 240(Two Hundred and Forty) days of the date of execution of this MoU, in the manner specified in this MoU.

5.2 Either Party shall have the right to terminate this MoU upon the happening of any of the following events, by giving the other Party 30(Thirty) days prior notice in writing:

> (i) Should the other Party become insolvent or a receiver is appointed in respect of its properties;
>
> (ii) Should the other Party commit a breach of any of the provisions of this MoU, which is not remedied with 30 (Thirty) days of receipt of written notice in this respect from the non-defaulting Party.
>
> VI. Consequences of Termination 6.1 In the event, this MoU is terminated for any reasons whatsoever, other than such termination being solely due to a breach attributable directly to NTC or such termination is due to the Definitive Agreements not being executed within 240 (Two Hundred and Forty) days of the date of execution of this MoU, as specified in Article 5.1 above, due to a default on part of NTC, NTC will immediately on such termination en-cash the bank guarantee deposited by the Strategic Partner in the manner specified in Article 1.1, above and forfeit the EMD Amount. It is clarified that the Strategic Partner shall not raise any objections whatsoever at any point of time to such act on part of NTC."
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> "XI. Miscellaneous 11.1 This MoU constitutes the entire agreement between the Parties and supersedes any previous agreements between the Parties whether oral or in writing regarding the subject matter hereof.
>
> 11.4 This MoU may be amended only by an instrument in writing signed by each party to this MoU.
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> 11.6 The failure on the part of one party to exercise or enforce any rights resulting from this MoU shall not be a waiver of any such rights, nor shall any single or partial exercise thereof operate so as to bar the later exercise or enforcement thereof."

6. Under the said MOU, NTCL and KSL agreed to incorporate a joint venture company with 51% of the issued, subscribed and paid up capital with NTCL, and the remaining 49% with KSL. The JV Company was to own, operate and run the Textile Mills for a period of 33 years which was extendable for two additional terms of 33 years. The MOU contained several obligations to be performed by the parties within the indicative time frame as provided in the MOU. Further, the term of the MOU was provided to be as 240 days from the date of its execution, unless the parties mutually extended the same.

7. KSL furnished five bank guarantees of Rs. 25,00,000 (twenty five lakhs) for each textile mill towards earnest money deposit in favour of NTCL. These bank guarantees were valid for 240 days but later on they were extended till December 10, 2010. Further, in addition to the aforesaid bank guarantees, on 14th November 2008 KSL also deposited an amount of Rs. 3,60,00,000 as an advance towards consideration for acquisition of shares in the JV Company. All the three petitioners have made an aggregate payment of Rs. 8.40 crores to the respondent NTCL.

8. Pursuant to the MOU, KSL suggested the name of the JV Company and also proposed the name of the directors. A joint inventory of plant and machinery, measurement of land and note of assets and liabilities was taken. In January 2009 NTCL informed KSL that the possession of mills can be taken in March 2009. Security guards of both NTCL and KSL were appointed for the mills.

9. On 13th April 2009 one JV Company in the name of KSL Apparels Ltd. was incorporated by NTCL for running and operating the Nanded Textile Mills. Pursuant to the incorporation, KSL requested NTCL to execute the Definitive Agreements.

10. In June 2009, NTCL proposed a few changes in the terms of the MOU and requested to incorporate separate JV Companies for each textile mill instead of having one JV for all the five textile mills as per the MOU. On 5th August 2009, almost a month after the expiry of the MOU on 12th July 2009, NTCL granted approval to KSL to take possession of the Nanded Textile Mills and to initiate preliminary work. It was also informed that the proposal of formation of separate JVs for separate mills has got a "go ahead" from Ministry of Textile. Assurance of the execution of Definitive Agreements was also given.

11. KSL vide their letter dated 12th August 2009, addressed to the respondent, claimed that heavy expenditures were being incurred due to delay in execution of the Agreement. Ministry of Textiles reviewed the progress of the JV companies on 14th September 2009. Presentation was made by KSL to the Ministry and proposal to start operations within 100 days was also offered.

12. Thereafter, discussions were held between the representatives of KSL and NTCL on 18th September 2009. A revised road map for actions to be taken after execution of MOU in respect of the Textile Mills was provided to KSL. Petitioner expressed its intention to start the operations and to open bank accounts in name of JV companies on 24th September and 6th October 2009. NTCL got an extension for implementation of the sanctioned scheme from BIFR vide order dated 23.12.2009, whereby BIFR extended the period of implementation till 31.03.2011.

13. Thereafter, on several occasions, KSL requested NTCL to complete the formalities and execute the Definitive Agreements. It is stated by the petitioner that the respondent did not take any steps for completing its obligations as per MOU, and the Definitive Agreements were not executed. However, NTCL vide letters dated 13th January 2010 and 2nd July 2010 requested KSL to appoint security guards for maintaining the mills.

14. On 14th September 2010, NTCL terminated the MOU citing the reason that pursuant to clauses 2.1 and 5.1 of the MOU, as the Definitive Agreements were not executed by KSL, NTCL had the right

to terminate the MOU. Similarly, the MOUs entered into by the other two petitioners were also terminated by NTCL.

15. It is in the background of these circumstances that the present petitions have been preferred by the petitioners. Case of the Respondent as pleaded

16. The respondent generally denies the case of the petitioners. It relies upon clauses 2.1 and 5.1 of the MOU. Its case is that, admittedly, the petitioner had not entered into any definitive agreement with the NTCL pursuant to the MOU, even till the date of filing of the reply. The MOU lapsed due to efflux of time on 12.07.2009 as no definitive agreement was entered into within 240 days of the execution thereof. The respondent categorically submits that it had not given up possession of any of the mills and/or the mill lands in favour of the petitioner pursuant to the MOU and the petitioner did not take possession of the mill lands. The respondent claims that it has always remained in exclusive possession of the mill lands/premises. The petitioner s claim to have possession and/or possessory right, title or interest in the mill premises or parts thereof is denied.

17. The respondent claims that it became entitled to terminate the MOU as definitive agreements were not executed within 240 days of the signing thereof and that its termination dated 14.09.2010 is justified. The respondent denies that its action is arbitrary or malafide.

18. The respondent also claims that the MOU was a mere "agreement to agree". It is claimed that the MOU was not an executory contract.

19. The respondent denies that it failed to perform its obligations, which were conditions precedent to the execution of the definitive agreements within the stipulated 240 days period provided for in the MOU. The respondent repels the petitioner s challenge to the respondent s right to unilaterally terminate the MOU on the ground that in terms of clause 5.1 of the MOU, the definitive agreements had not been executed within 240 days. The respondent claims that the petitioner extended the tenure of the bank guarantees of its own volition, and that the respondent had never asked the petitioner to extend the same. It is denied that the extension of the bank guarantees was done by mutual consent of the parties. The respondent denies that on 05.08.2009 it had informed the petitioner that the terms of the MOU had been extended. The respondent denies that the petitioner has incurred heavy expenditure in the security of the textile mills and employment of managerial staff to operate and run the mills. The respondent also denies that clause 5.1 of the MOU had become inoperative for any reason.

20. The respondent filed an additional affidavit in support of its reply. The respondent once again claimed that the MOU dated 14.11.2008, executed between the parties, is not a contract. It would have fructified into a contract, only if and when each one of the three contracts, referred to as the definitive agreements, specified in clause 1.4 of the MOU had been executed by the parties. Since the definitive agreements have not been executed, the MOU remains only an agreement to agree, and is not a binding contract. The respondent submits that the MOU is a "if" contract, namely, the contract will come into being if the terms and conditions set out therein, i.e., the execution of the definitive agreements in clause 1.4, are fulfilled. The respondent submits that clause 11.4 of the MOU provides

that any amendment thereto has to be in writing and signed by each party. No amendment in relation to clause 11.4, regarding the term of the MOU, was ever signed. It is also argued that by virtue of clause 11.6 of the MOU, no case of waiver can be advanced by the petitioner.

21. The respondent further submits that the MOU is not a specifically enforceable contract because money is an adequate relief and compensation for its non-performance, assuming that there is non-performance of the MOU on the part of the respondent. The respondent invokes Section 41(e) and Section 14 of the Specific Relief Act, 1963, to submit that the MOU is incapable of being specifically performed.

Petitioner's submissions

22. Mr. Krishnan Venugopal, Learned Senior counsel for the petitioner submits that upon the acceptance of KSL s bid and the execution of the MOU, a concluded contract came into existence. The fact that the Definitive agreements remained to be signed, on performance by the parties of their respective obligations under the MOU, does not mean that that the MOU was a mere "agreement to agree". The exact content of the Definitive Agreements was known in advance to the parties, because the forms of agreements were already annexed to the MOU. There was nothing material left to be agreed between the parties. Further, the consideration that was to flow from one party to the other parties was specified in the MOU itself and this consideration was to be exchanged before the execution of the Definitive Agreements.

