ADHUNIK STEELS LTD.

v.

ORISSA MANGANESE AND MINERALS PVT. LTD.

JULY 10, 2007

[H.K. SEMA AND P.K. BALASUBRAMANYAN, JJ.]

Arbitration and Conciliation Act, 1996—Section 9:

Interim prohibitory/mandatory injunction—Grant of—Held—It is governed by Specific Relief Act, 1963 and well known concepts of balance of convenience, prima facie case, irreparable injury and interim measure appearing to court to be just and convenient—Section 9 was not **de hors** *them—It was more so since a right to approach ordinary court was given without providing a special procedure in that behalf—Approach that at initial stage only existence of arbitration clause need be considered is not justified.*

One party obtaining mining lease from Government and contracting with another for raising ore on its behalf—Notice by former to latter purporting to terminate contract on ground that contract was violative of Rule 37 of Mineral Concession Rules, 1960 and there was danger of their losing rights as a lessee, and also asking latter to remove their workmen and equipment from site—The latter alleging that pursuant to contract it had mobilized huge resources for extraction of mineral and incurred losses, moved District Court under Section 9 for injunction restraining termination of contract and dispossession from site of mines—District Court refusing it but High Court granting it—Correctness of—Held—Whatever might be reasons for termination of contract, a notice had been issued regarding same and in terms of Order XXXIX Rule 2 of Code of Civil Procedure, 1908, an interim injunction could be granted restraining breach of contract—To that extent, there was a prima facie case—However, it was possible to assess compensation payable to latter if their claim was upheld by arbitrator—Though the former could not enter into a similar transaction with any other entity since that would also entail violation of Rule 37 there was no justification in preventing them from carrying on mining operations by themselves as that would not prejudice the latter who in case of success of

A *their claim were entitled to get compensation for termination of contract—Question of application of Rule 37 left to be decided by arbitrator.*

Arbitration—Precedent—Other arbitral award—Held—Court is not concerned with what arbitrator who may be appointed will hold in impugned case and not what some other arbitrator held in some other arbitration and B *some other contract even if it be between same parties—Moreover, Court could not be bound by what an arbitrator might have held in an arbitration proceeding unless it be that the said award operates as a bar between the parties barring either of them from raising a plea in that behalf.*

C **O.M.M. obtained a mining lease from the Government and entered into a contract with AS for raising the ore on its behalf. However, a few months thereafter, O.M.M. issued a notice to AS purporting to terminate the contract and asking them to remove their workmen and equipment from the site. According to O.M.M., it had realized that its contract with AS was violative of Rule 37 of the Mineral Concession Rules, 1960 and since there was danger** D **of itself losing its rights as a lessee, the contract had to be terminated. AS alleged that pursuant to contract it had mobilized huge resources for the extraction of the mineral and incurred losses, and moved the local District Court under Section 9 of the of the Arbitration and Conciliation Act, 1996 for an injunction restraining O.M.M. from terminating the contract and dispossessing it from the site of the mines. O.M.M. contested the application** E **but the District Court allowed it. However, the High Court allowed the appeal of O.M.M holding that (i) in view of Section 14(3)(c) of the Specific Relief Act, 1963 the loss, if any, that may be sustained by AS, could be calculated in terms of money; (ii) the question of balance of convenience for grant of injunction was not required to be gone into as it was otherwise not a fit case** F **for grant thereof. However, the High Court also held that *prima facie* neither Rule 37 ibid nor Section 14(1)(c) of the Act of 1963 were applicable to the facts of the case. Feeling aggrieved thereby, both AS and O.M.M. filed the present cross appeals.**

AS contended that (i) Section 9 of the Act of 1996 was independent of G **Order XXXIX of the Code of Civil Procedure and Act of 1963; (ii) by way of an interim measure, the court could pass mandatory or prohibitory order for the preservation of the subject matter of the arbitration agreement; (iii) until the arbitrator decided whether O.M.M. was entitled to terminate the contract and its consequences, the court had not only the power but the duty under Section 9 Act of 1996 to protect their contractual right to mine and lift the** H

ore to the surface on behalf of O.M.M; (iv) if O.M.M. is permitted to enter into agreements with others for the same purpose, it would be unjust as it cancelled the agreement mainly because it was hit by Rule 37 ibid; (v) O.M.M. must be restrained from carrying on any mining operation in the mines concerned pending the arbitral proceedings.