23. Attention of the court was drawn to clause 4.1(ii) of the MOU which read as follows;

> "4.1 Each of the parties represents and warrants that:
>
> (ii) the execution and delivery of this MOU and the performance by it or its obligations under this MOU have been duly and validly authorized by all necessary corporate actions on the part of it. The MOU constitutes a legal, valid and binding obligation on its part enforceable against it in accordance with its terms." (emphasis supplied)

24. Attention is also drawn to clause 11 of the MOU which, inter- alia, read as follows;

> "11.1 This MOU constitutes the entire agreement between the parties and supersedes any previous agreements between the parties whether oral or in writing regarding the subject matter hereof."

25. Petitioner submits that under the MOU it is the respondent who had to perform the obligations, as the petitioner had already performed its part. He further submits that Draft Agreements annexed to the MOU were final and not open to change at the instance of petitioner. Instances when the MOU have been held to constitute definitive agreement have been cited as Old World Hospitality v. Indian Habitat Center, 73 (1998) DLT 374; Kollipara Sriramulu v. T. Aswatha Narayana, AIR 1968 SC 1028.

26. Petitioner submits that from the conduct of the parties it is established that the MOU was a concluded contract when entered into, and cannot be taken as an „if contract. Considerations have flown from the petitioner under the MOU, and the mutual obligations are certain, and binding on the parties. He further submits that, where the parties have agreed upon the essential terms, the dealing between them is treated as a concluded contract, even if some insignificant terms remain to be agreed, and a formal contract is yet to be executed. He submits that clauses 4.1 (ii) and clause 11.1 make it clear that parties understood the MOU to be a binding agreement and a concluded contract. Consideration of Rs. 8.40 crores had flown under the three MOUs from the three petitioners to the respondent. Reliance is placed on Trimex International FZE Ltd. v. Vedanta Aluminium Ltd., (2010) 3 SCC 1. It is argued that the MOU is, therefore, enforceable.

27. Petitioner submits that NTCL cannot be permitted to terminate the MOU on the sole ground that 240 days period for KSL to execute the Definitive Agreements under clause 5.1 of the MOU had expired, when the only reason that petitioner could not do so was, because NTCL failed to perform its obligations that were condition precedent for executing the Definitive Agreements. Termination letter itself makes it clear that NTCL did not claim any breach of the MOU on the part of petitioner. Termination is unilateral and arbitrary. Termination is contrary to the provisions of section 51 and 52 of Contract Act. These provisions lay down the principle that, when reciprocal promises are made by the parties, one party cannot require the other party to perform its obligations, which are dependent on the performance of obligation by the first party, unless the first party has performed its obligations.

28. Petitioner submits that MOU provided that termination could have been done immediately on expiry of 240 days, as the clause is qualified by the term „forthwith . This right stood waived, as it was not exercised immediately after 240 days of the expiry of 240 days from the date of execution of MOU. He submitted that the 240 days period expired on July 12, 2009 and the termination of the MOU took place after passing of more than 428 days from 12.07.2009, i.e. on 14.09.2010. The petitioner submits that the respondent could have terminated the MOU under clause 5.1 only within a reasonable period after expiry of 240 day period. Petitioner submits that time did not remain of essence of the contract. The parties to the contract, by their conduct, gave a go by to the term of the contract relating to time.

29. Petitioner submits that termination, by placing reliance upon clause 5.1 cannot be done as same had become inoperative due to NTCL s own conduct in extending the period of performance of its own obligations after the expiration of 240 days period. Even after expiry of the said period of 240 days, NTCL continued to require KSL to undertake expenditures and perform tasks that were premised on the mutual extension of the MOU. It is argued that the extension of MOU is clear from the following:

> (a) On September 18, 2009, NTCL provided a revised road map for actions to be taken pursuant to the MOU in respect of the Textile Mills.
>
> (b) On December 7, 2009 NTCL filed a Misc. Application before the BIFR stating that they have already completed the modernization programme of 17 mills, including

that of textile mills covered by the MOU with KSL, and the other two petitioners and requested BIFR to extend the implementation period upto 31.03.2011.

(c) On 13th January 2010 and 2nd July 2010 NTCL requested KSL to appoint security guards for maintaining one of the textile mills, namely Dhule Textile Mills.

(d) Considering the delay in compliance with the obligations of MOU, the validity of the bank guarantee given by KSL were extended till December 2010 by mutual consent.

30. Petitioner submits that when MOU has been extended by conduct, time cannot be considered as being of the essence. Moreover, when respondent acted in accordance with MOU even after expiry of 240 days, they have waived their right to terminate the MOU under clause 5.1. Reliance is placed on P. D Souza v. Shondrilo Naidu, (2004) 6 SCC 649 and Panchanan Dhara v. Monmatha Nath Maity (dead), (2006) 5 SCC 340.

31. Learned senior counsel also submitted that the principle of contra proferentum, i.e. a document has to be read against the interest of the party who drafted it, would be applicable in the present case against the respondent. He submits that all the documents including the MOU and the definitive agreements were drafted solely by the respondent and their terms and clauses could not be negotiated by the petitioner. So, if any part of the agreement is unclear or ambiguous, than that clause should be construed against the respondent. Similarly, clause 5.1 should be construed against the respondent in this case. He referred to cases of Bank of India v. K. Mohandas, (2009) 5 SCC 313, and United India Insurance Co. Ltd. v. Pushpalaya Printers, (2004) 3 SCC 694, to substantiate his point.

32. The petitioner further submitted that the respondent has not been able to give any reason to terminate the contract. It is submitted that the respondent has acted arbitrarily and whimsically. Being a state instrumentality, the respondent s actions cannot be arbitrary or unfair, else they would offend Article 14 of the Constitution of India. Injunction can be sought against such arbitrary actions. Reliance is placed on:

1. Old World Hospitality v. Indian Habitat Center (supra);

2. Pioneer publicity Corporation V. Delhi Transport Corporation, 103 (2003) DLT 442;

3. Atlas Interactive (India) Pvt Ltd v. BSNL & Anr., 126 (2006) DLT 504;

4. Ramjee Power Construction LTd. v. Union of India & Ors., 127 (2006) DLT 346;

5. Panchkuian Road Refugee Vyapar Sangh & Ors v.

Delhi Metro Rail Corporation & Ors., 130 (2006) DLT 553;

6. Hindustan Petroleum Corporation Ltd. & Ors. v Super Highway Services & Anr., (2010) 3 SCC 321.

Respondent's Submissions

33. Mr. Parag Tripathi, the learned ASG appearing for the respondent submits that in the present case the primary issue that needs to be considered is whether, in relation to a commercial bargain, interim protection can be granted where the agreement is itself determinable.

34. The first submission of Mr. Tripathi is that there was no concluded contract arrived at between the parties, and only a MOU had been signed. He submits that the MOU was at the initial stage, and not much has been done under the said MOU by either of the parties. He contended that the MOU itself stipulated that following 3 Definitive agreements had to be signed by the parties;

i) Undertaking Transfer Agreement

ii) Lease deed

iii) Share quotation and Shareholders agreements; but they were not executed within 240 days, and not even till the termination of the MOU,

35. Thus he submits that the MOU was not a concluded contract as it required execution of formal agreements. He submits that no rights have been created in favor of the petitioner by the said MOU. He also submits that in the absence of a formal agreement being signed, the court would refrain itself from granting any interim relief.

36. Respondent further submits that MOU is in the nature of an "if" contract, viz., the contract will come into being, if the terms and conditions set out therein - namely, the execution of the Definitive Agreements in Clause 1.4, are fulfilled.

37. The main thrust of the argument of the learned ASG is that the injunctive relief as claimed by the petitioner cannot be granted as the so called contract contained in the MOU cannot be specifically enforced. He relies on section 41(e) of Specific Relief Act, which, inter- alia, reads as under-

> "41. Injunction when refused- An injunction cannot be granted-
>
> x x x x x x x x x
>
> (e) To prevent the breach of a contract the performance of which would not be specifically enforced;
>
> x x x x x x x x x"

38. He submits that contracts which cannot be enforced are enumerated in section 14 of Specific Relief Act., which, inter-alia, reads as under:-

"14. Contracts not specifically enforceable. --

(1) The following contracts cannot be specifically enforced, namely, --

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

(b) a contract which runs into such minute or numerous details or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;

(c) a contract which is in its nature determinable;

(d) a contract the performance of which involves the performance of a continuous duty which the court cannot supervise."

39. He submits that all four contingencies set out above are made out in the present case. He contends that the contract contained in the MOU (even if it is accepted, for the sake of argument, that the MOU is a definite agreement, and not merely an agreement to agree) cannot be specifically enforced in light of section 14 of Specific Relief Act. Reliance is placed on the decision of the Calcutta High Court in Vipin Bhimani & Anr. V. Smt. Sunanda Das & Anr., AIR 2006 Calcutta

209.

40. He submits that only exceptions to section 14(1) are contained in section 14(3), and the case of the petitioner does not fall under those exceptions.

41. The learned ASG contends that the onus is on the petitioner to show why compensation in money will not be an adequate relief for the petitioner, and the petitioner has failed to discharge this obligation. He submits that since this was a pure commercial transaction, and the MOU was only at an initial stage, money would be an adequate compensation, in case the petitioner is able to prove that the MOU was wrongly terminated. Reliance is placed upon the decision of the Hon ble Supreme Court in Ram Awadh (Dead) by Lrs & Ors Vs. Achhaibar Dubey and Another, (2000) 2 SCC 428 and Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner; AIR 2004 SC 1801; and the decision of this Court in Shri Brahm Dev Narang Vs. Mr. Satyajeet Narang & Anr, 82 (1999) DLT 979.

42. Mr. Tripathi also submits that the MOU provides for revival of the textile mills by forming a JV company, with the respondent having 51% shareholding and the petitioner having 49% share in the JV Company. He submits that the rights and liabilities arising out of the MOU are complex, and they

run into great detail and the court will not be able to implement such minute details, if the MOU is specifically enforced. Also, the working of the MOU involves performance of a continuous duty which the court will not be able to supervise. Thus, as per the submission of the respondent, particularly clause (b) and (d) of section 14(1) are applicable in the present case.

43. The learned ASG next contends that the MOU is determinable as it provides for termination in Clause 5.1, which has been reproduced above, and it confers a unilateral right upon the respondent to terminate the MOU at any time after 240 days of the signing of the MOU, if the definitive agreements are not executed till then to the fullest satisfaction of the respondent. He also places reliance on clause 5.2 which confers the right to terminate the MOU on both the parties, by giving a prior notice of 30 days in writing, upon happening of any of the events mentioned in clause 5.2.

44. Respondent submits that from a reading of the abovementioned clauses it is clear that the agreement/MOU, by its very nature, is determinable. The petitioner may be entitled to claim damages on termination, if the termination is found to be invalid, but there is no question of specific performance. He submits that this Court cannot be called upon to adjudicate on the aspect of whose fault it is, for which the definitive agreements have not been executed, and that question will be decided in arbitration. Reliance is placed on the decision of this Court in Bharat Catering Corpn. Vs. Indian Railway Catering & Tourism Corp.Ltd (IRCTC), 164 (2009) DLT 530(DB)

45. Strong reliance is placed by Mr. Tripathi on Rajasthan Breweries Ltd. v. The Stroh Brewery Company, AIR 2000 Del 450, which in turn has relied upon the supreme court judgment of Indian Oil Corporation Ltd. V. Amritsar Gas service and Others, (1991) 1 SCC 533. The extract relied upon by the respondent is as follows-

> "14. The effect of breach of a contract by a party seeking to specifically enforce the contract under the Indian law is enshrined in Section 16(c) read with Section 41(e) of the Specific Relief Act, 1963. Clause (e) of Section 41 of the Specific Relief Act provides that injunction cannot be granted to prevent the breach of contract, the performance of which would not be specifically enforced. Clause (c) of Section 41 enumerates the nature of contracts, which could not be specifically enforced. Clause
>
> (c) to sub-section (1) of Section 14 says that a contract which is in its nature determinable cannot be specifically enforced. Learned Single Judge thus was justified in saying that if it is found that a contract which by its very nature is determinable, the same not only cannot be enforced but in respect of such a contract no injunction could also be granted and this is mandate of law. This, however, is subject to an exception, as provided in Section 42 that where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstances that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.
>
> x x x x x x x x x x

> 20. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the appellant had sought for an injunction seeking to specifically enforce the agreement.

Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii)(e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(i)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same."(Emphasis supplied)

46. Respondent also places reliance on Clause 11.4 of MOU which provides that:

> "This MOU may be amended only by an instrument in writing signed by each party to this MOU."

47. Mr. Tripathi submits that there was no amendment in relation to the clause regarding the term of the MOU, and no extension of the time period stipulated for execution of the definitive agreements was agreed to or granted. Secondly, in view of clause 11.6 of the MOU, the petitioner cannot advance a case of waiver.

48. Respondent submits that the agreement is not for sale of land. It is simply for sale of shares in a JV Company. The learned ASG submits that so long as the share structure of 49:51 was to remain, the majority of the directors on the Board (5 out of 8) were to be appointed by the respondent. Therefore, the control of the JV Company was to remain principally with the respondent only. He has drawn the court s attention to clause 3 of MOU, whereby leasehold rights in respect of land on which the Textile Mills are situated, was agreed to be transferred to the JV Company, and not the petitioner. He submits that the shareholders of a company are not the owners of the property of the company. Petitioner as a minority shareholder could not claim that the MOU was for transfer of property. Reliance is placed on Rustom Cavasjee Cooper v. Union of India, (1970) 1 SCC 248, wherein it was observed:-

> "11. A company registered under the Companies Act is a legal person, separate, and distinct from its individual members. Property of the Company is not the property of the shareholders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability,

and by a share in the distributed profit. ....."

49. To counter the submission of the petitioner regarding the respondent being a state instrumentality, and the principles of arbitrariness and fairness being applicable to the actions of the respondent, learned ASG submits that the principles of arbitrariness and fairness are inapplicable in the present case. He contends that the MOU was a commercial transaction and the petitioner had agreed upon and accepted each term of the agreement, and now petitioner cannot raise the plea of arbitrariness to alter the terms of the MOU.

50. He submits that the MOU was determinable and there was no obligation upon the respondent, under the termination clause, to assign any reasons for termination of the MOU in view of the failure of the parties to execute definitive agreements. He also submits that the courts have always recognized the freedom of the parties to enter into, and get out of a contract when the agreement is of purely commercial nature. Whatever would be the consequences of such termination, is a different matter altogether, but the contract cannot be specifically enforced.

51. To substantiate his submission, he placed reliance on Life Insurance Corporation of India v. Escorts Ltd., (1986) 1 SCC 264. In this case the Hon ble Supreme Court held that, "if the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field". He also relied upon Puravankara Projects Ltd. v. Hotel Venus International, (2007) 10 SCC 33, wherein the court held that in commercial transactions the State can choose its own method to arrive at its decision. The Court also observed that the principle of fairness or reasonableness cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties. He also placed reliance on M/s Radhakrishna Agarwal Vs. State of Bihar & Ors, (1977) 3 SCC 457; Assistant Excise Commissioner & Ors. Vs. Issac Peter, (1994) 4 SCC 104; ONGC Vs. Streamline Shipping Co. Pvt. Ltd. , AIR 2002 Bom 420; Kerala State Electricity Board Vs. Kurien E. Kalathil, (2000) 6 SCC 293; Premji Bhai v. DDA, (1980) 2 SCC 129, and; Noble Resources Ltd. v. State of Orissa & Anr, (2006) 10 SCC 236.

52. Mr. Tripathi urged that a contract is in the realm of private law. Contract by a statutory body need not necessarily mean a statutory contract. Commercial activities of a statutory body need not necessarily raise issues of public law. It is further contended that where the contract is freely entered into with the state, there is no scope for invoking Article 14 of the Constitution, and the matter must be strictly governed as per the law of contract.

Petitioner's Rejoinder

53. Petitioner in its rejoinder submits that the respondent s contention that the MOU should not be specifically enforced because its non performance can be adequately compensated in money is misplaced. It is submitted that the privatization of sick textile mills, in which petitioner would own 49% is unique, and such an opportunity is not easy to come by. It is estimated that profits that would accrue to the respondent and the petitioner for all the 11 mills put together, would be in the

range of Rs. 2500 crore. The petitioner is entitled to claim damages in the form of loss of profit, on account of the illegal termination of the MOU by respondent NTCL, in addition to the actual loss that it has suffered by way of interest on the amount of 8.40 crore already paid. All this amounts to very large damage payable out of public funds. Reliance is placed on Decro-Wall International SA v. Practitioners in Marketing Ltd., (1971) 1 W.L.R. 361, and Thames Valley Power Ltd. v. Total Gas & Power Ltd., (2005) EWHC 2208 (Comm).

54. Petitioner submits that there is no force in respondent s contention that the MOU is determinable in nature as contemplated by Sec 14 (c). Mr. Venugopal submits that contracts which are terminable at the will of the terminating party, or terminable with a very short notice period, are determinable in nature. He referred to „Corbin on Contracts , Interim Edition, Volume 12, Pg 434, wherein the learned author observes:

> "Where one of the parties to a contract has the power to terminate its operation at will or by giving a notice for a comparatively small period, specific performance will not be decreed against him, because, by the exercise of his power, he can substantially nullify the effect of the decree."

55. Mr. Venugopal argues that clause 5.1 is not a provision that entitles the respondent to unilaterally terminate the contract because the precondition is that the petitioner should have refused to sign, or failed to sign the definitive agreements in the manner specified in the MOU, which implies that the respondent should have signed or should have been ready and willing to sign the definitive agreements. Therefore, it is a condition precedent to termination of the MOU that the respondent should have done, all that that it was obliged to do. Then alone the question of the petitioners failure would arise. However, in present case, the respondent failed to comply with the condition precedent for over one year after expiry of initial period of 240 days.