O.M.M. contended that (i) since neither Section 9 of the Act of 1996 nor any other of its provisions provided the conditions for grant of interim protection, the provisions of the Code of Civil Procedure and the Act of 1963 cannot be kept out while the court considers the question whether on the facts of a case, any interim protection should be granted; so, the court had necessarily to consider the well known restrictions on the grant of interim orders; (ii) grant of an injunction by way of interim measure to permit AS to carry on the mining operations pending the arbitration proceedings notwithstanding the termination of the contract by O.M.M. was not permissible in law.

Disposing of the appeals, the Court

HELD 1.1. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was de hors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, *prima facie* case, irreparable injury and the concept of just and convenient while passing interim measures under Section 9 of the Act. [Para 10] [224-E, F, G, H]

American Jurisprudence, 2nd Edition referred to.

A **1.2. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, the relevant provisions of the Specific Relief Act cannot be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act** B **and the law bearing on the subject. Under Section 28 of the Act of 1996, even the arbitral tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that Section 9 keeps out the substantive law relating to interim** C **reliefs. [Para 14] [227-F, G; 228-A]**

Nepa Limited v. *Manoj Kumar Agrawal,* AIR (1999) *Madhya Pradesh* 57 overruled.

Coppee Levalin NV v. *Ken-Ren Fertilisers and Chemicalsb,* (1994) 2 D *Lloyd's Report 109 at 116)* referred to.

Dr. Banerjee in his Tagor Law Lectures on Specific Relief, referred to .

Commentary on Interim and Conservatory Measures in ICC Arbitration Cases by Professor Lew; David Bean on Injunctions. , referred to.

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1.3. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration agreement. It was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. But, at F **the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for** G **the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of** H **an injunction. Therefore, on the whole, it would not be correct to say that the**

power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. [Para 18] [229-B, C, D, E, F] A

2. The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. [Para 15] [228-A]

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The Siskina (1979) AC 210, *Fourie* v. *Le Roux,* (2007) 1 W.L.R. 320, referred to.

3.1. The question here is whether in the circumstances, an order of injunction could be granted restraining O.M.M. Private Limited from interfering with Adhunik Steels' working of the contract which O.M.M. Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the O.M.M. Private Limited terminating the arrangement entered into between itself and Adhunik Steels. In terms of Order XXXIX Rule 2 of the Code of Civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a *prima facie* case for restraining O.M.M. Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. C D

[Para 20] [230-E, F]

3.2. The High Court has held that this was not a case where the damages that may be suffered by Adhunik Steels by the alleged breach of contract by O.M.M. Private Limited could be quantified at a future point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These are impoundables to some extent but at the same time it cannot be said that at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award. [Para 20] [230-F; 231-A] E F

4. O.M.M. Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct O.M.M. Private Limited not to enter into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings. [Para 21] [231-B, C] G

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A 5. There is no justification in preventing O.M.M. Private Limited from carrying on the mining operations by itself. It has got a mining lease and subject to any award that may be passed by the arbitrator on the effect of the contract it had entered into with Adhunik Steels, it has the right to mine and lift the minerals therefrom. The carrying on of that activity by O.M.M. Private Limited cannot prejudice Adhunik Steels, since ultimately Adhunik Steels,
B if it succeeds, would be entitled to get, if not the main relief, compensation for the termination of the contract on the principles well settled in that behalf. Therefore, it is not possible to restrain O.M.M. Private Limited from carrying on any mining operation in the mines concerned pending the arbitral proceedings. [Para 22] [231-D, E]

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6. There is considerable dispute as to whether Rule 37 of the Mineral Concession Rules, 1960 has application. The District Court and the High Court have *prima facie* come to the conclusion that the said Rule has no application. Whether the said Rule has application, is one of the aspects to be considered by the arbitrator or the Arbitral Tribunal that may be constituted
D in terms of the arbitration agreement between the parties. It is not proper for the Court at this stage to pronounce on the applicability or otherwise of Rule 37 of the Mineral Concession Rules, 1960 and its impact on the agreement entered into between the parties. Therefore, that question is left open for being decided by the arbitrator. [Para 19] [230-A, B, C]

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7. The attempt made by O.M.M. Private Limited to rely upon some other arbitral award in support of its claim that Rule 37 of the Mineral Concession Rules, 1960 would apply, is neither here nor there. The Court is not concerned with what the arbitrator who may be appointed will hold in the present case and not what some other arbitrator held in some other arbitration and some
F other contract even if it be between the same parties. Moreover, the Court could not be bound by what an arbitrator might have held in an arbitration proceeding unless it be that the said award operates as a bar between the parties barring either of them from raising a plea in that behalf.

[Para 19] [230-C, D]

G 8. The arbitration proceedings must be expedited. The application for appointment of an arbitrator made before the Chief Justice of the Orissa High Court under Section 11(6) of the Act is pending for over two years without orders. Normally, the Court would have requested the Chief Justice of the Orissa High Court or his nominee to take up and dispose of the application
H under Section 11(6) of the Act expeditiously. But the Court put it to the parties

that it would be more expedient if we appoint an arbitrator in this proceeding itself, so that further delay can be avoided. The parties have agreed to that course. The Court, therefore, in the interests of justice appointed a sole arbitrator to adjudicate on the dispute between the parties. It was expected that the sole arbitrator would enter upon the reference and pronounce his award expeditiously. [Para 25] [232-B, C, D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6569 of 2005.

From the Judgment & Order dated 18.03.2005 of the High Court of Orissa at Cuttack in Arbitration appeal No. 26 of 2004.

WITH

Dushyant Dave and Shyam Divan, Sr. Adv., Smita Bankoti, Anirudh and Devendra Singh for the Appellant.

C.A. Sundaram and Ranjit Kumar, Sr. Adv., Arvind Kumar, Laxmi Arvind, Mahesh Agarwal, Gopal Jain and Poonam Prasad for the Respondent.

The Judgment of the Court was delivered by

P.K. BALASUBRAMANYAN, J. 1. These Cross Appeals by Special Leave challenge the order passed by the High Court of Orissa in an appeal under Section 37(1)(a) of the Arbitration & Conciliation Act, 1996. The said appeal was one filed by the respondent in C.A. No. 6569 of 2005 which is the appellant in C.A. No. 6570 of 2005 challenging an order of the District Court at Sundargarh in a petition under Section 9 of the Act filed by the appellant in C.A. No. 6569 of 2005 and the respondent in C.A. No. 6570 of 2005. For convenience, the parties will hereinafter be referred to as "Adhunik Steels" and "O.M.M. Private Limited". Adhunik Steels it was, that filed the application under Section 9 of the Act.

2. O.M.M. Private Limited obtained a mining lease from the Government of Orissa for mining manganese ore from certain extents of land situate in Sundargarh district in the State of Orissa. For reasons of its own, O.M.M. Private Limited entered into an agreement dated 14.5.2003 with Adhunik Steels for raising the manganese ore on its behalf. The term of the agreement was 10 years with effect from 18.5.2003, it conferred on Adhunik Steels an option to seek a renewal for a further term.

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A 3. According to Adhunik Steels, pursuant to this agreement, it had mobilized huge resources for carrying on the excavation and extraction of the mineral by arranging for the necessary labour, staff, equipments, and so on. It had also incurred expenditure for removing the overburden. On 24.11.2003, O.M.M. Private Limited issued a notice to Adhunik Steels purporting to terminate the agreement. The notice also called upon Adhunik Steels to B remove their workmen and equipment from the site. According to O.M.M. Private Limited, it had realized that the contract it had entered into with Adhunik Steels was one in violation of Rule 37 of the Mineral Concession Rules, 1960 and since there was danger of O.M.M. Private Limited itself losing its rights as a lessee, the contract had to be terminated. Adhunik Steels, C alleging that it had incurred considerable expenditure and had already incurred losses, moved the District Court at Sundargarh under Section 9 of the Act for an injunction restraining O.M.M. Private Limited from terminating the contract and from dispossessing Adhunik Steels from the site of the mines and for other consequential reliefs. The said application was opposed by O.M.M. Private Limited on various grounds. Ultimately, by order dated D 18.8.2004, the District Court allowed the application and restrained O.M.M. Private Limited from relying on, acting upon or giving effect to the letter of termination dated 24.11.2003 and further restraining O.M.M. Private Limited from dispossessing Adhunik Steels from the mines in question. The order was to remain in force till the final award that was to be passed by an Arbitral E Tribunal constituted in terms of the arbitration agreement.