56. Mr. Venugopal submits that the present contract is not a pure commercial contract, but was entered into to salvage the sick public textile mills and has a public purpose attached to it. He submits that respondent is a public body and has been assigned a public purpose. It cannot act arbitrarily and unreasonably without cause. He submits that the agreements have been imbued with an element of public interest because they have been entered into after a public tender. The transfer of assets of sick mills is taking place under the mandate of the group of Ministers, in view of section 11A of the Sick Textile Undertaking (Nationalization) Act, 1974. A contract by an instrumentality of the state is not a purely commercial transaction, like one between purely private parties. Rather it is a contract with public interest attached to it. Reliance is placed on ABL International & Anr vs. Export Credit Guarantee Corp., (2004) 3 SCC 553; United India Insurance Co. Ltd. vs. Manubhai Dharamsinhbhai Gajera & Ors., (2008) 10 SCC 404, and; Karnataka State Forest Industries Corporation vs. Indian Rocks, (2009) 1 SCC 150.

57. It is further contended that state instrumentalities cannot rely upon Section 14 of the Specific Relief Act to justify arbitrary and unfair termination of contracts. Article 14 of the Constitution is a complete defense to section 14. Injunction can be sought against such arbitrary actions. Petitioner also placed reliance on Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay,

(1989) 3 SCC 293, which distinguished the case of LIC vs. Escorts (supra) relied upon by the respondent.

58. Mr. Venugopal also distinguished the case of Rajasthan Breweries Ltd. (supra) relied upon by the respondent by submitting that that was not a case dealing with a state instrumentality, as in this case. He also submits that in Atlas Interactive (India) Pvt. Ltd (supra), this court has distinguished Rajasthan Breweries (supra). Learned senior counsel also placed reliance on decision of this court in Canoro Resources Ltd. v. Union of India, 179 (2011) DLT 72, wherein this court in para 67 has specifically noted the observation of the learned single judge in the case of Atlas Interactive (supra), that Rajasthan Breweries (supra) was a case where both the parties were private parties, and that it did not apply where one of the contracting parties was a state instrumentality.

59. Mr. Venugopal also distinguishes the case of Amritsar Gas Service (supra). He submits that the Hon ble Supreme Court in that case was not dealing with the plea of Article 14, and the matter was decided strictly within the realm of private law. He placed reliance on para 11 of that decision which is reproduced here:

> "We may at the outset mention that it is not necessary in the present case to go into the constitutional limitations of Article 14 of the Constitution to which the appellant-Corporation as an instrumentality of the State would be subject particularly in view of the recent decisions of this Court in M/s. Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay [1989] 2 SCR 751 , Mahabir Auto Stores and Ors. v. Indian Oil Corporation and Ors. and Shrilekha Vidyarthi etc. etc. v. State of UP, and Ors. AIR 1991 SC 537 , This is on account of the fact that the suit was based only on breach of contract and remedies flowing therefrom and it is on this basis alone that the arbitrator has given his award. Shri Salve is, therefore, right in contending that the further questions of public law based on Article 14 of the Constitution do not arise for decision in the present case and the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the Specific Relief Act providing for non-enforceability of certain types of contracts. It is, therefore, in this background that we proceed to consider and decide the contentions raised before us." (Emphasis supplied)

60. Petitioner also places reliance on Union of India v. Millennium Mumbai Broadcast (P) Ltd., (2006) 10 SCC 510, where the Hon ble Supreme court has held that the provisions of the Specific Relief Act would not apply to contracts which are governed by statutory provisions.

61. In the end, Mr. Venugopal submits that in this petition under section 9 the Court is taking only a prima- facie view of the matter and since 01.10.2010, when the first hearing of the matter had taken place, status quo order in respect of possession of 11 mills is prevailing, and no prejudice has been caused to the respondent. He submits that equity is in favour of the petitioner. He thus submits that this court may allow this petition and maintain the status quo in respect of the textile mills in question till the final determination of the disputes by the arbitral tribunal.

Discussion

62. The scope of enquiry in these proceedings is limited to the examination of the issues raised by the parties only at a prima facie stage. The court while exercising its jurisdiction under Section 9 of the Act does not finally determine any issue of fact or of law, which fall within the jurisdiction of the Arbitral Tribunal to determine. The interpretation of the terms of the Contract/MOU, as also the determination of the scope of the Contract/MOU would eventually, and finally, fall for determination of the Arbitral Tribunal. The court while dealing with a petition under Section 9 of the Act applies the same principle as are applicable to the determination of an application under Order 39 Rules 1 & 2 of the CPC in a pending suit. Thus, the examination of the submission of the parties, as well as the terms of the MOU, would be made only to assess the strength of the petitioner s case on a prima facie basis, and any observation made during the course of such evaluation would, obviously, not be binding either on the parties or the Arbitral Tribunal, which has the jurisdiction to determine all such issues of fact and law independently, without, in any manner being influenced by any observation that may be made in the present order.

63. Firstly, I may deal with the respondent s defence that the MOU dated 14.11.2008 is not an enforceable agreement but it is only an agreement to enter into further agreements. In my view, prima facie, this submission of the respondent is not correct. At this stage, I may note that Mr. Parag Tripathi, learned ASG did not press this defence with any seriousness and proceeded to argue the case on the assumption that the MOU in question is a binding agreement. In any event, it appears from clause 4.1(ii) that the parties understood the MOU as creating legal, valid and binding obligations on the parties. Both the parties acted in terms of the MOU to a certain extent. Forms of formal agreements i.e. definitive agreements formed part of the MOU and, therefore, the parties were aware of the essential terms of the definitive agreements even when they signed the MOU.

64. The petitioner has placed reliance on various decisions to support the submission that the MOU constitutes a binding contract between the parties. The Hon ble Supreme Court in Kollipara Sriramulu (supra) observed that a mere reference to a future formal contract will not prevent a binding bargain between the parties. There are cases where the reference to a future contract is made in such term as to show that the parties did not intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the circumstances of each case.

65. The Hon ble Supreme Court referred to the decision in one Von Hatzfeldt-Wildenburg vs. Alexender, [1912] 1 Ch. 284, wherein it had been held that if the documents or letters relied on, as constituting a contract, contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will, in fact, go through. In the former case there is no enforceable contract either because the condition is unfulfilled, or because the law does not recognize a contract to enter into a contract. In the latter case, there is a binding contract and the reference to the more formal document may be ignored. In other words, there may be a case where the signing of a further formal agreement is made a condition or term of the bargain, and if the formal agreement is not approved and signed there is no concluded contract.

66. In Trimex International FZE Limited, Dubai (Supra), the Hon ble Supreme Court again held that where the contract is concluded orally or in writing, the mere fact that a formal contract has to be prepared and initialed by the parties would not affect either the acceptance of the contract so entered into, or implementation thereof, even if the formal contract has never been initialed.

67. I may also refer to the judgment of learned Single Judge of this court in Old World Hospitality (supra) wherein the aforesaid issue had been discussed at some length in paragraphs 48 to 50 & 53. From a reading of the terms of the MOU, particularly clause 4.1 (ii) and the fact that the forms of the definitive agreements formed a part of the MOU, as also the conduct of the parties post the signing of the MOU that they did not indulge in any significant negotiations with regard to the settlement of any further terms and conditions, I am, prima facie, of the view that the intention of the parties was that the MOU should serve as the binding agreement, and the execution of the definitive agreements was not a condition that without which the MOU cannot be enforced. Keeping in view the above clauses of the MOU and the case law above referred to, I am of the prima facie view that the MOU in question constitutes a binding contract between the parties.

68. I may now proceed to consider whether the relief sought by the petitioner cannot be granted, because the MOU/Agreement is not specifically enforceable by reference to various Clauses of Section 14 (1) of the Specific Relief Act.

69. Clause (a) of the Section 14(1) provides that the Contract for the non performance of which compensation is an adequate relief, would not be specifically enforceable. The MOU was entered into as a consequence of petitioner emerging as the successful bidder for the management of various sick textile mills, of the respondent. As to what is the expenditure that the petitioner would entail in rehabilitating the sick textile mills and what is the possible return that the petitioner may derive upon such rehabilitation, as and when it takes place, is uncertain and not possible of estimation. The petitioner agreed to acquire 49% shareholding in the proposed JV Companies which were to be set up to take over the businesses of the sick textile mills. The worth of the said 49% shareholding of the proposed JV Companies would obviously dependent upon the business success of the textile mill, once they are rehabilitated. I agree with the petitioner s submission that, prima facie, too many speculative assumptions would be needed to estimate the correct valuation of the petitioner s proposed 49% shareholding in the said JV companies. It is not that such opportunities are available in the business world in routine. The shareholding in the proposed JV Companies cannot be acquired "off the shell". With the acquisition of the said 49% shareholding in the proposed JV Companies, the petitioner was also to become entitled to manage the sick textile companies. The value of this opportunity cannot be estimated.