4. We may notice here that prior to approaching the District Court at Sundargarh, Adhunik Steels had moved the Calcutta High Court under Section 9 of the Act seeking identical reliefs. O.M.M. Private Limited had raised an objection to jurisdiction in the Calcutta High Court and the said objection was F upheld by the Calcutta High Court and that had led to Adhunik Steels approaching the District Court at Sundargarh. We may also notice that it is contended that Adhunik Steels had thereafter moved the Chief Justice of the High Court of Orissa under Section 11(6) of the Act for appointment of an Arbitrator in terms of the arbitration agreement. The application is said to be G pending.

5. The District Court, Sundargarh held that Rule 37 of the Mineral Concession Rules, 1960 cannot be held to be applicable to the working arrangement between the parties which has been termed a raising contract. It further held that the balance of convenience was in favour of the grant of H an injunction against O.M.M. Private Limited as sought for by Adhunik

Steels, and that if an order of injunction was not granted, the very purpose of initiating the arbitration proceeding would be defeated. Following the decision of the Madhya Pradesh High Court in *Nepa Limited* v. *Manoj Kumar Agrawal,* AIR (1999) MADHYA PRADESH 57, it accepted the principle that there was a distinction between Section 9 and Section 11 of the Act and that the powers under Section 9 are wide and what is relevant to be considered at the stage of a motion under Section 9 of the Act was the existence of an arbitration clause and the necessity of taking interim measures and the court could issue any direction that is deemed appropriate. Rejecting the contention of O.M.M. Private Limited that Adhunik Steels had been dispossessed subsequent to the letter terminating the contract, the court held that in its opinion it would be equitable to grant the orders sought for under Section 9 of the Act. It also stated that an order of injunction would be necessary to preserve the mines in dispute so that the arbitrators at a later point of time can have an effective and proper adjudication of the dispute referred to them. It was thus that the order of injunction was granted.

6. Aggrieved by the order of the District Court, Sundargarh, O.M.M. Private Limited filed an appeal before the High Court of Orissa. It was argued on behalf of O.M.M. Private Limited that the contract between the parties was in violation of Rule 37 of the Mineral Concession Rules, 1960 and hence the agreement itself was illegal and no right could be founded on such an illegal agreement by Adhunik Steels. It was alternatively contended that in terms of Section 41 of the Specific Relief Act, no injunction can be granted for continuance of the contract and the working of the contract involved intrinsic details in its performance extended over a period of 10 years and the court would not be in a position to supervise the working of the contract and in such a situation, an interim injunction ought not to be granted. It was also contended that in terms of Section 14 of the Specific Relief Act, the agreement was not specifically enforceable as it was terminable and in any event, since Adhunik Steels could be compensated in terms of money, even if its claim was ultimately upheld, it was not a case for grant of an interim injunction in terms of Section 14(3) of the Specific Relief Act. The learned judge of the High Court came to the *prima facie* conclusion that Rule 37 of the Mineral Concession Rules, 1960 had no application to the facts of the case. The learned judge also held that in view of clause 8.2 of the agreement, Section 14(1)(c) of the Specific Relief Act was not attracted. But the learned judge upheld the contention on behalf of O.M.M. Private Limited that the loss, if any, that may be sustained by Adhunik Steels, could be calculated in terms of money and in view of that and in the light of Section 14(3)(c) of

A the Specific Relief Act, an injunction as prayed for by Adhunik Steels could not be granted. The court did not go into the question of balance of convenience in granting an order of injunction in the light of its conclusion that this is not a fit case for grant of an interim injunction.

7. Thus, the High Court allowed the appeal filed by O.M.M. Private B Limited and set aside the order of injunction passed by the District Court, Sundargarh. Feeling aggrieved thereby, Adhunik Steels has filed its appeal. Feeling aggrieved by the finding that Rule 37 of Mineral Concession Rules, 1960 does not hit the contract in question and the finding that Section 14(1)(c) of the Specific Relief Act did not stand in the way of injunction being granted, C O.M.M. Private Limited has come up with its appeal.

8. There was considerable debate before us on the scope of Section 9 of the Act. According to learned counsel for Adhunik Steels, Section 9 of the Act stood independent of Section 94 and Order XXXIX of the Code of Civil Procedure and the exercise of power thereunder was also not trammeled by D anything contained in the Specific Relief Act. Learned counsel contended that by way of an interim measure, the court could pass an order for the preservation or custody of the subject matter of the arbitration agreement irrespective of whether the order that may be passed was in a mandatory form or was in a prohibitory form. The subject matter of arbitration in the present case was the continued right of Adhunik Steels to mine and lift the ore to E the surface on behalf of O.M.M. Private Limited and until the arbitrator decided on whether O.M.M. Private Limited was entitled to breach the agreement or terminate the agreement and what would be its consequences, the court had not only the power but the duty to protect the right of Adhunik Steels conferred by the contract when approached under Section 9 of the Act. F Learned counsel emphasized that what was liable to be protected in an appropriate case was the subject matter of the arbitration agreement. Learned counsel referred to 'The Law and Practice of Commercial Arbitration in England' by Mustill and Boyd and relied on the following passage therefrom:

"(b) Safeguarding the subject matter of the dispute:

G The existence of a dispute may put at risk the property which forms the subject of the reference, or the rights of a party in respect of that property. Thus, the dispute may prevent perishable goods from being put to their intended use, or may impede the proper exploitation of a profit-earning article, such as a ship. If the disposition of the property H has to wait until after the award has resolved the dispute, unnecessary

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hardship may be caused to the parties. Again, there may be a risk that if the property is left in the custody or control of one of the parties, pending the hearing, he may abuse his position in such a way that even if the other party ultimately succeeds in the arbitration, he will not obtain the full benefit of the award. In cases such as this, the Court (and in some instances the arbitrator) has power to intervene, for the purpose of maintaining the *status quo* until the award is made. The remedies available under the Act are as follows:-

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(i) The grant of an interlocutory injunction.

(ii) The appointment of a receiver

(iii) The making of an order for the preservation, custody or sale of the property.

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(iv) The securing of the amount in dispute."

Learned counsel also relied on 'International Commercial Arbitration in UNCITRAL Model Law Jurisdictions' by Dr. Peter Binder, wherein it is stated:

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"It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure."

It is further stated:

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"In certain circumstances, especially where the arbitral tribunal has not yet been established, the issuance of interim measures by the court is the only way assets can be saved for a future arbitration. Otherwise, the claimant could end up with a worthless arbitral award due to the fact that the losing party has moved his attachable assets to a "safe" jurisdiction where they are out of reach of the claimant's seizure. The importance of such a provision in an arbitration law is therefore evident, and a comparison of the adopting jurisdictions shows that all jurisdictions include some kind of provision on the issue, all granting the parties permission to seek court-ordered interim measures."

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9. Learned counsel for O.M.M. Private Limited submitted that Section 9 leaves it to a party to approach the court for certain interim measures and it enables the court to pass orders by way of interim measures of protection in respect of the matters enumerated therein. Neither this Section nor the Act

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A elsewhere has provided the conditions for grant of such interim protection leaving it to the court to exercise the jurisdiction vested in it as a court to adjudge whether any protective measure is called for. In that context, neither the provisions of the Code of Civil Procedure nor the provisions of the Specific Relief Act can be kept out while the court considers the question whether on the facts of a case, any order by way of interim measure of B protection should be granted. So, the court had necessarily to consider the balance of convenience, the question whether at least a triable issue arises if not the establishment of a *prima facie* case by the applicant before it and the other well known restrictions on the grant of interim orders, like the principle that a contract of personal service would not be specifically enforced C or that no injunction would be granted in certain circumstances as envisaged by Section 14 and Section 41 of the Specific Relief Act. Thus, it was contended that grant of an injunction by way of interim measure to permit Adhunik Steels to carry on the mining operations pending the arbitration proceedings notwithstanding the termination of the contract by O.M.M. Private Limited was not permissible in law.