70. In Old World Hospitality (supra) on the aspect whether damages are in adequate remedy would bar relief of specific performance in all cases, the Court observed that in „Chitty on Contracts , 27th Edition, 1994, Vol.1, Para 27.003, the statement of law is as follows:

> "The question is not simply whether damages are an „adequate remedy, but whether specific performance will "do more perfect and complete justice than an award of damages."

71. The learned Judge relied upon the view of the author and quoted with approval the contents of the treatise dealing with an issue Akin to the controversy in the present case. The author had invoked the concept of distributive justice for achieving fairness, the primary concern of the Courts. The relevant portion is being reproduced herein below:-

> "The most common kind of case where compulsory performance is ordered for distributive purposes involves transactions for the transfer of an asset which will provide an opportunity to earn an uncertain income. If the injured party cannot prove his losses with sufficient certainty to satisfy the compensatory principle, a Court may order specific performance. For example, an injured party may be able to enforce a sale of shares which would give him control over a Corporation, because damages for his loss of the right to control the Corporation are too speculate to be compensatable."

72. The rationale according to the learned author for so ordering specific performance is not that damages are inadequate to cover these kinds of losses, but that losses cannot be proven.

73. In Atlas Interactive (supra) the Court took note of the nature of article- subject matter of the contract. The Court held that the agreement in question was not for an ordinary article of trade and commerce and the efforts already made by the petitioner towards completing its obligations were taken note of and the Court concluded that ouster of the petitioner before it from the contract would cause irreparable loss and injury. The principle applied was nonetheless one incorporated in Section 10 of the Specific Relief Act. In Decro Wall International (supra) the Court of Appeal in England held that time, effort and money are relevant factors in determining whether damages would be appropriate remedy to a party complaining of breach or not. In Thames Valley Power (supra) the Queen s Bench Division held that the market forces are relevant aspects while calculating damages and can be used to show the difficulty in so calculating. The Court took note of the fact that the agreement was for supply of gas for a long period and depriving a party of the same would be substantially depriving the party of the whole benefit that contract intended to give them.

74. In Old World Hospitality (supra) the Court was dealing with the objection based on Section 14(1)(d) of the Specific Relief Act, on the ground that the specific performance of the contract would require constant supervision. The Court while quoting the learned Author „Chitty on Contracts observed:

> "About the aspect of the supervision, in paragraph 27.016 the learned Author succinctly puts it; it is submitted that difficulty of supervision should not of itself be regarded as a bar to specific performance but only as one of many factors to be taken into account in determining whether this form of relief is to be granted. If the Court attaches sufficient importance to the interest which the plaintiff wishes to protect, it will not be deterred from granting specific relief by the argument that such relief will require constant supervision."

Thus the test is not whether the contract would require supervision, but that of fairness, and supervision is only one of the factors to be considered.

75. The aspect whether the contract is such that it would require constant supervision is a matter to be considered by the learned arbitrator based on the merits of the case. Prima facie, the view has to be based on the MOU working itself to extinction in terms of clause 2.1 and 5.1, i.e. till the execution of the definitive agreements and no further. To my mind, such a process would not require constant supervision. In cases where specific performance has been decreed by a court and documents/instruments are required to be executed for satisfying the decree, a party is not relieved by merely alleging that execution of a definitive instrument is not possible, and the courts are not rendered powerless. Order 21 Rule 34 of CPC deals with such situations. The said rule is reproduced herein below for ease of reference:

> "34. Decree for execution of document, or endorsement of negotiable instrument (1) Where a decree is for the execution of a document or for the endorsement for a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.
>
> (2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.
>
> (3) Where the judgment-debtor objects to the draft,'his objections shall be stated in writing within such time, and the court shall make such order approving or altering the draft, as it thinks fit.
>
> (4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.
>
> (5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :-
>
> "CD., Judge of the Court of (or as the case may be), for A.B. in suit by E.F. against A.B.", and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.
>
> (6) (a) Where the registration of the document is required under any law for the time being in force, the Court, or such officer of the court as may be authorised in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration."

The said argument is, therefore, without any substance.

76. The third aspect on section 14 pertains to the agreement being determinable in nature. In Atlas Interactive (supra), the learned Single Judge of this Court in para 17 observed that the contract may be determinable in nature, but the instrumentality of the State has to act in a fair and just manner and not arbitrarily. This principle may hold good between private parties, but not in those cases where highhandedness by the State is apparent. Without going into the fairness or arbitrariness of the decision to terminate the contract, I would first like to dwelve into the questions whether, or not, in all cases where a contract is determinable, specific performance shall not be ordered and whether the present contract was determinable, or that, prima facie, it was not legally determined.

77. As far as the broad legal proposition is concerned, since the main thrust of the argument of the respondent is based on the decision in Amritsar Gas (supra), I may first deal with the same. The court had noted the argument advanced by the appellant that the contract was admittedly revocable at the instance of either party in accordance with clause 28 of the agreement. The court further noted in para 12 of the decision that the award itself accepted that the agreement could be terminated in accordance with clauses 27 and 28 and the same was revocable in accordance with the said clauses. The court did not go into the question of validity of revocation of agreements, where the power to terminate was contingent, and could not be exercised otherwise than on the happening of the contingency. The facts before the Hon ble Supreme Court, admittedly, were that the agreement could be terminated by either of the parties by simply giving a notice. The ratio of the said judgment therefore cannot be extended to all cases where the contract could be determined only on the happening of a particular contingency.

78. The clauses of the contract before me may be appreciated at this stage to, prima facie, examine whether the termination was illegal. Clause 2.1 is not a clause authorizing any of the parties to terminate the contract but, rather is a term of automatic rescission/ dispensation with the performance of the promise, or discharge of the contract (See Section 62, 63 of the Indian Contract Act, 1872). The said clause also provides that the contract shall not so come to an end, if mutually extended or till the execution of the definitive agreements, whichever is earlier. So the contract would have come to end on the expiry of 240 days period, but for the mutual extension which could have fixed an outer limit or a new time schedule, or could be open ended. In the present case, it seems to be the latter. In the case of an extension with a fresh time schedule, the use of the disjunctive "or" in clause 2.1 would have implied the extinction of obligations of the parties at the time so expiring, or execution of definitive agreements, whichever would have been earlier in time. However, where the extension was without fixing any outer time limit, it would automatically survive till the execution of the definitive agreements. Since I am of the view that the extension in this case was without fixing an outer limit, clause 2.1 became inoperable till the execution of the

definitive agreements. The only other clause under which the contract could come to end is clause 5.1- which empowers the respondent to terminate the MOU, albeit, on the happening of a contingency and not before the same.

79. Under clause 5.1, respondent had a right to terminate the MOU forthwith in the event of the definitive agreements not being executed to the fullest satisfaction of NTC within 240 days of the execution of the MOU. Therefore, the right to terminate the MOU would have accrued on the expiry of 240 days. The MOU was executed on 14.11.2008 and 240 days would have expired on or about 14.07.2009. The alleged termination letter was issued on 14.09.2010. Thus, the respondent chose not to exercise the right to terminate the MOU which accrued on the expiry of 240 days until 14.09.2010, and till that date continued, by its conduct, to acquiesce in the continuous performance of the contract by the petitioner. On its own part, the respondent took various clear steps to convey its intention to extend the term of the MOU. The extension of the contract has its own implications in law and its impact and obligations have to be considered. Section 62 of the Contract Act is relevant and defines the concept of novation. A Division Bench of this Court has explained the concept of novation in M/s R.S. Amar Nath Mehra & Co. vs. Union of India & Ors., 1993 III AD (Del) 735, in the following manner:

> "Novation operates as a release of the original debtor and its effect is to discharge a party from its obligation under the old contract. Section 62 of the Indian Contract Act defines novation as under:
>
> "62. Effect of novation, rescission and alteration of contract - If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.
>
> 21. Blacks Law Dictionary Sixth Edition at page 1064 defines Novation thus:
>
> Novation. A type of substituted contract that has the effect of adding a party, obligor or oblige, who was not a party to the original duty. Substitution of a new contract, debt or obligation for an existing one, between the same or different parties.
>
> The requisites of a novation are a previous valid obligation, an agreement of all the parties to a new contract, the extinguishment of the old obligation, and the validity of the new one. Blyther v. Pentagon Federal Credit Union, D.C. Mun. App. 182 A2d 892, 894.
>
> 22. Relying on Scarf v. Jardine 7 AC 345 this court in R.S. Amar Nath Mehra & Co. (Supra) further observed:
>
> Novation is a legislative expression of the common law of England. It is a term derived from English civil law and it means-that there being a contact in existence some new contract is substituted for it either between the same parties or between different parties, the consideration being the discharge of the old contract.

> 23. In Kailash Nath & Associates v. New Delhi Municipal Committee MANU/DE/0538/2002 : 99(2002)DLT361 , this court held that in building contracts, multiplicity of reciprocal promises usually exist. In its rudimentary aspect, the Builder/Contractor undertakes to complete the work according to time and specification, and the owner correspondingly agrees to make payments. However usually there are many other obligations, such as supply of material and/or drawings etc. to be performed at different stages of the contract. A default in respect of any of them would result in delay, giving rise to claims for damages. In a typical building contract, the work is to be completed within a specified period. The owner must make the site available, and on his failure to do so within the agreed time, it would be unfair to hold the Contractor bound to his time of delivery or performance. The Contractor may, however, estimate that despite the delay in handing over the site, he would nonetheless be able to complete the project within the contracted time. He may succumb to the pressure on the likelihood of his security deposit being forfeited; or the uncertainty and delay in collecting damages. He may also not want to lose the profits that he had calculated he would earn from the project. He would thus prefer to take over the site on the day on which it is offered to him by the owner rather than treat the contract as having been breached. In doing so without any recorded reservations, he would be precluded from claiming damages at a later date.
>
> 24. The court further held that extension of time for the completion of the project is essentially a novation in the contract, and by application of Section 62 and 63 of the Contract Act, relieves the opposite party from performing the obligations pertaining to time as contained in the original contract. Where the extension of time is unconditional, the original date is substituted by the extended date sans any liability."

80. Therefore, in the present case, the extension of time was essentially a novation in the contract without substituting the original date by any extended date, and the MOU would, therefore, continue to remain binding till the definitive agreements were executed. Clause 5.1 stood exhausted and the right therein waived by the petitioner. There is no other provision within the MOU itself conferring any right on the petitioner to terminate the contract and the parties would therefore be left to rely on the general law of contract to trace any such right. Thus, to my mind, the contract ceased to be terminable or determinable on the expiry of the period mentioned in the clause 2.1 and 5.1 of the MOU.

81. The decision in Canoro Resources Ltd. (supra) of this Court follows the decision in Amritsar Gas (Supra), as on facts, it was found that the contract in issue was terminable by giving a fixed time notice without assigning any reasons. The observation that the agreement in Amritsar Gas (supra) was terminable under clause 27 as well is not relevant for the present case, as in the present case there is no provision akin to clauses 27 or 28. The reference to the decision in Rajasthan Breweries (supra) is also not of relevance as the agreement in question ceases to be determinable as the contingency has already occurred and the right waived by the respondent. Reliance placed on Cogent Silver Fibre Pte Ltd. Vs. Noble Fibre Technolgies Inc. & Ors, 127 (2006) DLT 707 by the

respondent also appears to be misplaced. In that case the Court raised a serious doubt as to whether the MOU constituted a complete agreement. That does not appear to be the position in the present case. Further, it was held that the MOU was determinable in nature. As I have already observed, prima facie, it appears that on account of the conduct of the parties there was novation of the contract. i.e. MOU between the parties, and the MOU was no longer determinable accept upon the occurrence of contingencies mentioned therein (except from the failure of the parties to enter into definitive agreements within 240 days of the execution thereof). Thirdly, the Court held that the plaintiff could be compensated in money in the facts of that case, which does not appear to be so in the facts of the present case.

82. Reliance placed on Vipin Bhimani (supra) is of no avail as the Court held in the facts of that case that the relief of specific performance was barred in view of Section 14(3)(c) of the Specific Relief Act. I have already dealt with the aforesaid aspect, and prima facie, found in favour of the petitioner. This case in my view has no application in the facts of the present case.

83. The decision in Ram Awadh (supra), Sopan Sukhdeo Sable (supra) and Shri Brahm Dev Narang (supra) have absolutely no relevance to any of the issues raised in the present case. The decision in Bharat Catering Corpn. (supra), para 17 whereof has been relied upon by the respondent, also has no relevance for the simple reason that the petitioner is not seeking restoration of the MOU in the present proceedings. The petitioner is only seeking preservation of the subject matter of dispute between the parties. In fact, the following extract from para 17 of the decision supports the petitioner s case rather than that of the respondent.

> "17.....It is not open to this Court to restore the contract under Section 9, which is meant only for the sole purpose of preserving and maintaining the property in dispute and cannot be used to enforce specific performance of a contract as such. A bare glance at the said section will suffice to show that pending arbitration proceedings, the Court and the Arbitral Tribunal have been vested with the power to ensure that the subject matter of the arbitration is not alienated or frittered away....."

84. On the aspect of waiver, the decision in P. Dsouza (supra) and Panchanan Dhara (supra) are relevant. In P Dsouza (supra), it was held that where part payment of the consideration was accepted without demur at a later date, and extension of time for completion of the contract was sought at a date later than the month stipulated in the agreement, it could be concluded that the parties did not intend time to be of the essence of the contract or, in any event, there was waiver of the right to terminate the contract on grounds of time being of the essence of contract. In Panchanan Dhara (supra), it was held that extension of time for performance of a contract need not always be in a written instrument but can be implied from the conduct of the parties. Contract is a creature of will of the parties and they can always, in terms of section 62 of the Contract Act, novate or substitute, alter or amend their contract by mutual consent. The contract cannot take away the right of the parties to mutually agree to alter or amend the same, or the manner in which the contract is so altered or amended. Even if parties had earlier agreed to a mode for making such an amendment, there cannot be any absolute rule or proposition that the amendment cannot be made otherwise, if the parties mutually decide to give up the term laying down such a restriction. The

difficulty would be only in proving such an amendment or change in the contract, but that by itself cannot mean that under no circumstances the parties, mutually, cannot so amend or alter the contract. Perhaps the element of burden and onus would lie heavily on the party who submits that there was such an amendment, if denied by the other party. However, in a case where such novation or alteration is writ large from the conduct of the parties, the question of evidence may also not present a great difficulty.

85. In the present case, the facts and circumstances relied upon by the petitioner, which have gone unrebutted materially, prima facie, establish such a mutual agreement altering the original contract so as to constitute novation or waiver on part of the respondent of some of the rights accrued in its favour and, in particular, the right to terminate the contract upon the expiry of the original term of the MOU, i.e. 240 days.

86. It need not be forgotten that any interpretation clause 2.1 and 5.1, so far as the same are ambiguous, would preferably be made against the respondent, as the contract was drafted by the respondent in the standard form and the doctrine of contra preferendum would be applicable.

87. So far as clause (b) of Section 14(1) of the Specific Relief Act is concerned, the purpose of execution of the MOU was to secure the execution of the definitive agreements. The forms of these agreements are annexed to the MOU itself and the terms and conditions thereof are not open to negotiation. If one party does not agree to any proposal made by the other to alter or amend any term of the definitive agreements, the parties have no option but to proceed to execute the definitive agreements in the form which they exist.

88. The petitioner is only seeking specific performance of the terms of the MOU, i.e. execution of the definitive agreements. In itself, the execution of the definitive agreements cannot be said to be imbued with minute or numerous details, or to be dependant on personal qualifications or volition of either of the parties, or of a nature of which the Court cannot enforce specific performance. Consequently, the bar under Section 14 of the Specific Relief Act urged by the respondent, in my view, prima facie, is not made out in the present case.

89. The concept that a fight between citizen and the government is not to be viewed as ordinary litigation was recognized by this Court in Old World Hospitality Pvt. Ltd. (supra), wherein it was observed:

> "In a matter like this, when the citizens are to fight against the Government, the Court has to interdict and dispense justice as far as possible. From the conduct of the plaintiff, that could be seen from the materials placed before me, the defendant has not said anything which could persuade me to say that the continuance of the plaintiff in the Complex would affect the rendering of service to the persons coming to the Complex. Of course, in fiscal matters one has to be careful and in particular when one has to handle public money but that is no reason to deprive a citizen of his legitimate rights. The plaintiff had accepted the decision by the defendant that the income from the Fitness Centre should go to the defendant and as a matter of fact

> that plaintiff had not objected to anything that is directed to be done by the defendant. Having entered in to a contract and having lulled the plaintiff into a sense of security and the guarantee of continuance of the contract and having stopped the work for nearly five months and having asked the plaintiff to resume work pursuant to the decision of the Governing Council on 10th of November, 1994 it is not open to the defendant to say "I do not want you. I will be incurring loss even though my Auditors or my lawyers may have different opinion. I go by my Malhotra Committee's Report". In my view, this can never be accepted. It is against all canons of principles of law besides being contrary to the principles of natural justice. It is also against the principles of fairness. Therefore, I find no difficulty in coming to the conclusion that the plaintiff has made out a, prima facie, strong case for the grant of injunction."