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10. It is true that Section 9 of the Act speaks of the court by way of an interim measure passing an order for protection, for the preservation, interim custody or sale of any goods, which are the subject matter of the arbitration agreement and such interim measure of protection as may appear E to the court to be just and convenient. The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was *de hors* the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the Section itself F brings in, the concept of 'just and convenient' while speaking of passing any interim measure of protection. The concluding words of the Section, "and the court shall have the same power for making orders as it has for the purpose and in relation to any proceedings before it" also suggest that the normal rules that govern the court in the grant of interim orders is not sought to be G jettisoned by the provision. Moreover, when a party is given a right to approach an ordinary court of the country without providing a special procedure or a special set of rules in that behalf, the ordinary rules followed by that court would govern the exercise of power conferred by the Act. On that basis also, it is not possible to keep out the concept of balance of convenience, *prima facie* case, irreparable injury and the concept of just and H convenient while passing interim measures under Section 9 of the Act.

11. The power and jurisdiction of courts in arbitral matters has been the subject of much discussion. The relationship between courts and arbitral tribunals have been said to swing between forced co-habitation and true partnership. The process of arbitration is dependant on the underlying support of the courts who alone has the power to rescue the system when one party seeks to sabotage it. The position was stated by Lord Mustil in *Coppee Levalin NV* v. *Ken-Ren Fertilisers and Chemicalsb,* (1994) 2 Lloyd's Report 109 at 116:

> "there is plainly a tension here. On the one hand the concept of arbitration as a consensual process reinforced by the ideas of transnationalism leans against the involvement of the mechanisms of state through the medium of a municipal court. On the other side there is a plain fact, palatable or not, that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering."

In Conservatory and Provisional Measures in International Arbitration, 9th Joint Colloquium, Lord Mustill in "Comments and Conclusions" described the relationship further:

> "Ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfil, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award."

It is in the above background that one has to consider the power of the court approached under the Arbitration Act for interim relief or interim protection.

12. Professor Lew in his 'Commentary on Interim and Conservatory Measures in ICC Arbitration Cases', has indicated:

> "The demonstration of irreparable or perhaps substantial harm is also necessary for the grant of a measure. This is because it is not appropriate to grant a measure where no irreparable or substantial

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> harm comes to the movant in the event the measure is not granted. The final award offers the means of remedying any harm, reparable or otherwise, once determined."

The question was considered in *Channel Tunnel Group Ltd. And Anr.* v. *Balfour Beatty Construction Ltd.,* (1993) Appeal Cases 334. The trial judge in that case took the view that he had the power to grant an interim mandatory injunction directing the continuance of the working of the contract pending the arbitration. The Court of Appeal thought that it was an appropriate case for an injunction but that it had no power to grant injunction because of the arbitration. In further appeal, the House of Lords held that it did have the power to grant injunction but on facts thought it inappropriate to grant one. In formulating its view, the House of Lords highlighted the problem to which an application for interim relief like the one made in that case may give rise. The House of Lords stated at page 367:

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> "It is true that mandatory interlocutory relief may be granted even where it substantially overlaps the final relief claimed in the action; and I also accept that it is possible for the court at the pre-trial stage of the dispute arising under a construction contract to order the defendant to continue with a performance of the works. But the court should approach the making of such an order with the utmost caution and should be prepared to act only when the balance of advantage plainly favours the grant of relief. In the combination of circumstances which we find in the present case, I would have hesitated long before proposing that such an order should be made, even if the action had been destined to remain in the High Court."