90. The principle was again reiterated by another learned Single Judge of this Hon ble Court (as his Lordship then were) in Pioneer Publicity Corporation (supra), in the following words:

> "I have given due thought to the contentions of the rival parties. The freedom which exists under the realm of private contract in respect of the performance of contractual obligation does not apply in the same measure where the Government is a party. Every action of the Government has to pass the rigorous inquisition of fair play, lack of arbitrariness, and its being founded on good and sound reasons. Government's freedom to contract as well as freedom to break free from the obligations of a contract is now rightly restricted in diverse manners. While the Government may enjoy the role of distribution of largesse, it may also suffer from the vulnerability of committing errors or perpetrating an inequitable or unjust implementation of its policies through its faceless and unidentifiable officers and agents. It, therefore, behoves the Court to treat Government contracts in a manner altogether different to that of the compact between private parties. Reliance of Ms. Jyoti Singh on the decisions mentioned above is of no avail as the learned authors of the judgements have taken care to highlight the fact that they had to pronounce upon contracts between private parties. The Hon'ble Supreme Court has opined that even where the State is empowered by a particular clause in a contract to terminate it by a notice simplicitor, the only possible construction that can be given to such a clause is that the reasons which prevailed upon it for justifying the termination need not be conveyed to the adversary. The Apex Court has clarified that such a clause does not permit the taking of arbitrary, biased, unreasonable or an ill- informed decisions. "

91. The decision in Pioneer Public (supra) was noticed and followed by another learned Single Judge of this Court in Atlas Interactive (supra) in the following words:

> "12..... It is true that the contracts which are determinable in nature cannot be specifically enforced and injunctions cannot be granted to prevent breach of such contracts but this principle primarily applies to private commercial contracts as held in the case of „Rajasthan Breweries . The case of BSM Contractors was regarding construction of a building. In the case of Vidya Securities, the agreement was for

> running a restaurant which included catering of food even. Therefore, all these judgments are not squarely applicable to the facts of the present case. Learned Counsel for the petitioner on the other hand relies upon the judgments in Mahabir Auto v. Indian Oil Corporation, (1990) 3 SCC 752 : AIR 1990 SC 1031 and Pioneer Publicity v. Delhi Transport Corporation, 103 (2003) DLT 442. He argues that the contract may be determinable in nature but since it was for setting up a unique project for which petitioner had procured tailormade equipment, which could not be utilized anywhere else, specific performance may be ordered. It is argued that in case the petitioner is left to pursue the remedy of damages only it would result in its ruination, as it has already pumped in over Rs. 115 crores in the project.

He further argues that there may be a discretion with respondent No. 1 to terminate or not the contract but this discretion should not be exercised arbitrarily without there being goods grounds for terminating the contract. It is submitted that respondent No. 1 is an instrumentality of the State and must act in a fair, just and equitable manner.

13. It is true that the Franchisee Agreement between the parties could be terminated by giving one month's notice or could be determined even after commissioning of the project but considering the fact that the petitioner has invested fairly large amount in the project which is unique and the respondent No. 1 is an instrumentality of the State which remains under an obligation to act in a just and fair manner, it has to be seen as to whether the decision of respondent No. 1 to terminate the Franchisee Agreement is prima facie sustainable or not. In the realm of private contracts, the freedom, which is available to a private party, in respect of the performance of contractual obligations, is not available to the State or its instrumentalities in the same measure because every action of the State has to be just, fair and devoid of arbitrariness. The State or its instrumentalities cannot conduct themselves like ordinary businessmen playing games with others for monetary gains. State cannot behave like a man in the street and indulge in arm-twisting tactics. Its conduct and actions have to be exemplary and decisions have to be free from arbitrariness, bias and unreasonableness. The reputation of the country and its credibility in business world are far more important than certain economic gains which appear to be unfair and unjust. (emphasis supplied) x x x x x x x x x x

15. It is not shown that the respondent No. 1 is in a position to launch the project on its own very soon. If the respondent No. 1 still needs time to start the project on its own, why it cannot give some time to petitioner also for completing the project. It is not at all alleged by respondent No. 1 that the petitioner had committed any other breach or default except delay in the commissioning of the project. It is also not understandable as to why the respondent No. 1 should run the risk of paying damages to the petitioner for breach of contract which the situation can be saved by permitting the petitioner to continue with the project in which petitioner has no exclusivity. Had the respondent No. 1 been a private party, it would have thought hundred times before raising such a plea as the damages, if awarded, may be enormous. The petitioner is pleading that it has already spent over 22 million dollars on the project. In case the Arbitrator holds that termination of contract was not lawful, the respondent No. 1 may have to pay this amount as damages. Since the respondent No. 1 is an instrumentality of the State and the damages are not to go from the pockets of its officers, a plea

is easily raised that the petitioner should seek damages. The respondent No. 1 and its officers dealing with the Franchisee Agreement should appreciate that risk of paying such heavy damages should not be taken lightly. Public money has to be protected with utmost care and concern. Hazardous and adventurous pleas should not be taken when public money is at stake. (emphasis supplied) x x x x x x x x x

17. After considering the submissions made by learned Counsel for the parties and considering the facts and circumstances of this case and as discussed hereinbefore also, this Court is of the considered view that Section 14 of the Specific Relief Act does not stand in the way of the Court to grant the relief as prayed in as much as by the impugned act of respondent No. 1 the petitioner may be unreasonably ousted from Indian market and, therefore, compensation in terms of money may not be adequate relief. The contract may be determinable in nature but the instrumentality of the State has to act in a fair and just manner and not arbitrarily. This principle may hold good between private parties but not in those cases where the highhandedness appears to be on the part of the State or its instrumentality. It also cannot be said that the contract between the parties runs into minute details or the Court cannot enforce specific performance of its material terms nor it can be said that the contract involves performance of continuous duty, which the Court cannot supervise. The Franchisee Agreement between the parties is a detailed agreement containing duties and obligations of both the parties. Respondent No. 1 has to provide its cable network and the rest of the performance is to be by the petitioner. The agreement between the parties is non-exclusive and on revenue sharing basis under which the respondent No. 1 has to gain only. The nonperformance or the failure of the petitioner would not cause any financial loss to respondent No. 1 inasmuch as under the agreement itself, the respondent No. 1 can involve itself or others also for providing the same services. The plea of respondent No. 1 that the petitioner may utilize its equipment in other areas and through other service providers is also no answer to the claim of the petitioner that it is being ousted arbitrarily and without any good and sufficient cause." (emphasis supplied)

92. Once again in Ramjee Power Construction Ltd. (supra) the aforesaid principle was reiterated. Although the writ petition came to be dismissed in the said case as the petitioner raised a plea of fraud by his own Chartered Accountant, which became a factual dispute, the legal proposition was once again reiterated. The relief in that case was declined holding the petitioner s conduct as unethical and not on grounds of want of jurisdiction.

93. In ABL International (supra), the Hon ble Supreme Court examined its earlier pronouncements on this very aspect. The Hon ble Supreme Court dealt with the ratio of a decision of another bench of the same Court in LIC Vs. Escorts (supra), which has been relied upon by the counsel for the respondents. In para 13 of the decision in ABL International (supra), the Hon ble Supreme Court observed and quote:

> "13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of LIC of India [(1986) 1 SCC 264] proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the

court's jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words "court may not ordinarily examine it unless the action has some public law character attached to it" itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available. The learned counsel then relied on another judgment of this Court in the case of State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] wherein this Court held: (SCC p. 31, para 21) Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy -- in this case, provided in the contract itself -- is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article

226."(emphasis supplied).

94. The above highlighted extract clearly shows that the nature of remedy i.e. whether it is a civil proceeding or an arbitration or a writ proceeding, does not have a bearing on the scope of examination of the issues raised by the petitioner/plaintiff/claimant, and the forum, whichever it be, is competent to deal with all issues of arbitrariness or irrationality in action of the State or its instrumentality, in contractual matters. Such a scrutiny is not confined to only a writ proceeding. It is precisely for this reason that the availability of the right to involve arbitration is considered as an "alternative efficacious remedy", and the writ Court normally does not exercise jurisdiction in such cases.

95. The Court further examined what could be meant by public function or discharge of public function or public law domain, as the effect of decision in LIC Vs. Escorts (supra) is to restrict interference under writ jurisdiction on contractual matters to actions that pertain to public law domain. The Apex Court observed in para 23 and 24 of the decision in ABL (supra):

"22. We do not think the above judgment in VST Industries Ltd. [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] supports the argument of the learned counsel on the question of maintainability of the present writ petition. It is to be noted that VST Industries Ltd. [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] against whom the writ petition was filed was not a State or an instrumentality of a State as contemplated under Article 12 of the Constitution, hence, in the normal course, no writ could have been issued against the said industry. But it was the contention of the writ petitioner in that case that the said industry was obligated under the statute concerned to perform certain public functions; failure to do so would give rise to a complaint under Article 226 against a private body. While considering such argument, this Court held that when an authority has to perform a public function or a public duty, if there is a failure a writ petition under Article 226 of the Constitution is maintainable. In the instant

> case, as to the fact that the respondent is an instrumentality of a State, there is no dispute but the question is: was the first respondent discharging a public duty or a public function while repudiating the claim of the appellants arising out of a contract? Answer to this question, in our opinion, is found in the judgment of this Court in the case of Kumari Shrilekha Vidyarthi v. State of U.P. [(1991) 1 SCC 212 :
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> 1991 SCC (L&S) 742] wherein this Court held: (SCC pp. 236-37, paras 22 & 24) "The impact of every State action is also on public interest. ... It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters."

23. It is clear from the above observations of this Court, once the State or an instrumentality of the State is a party of the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. Therefore, if by the impugned repudiation of the claim of the appellants the first respondent as an instrumentality of the State has acted in contravention of the abovesaid requirement of Article 14, then we have no hesitation in holding that a writ court can issue suitable directions to set right the arbitrary actions of the first respondent. In this context, we may note that though the first respondent is a company registered under the Companies Act, it is wholly owned by the Government of India. The total subscribed share capital of this Company is 2,50,000 shares out of which 2,49,998 shares are held by the President of India while one share each is held by the Joint Secretary, Ministry of Commerce and Industry and Officer on Special Duty, Ministry of Commerce and Industry respectively. The objects enumerated in the memorandum of association of the first respondent at para 10 read:

> "To undertake such functions as may be entrusted to it by the Government from time to time, including grant of credits and guarantees in foreign currency for the purpose of facilitating the import of raw materials and semi-finished goods for manufacture or processing goods for export."

Para 11 of the said object reads thus:

> "To act as agent of the Government, or with the sanction of the Government on its own account, to give the guarantees, undertake such responsibilities and discharge such functions as are considered by the Government as necessary in national interest."

24. It is clear from the above two objects of the Company that apart from the fact that the Company is wholly a Government-owned company, it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions

of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail."(emphasis supplied).

Thus, even in the present case, it cannot be doubted that the actions of the respondent do have a touch of public function, particularly in view of the background furnished by the petitioner of the manner in which the sick textile mills were sought to be rehabilitated by the government through the instrumentality of the respondent.

96. In an earlier decision in Dwarkadas Marfatia (supra), the decision in LIC Vs. Escorts (supra) had come up for consideration before a three judge bench of the Apex Court. The majority speaking through Hon ble Mr. Justice Sabyasachi Mukherji observed that:

> "22. Our attention was drawn to the observations of this Court in Radhakrishna Agarwal v. State of Bihar [(1977) 3 SCC 457 : (1977) 3 SCR 249] . Reliance was also placed on the observations of this Court in Life Insurance Corpn. of India v. Escorts Ltd. [(1986) 1 SCC 264 : 1985 Supp 3 SCR 909, in support of the contention that the public corporations dealing with tenants is a contractual dealing and it is not a matter for public law domain and is not subject to judicial review. However, it is not the correct position. The Escorts decision [(1986) 1 SCC 264 : 1985 Supp 3 SCR 909] reiterated that every action of the State or as instrumentality of the State, must be informed by reason. Indubitably, the respondent is an organ of the State under Article 12 of the Constitution. In appropriate cases, as was observed in the last mentioned decision, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. But it has to be remembered that Article 14 cannot be construed as a charter for judicial review of State action, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions.
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> 25. Therefore, Mr Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of this Court in E.P. Royappa v. State of T.N. [(1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348] , Maneka Gandhi v. Union of India [(1978) 1 SCC 248 : (1978) 2 SCR 621] , R.D. Shetty v. International Airport Authority of India [(1979) 3 SCC 489 : (1979) 3 SCR 1014] , Kasturi Lal Lakshmi Reddy v. State of J&K [(1980) 4 SCC 1 : (1980) 3 SCR 1338] and Ajay Hasia v. Khalid Mujib Sehravardi [(1981) 1 SCC 722 :
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> (1981) 2 SCR 79] . Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the executive

> authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14. The observations in paras 101 and 102 of the Escorts case [(1986) 1 SCC 264 :
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> 1985 Supp 3 SCR 909] read properly do not detract from the aforesaid principles."

97. The principle that even in the realm of contract the State action cannot be arbitrary was once again recognized in Manubhai Dharam Singh Bhai (supra), in para 55 -56:

> "55. Section 24-A, introduced in the 1972 Act, has invited a comment by the learned Solicitor General that the situation has completely changed. The High Court might have made a broad statement that by reason thereof, State within the meaning of Article 12 of the Constitution of India, does not cease to be one, but in our opinion, that is not the point. The point is what would be the effect. Would it mean that two concepts, namely, Article 12 of the Constitution and Section 24-A of the 1972 Act are different? If they are not, in a given case, it may be possible to hold that even while the State shall have more liberty to enter into a contract or fix the terms and conditions thereof having regard to the field of competition opened by reason of taking away of its monopoly status, but there exists a distinction between the acts of a private player and the State. We, however, do not mean to say that even in the field of contract qua contract, the State is not free to negotiate its terms; what we mean to say is that its action cannot be arbitrary. Role of both are different. A private player, as the law stands now, may not be bound to comply with the constitutional requirements of the equality clause but the appellants are.
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> 56. There exists a distinction between a private player in the field and a public sector insurance company. Whereas a private player in the field is only bound by the statutory regulations operating in the field, the public sector insurance companies are also bound by the directions issued by General Insurance Corporation as also the Central Government. They cannot be ignored. The said directions are not said to be in derogation of the statutory provisions. Their validity is not under challenge."

98. The fact that some of the aforesaid decisions were rendered in writ proceedings under Article 226 of the Constitution of India challenging the decision of the State has been arbitrary, though arising out of contractual matters between the State and the citizen makes no difference. As aforesaid, even the Civil Court or an Arbitrator is competent to undertake the examination of the issue whether the action of the State is arbitrary. Therefore, a challenge to the termination of the MOU on the ground of it being arbitrary can be raised by the petitioner in the present proceedings as well.

99. Reliance placed by the learned ASG on Puravankara Projects (supra) is misplaced. In the present case the petitioner is not seeking alteration of the terms of the MOU by invoking the doctrine of arbitrariness enshrined in Article 14 of the Constitution of India. In fact the petitioner is relying upon the terms of the MOU as novated by the conduct of parties. The doctrine of arbitrariness has

been invoked to question the sudden termination of the MOU by the respondent without assigning any reason thereof, even though the termination clause in the MOU stood novated by the conduct of the parties. In Puravankara Projects Ltd. (supra) it was the contractual terms which were sought to be assailed on the ground of unfairness and unreasonableness i.e. after entering into a contract the terms of the contract was sought to be assailed. That is not the position in the present case. The High Court had sought to imply a term in the contract on the ground of reasonableness and fairness, thereby implying an obligation on the Government (which was not even a party to the contract in that case) to grant permission/exemption under Section 81(3)(b) of the Kerala Reforms Act, 1963. In the present case the petitioner is not seeking to introduce a new obligation on the respondent by invoking Article 14 of the Constitution. For the same reason, the decisions in M/s.Radhakrishna Agarwal (supra); Premji Bhai (supra); Assistant Excise Commissioner (supra); Kerala State Electricity Board (supra), Noble Resources Ltd.,(supra) and ONGC (supra) have no applicability in the facts of the present case.

100. From the facts narrated above, it, prima facie, appears that there is no justification offered by the respondent for the sudden termination of the MOU without furnishing any reasons thereof, when both the parties and, in particular, the petitioner, had taken all the steps that were expected of it in furtherance of the MOU. I may note that the respondent has not even offered to explain or justify its conduct in terminating the MOU and its defence is only that the termination is in terms of the MOU. Prima facie, I am, therefore, of the view that the termination of the MOU vide letter dated 14.09.2010 is arbitrary, irrational and illegal.

101. The result of the aforesaid discussion is that I find that the petitioner has made out a prima facie case in its favour for grant of an injunction against the respondent from giving effect to the termination of the MOU dated 14.09.2010. The balance of convenience lies in preserving the subject matter of the dispute. If the respondent is permitted to give effect to the termination letter and, consequently, to deal with the subject matter of the MOU, namely, the textile mills in question, even if the petitioner were to succeed in the arbitration proceedings and to secure an award in its favour, it may be met with a fait accompli. The arbitration proceedings are already in progress since the arbitral tribunal has been constituted. The interim protection has continued in favour of the petitioner since 01.10.2010, that being the first hearing of the matter, and there is no reason to disturb the said status quo during the pendency of the arbitral proceedings. Even if the respondents were to succeed in the arbitration proceedings, they would then be in a position to proceed further in the matter of rehabilitation or winding up of the textile mills in question.

102. The petitioners would certainly suffer irreparable loss and injury if the said textile mills are not preserved during the pendency of the arbitral proceedings, as the alienation or disposal of the said textile mills and their assets would destroy the subject matter of the petitioners claim. Without the said textile mills and their assets, the MOU and the definitive agreements would loose their meaning and would be of no avail. Consequently, I allow these petitions and confirm the order dated 01.10.2010 till the making of the award by the arbitral tribunal, which is seized of the disputes between the parties.

103. I once again make it clear that the observations made by me in the aforesaid order, both on facts and in law, are only a prima facie evaluation undertaken for the purpose of passing this order, and that the arbitral tribunal shall not be bound by any of the observations made in this order. The arbitral tribunal shall deal with the issues raised before it, even if they are the same as raised before this Court, independently, without, in any manner, being influenced by any of my observations or prima facie findings.

104. The petitioners are entitled to costs of Rs. 25,000/- in each of these petitions.

VIPIN SANGHI, J AUGUST 14, 2012 sr/„BSR