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13. Injunction is a form of specific relief. It is an order of a court requiring a party either to do a specific act or acts or to refrain from doing a specific act or acts either for a limited period or without limit of time. In relation to a breach of contract, the proper remedy against a defendant who acts in breach of his obligations under a contract, is either damages or specific relief. The two principal varieties of specific relief are, decree of specific performance and the injunction (See David Bean on Injunctions). The Specific Relief Act, 1963 was intended to be "An Act to define and amend the law relating to certain kinds of specific reliefs." Specific Relief is relief in specie. It is a remedy which aims at the exact fulfilment of an obligation. According to Dr. Banerjee in his Tagor Law Lectures on Specific Relief, the remedy for the non performance of a duty are (1) compensatory, (2) specific.

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In the former, the court awards damages for breach of the obligation. In the latter, it directs the party in default to do or forbear from doing the very thing, which he is bound to do or forbear from doing. The law of specific relief is said to be, in its essence, a part of the law of procedure, for, specific relief is a form of judicial redress. Thus, the Specific Relief Act, 1963 purports to define and amend the law relating to certain kinds of specific reliefs obtainable in civil courts. It does not deal with the remedies connected with compensatory reliefs except as incidental and to a limited extent. The right to relief of injunctions is contained in part-III of the Specific Relief Act. Section 36 provides that preventive relief may be granted at the discretion of the court by injunction temporary or perpetual. Section 38 indicates when perpetual injunctions are granted and Section 39 indicates when mandatory injunctions are granted. Section 40 provides that damages may be awarded either in lieu of or in addition to injunctions. Section 41 provides for contingencies when an injunction cannot be granted. Section 42 enables, notwithstanding anything contained in Section 41, particularly clause (e) providing that no injunction can be granted to prevent the breach of a contract the performance of which would not be specifically enforced, the granting of an injunction to perform a negative covenant. Thus, the power to grant injunctions by way of specific relief is covered by the Specific Relief Act, 1963.

14. In *Nepa Limited* v. *Manoj Kumar Agrawal,* AIR (1999) MADHYA PRADESH 57, a learned judge of the Madhya Pradesh High Court has suggested that when moved under Section 9 of the Act for interim protection, the provisions of the Specific Relief Act cannot be made applicable since in taking interim measures under Section 9 of the Act, the court does not decide on the merits of the case or the rights of parties and considers only the question of existence of an arbitration clause and the necessity of taking interim measures for issuing necessary directions or orders. When the grant of relief by way of injunction is, in general, governed by the Specific Relief Act, and Section 9 of the Act provides for an approach to the court for an interim injunction, we wonder how the relevant provisions of the Specific Relief Act can be kept out of consideration. For, the grant of that interim injunction has necessarily to be based on the principles governing its grant emanating out of the relevant provisions of the Specific Relief Act and the law bearing on the subject. Under Section 28 of the Act of 1996, even the arbitral tribunal is enjoined to decide the dispute submitted to it, in accordance with the substantive law for the time being in force in India, if it is not an international commercial arbitration. So, it cannot certainly be inferred that

A Section 9 keeps out the substantive law relating to interim reliefs.

15. The approach that at the initial stage, only the existence of an arbitration clause need be considered is not justified. In The Siskina [1979] AC 210, Lord Diplock explained the position:

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> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

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He concluded:

> "To come within the sub-rule the injunction sought in the action must be part of the substantive relief to which the plaintiff's cause of action entitles him; and the thing that it is sought to restrain the foreign defendant from doing in England must amount to an invasion of some legal or equitable right belonging to the plaintiff in this country and enforceable here by a final judgment for an injunction."

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16. Recently, in *Fourie* v. *Le Roux,* (2007) 1 W.L.R. 320, the House of Lords speaking through Lord Scott of Foscote stated:

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> "An interlocutory injunction, like any other interim order, is intended to be of temporary duration, dependent on the institution and progress of some proceedings for substantive relief."

and concluded:

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> "Whenever an interlocutory injunction is applied for, the judge, if otherwise minded to make the order, should, as a matter of good practice, pay careful attention to the substantive relief that is, or will be, sought. The interlocutory injunction in aid of the substantive relief should not place a greater burden on the respondent than is necessary. The yardstick in section 37(1) of the 1981 Act, "just and

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> convenient", must be applied having regard to the interests not only of the claimant but also of the defendant."

17. No special condition is contained in Section 9 of the Act. No special procedure is indicated. In American Jurisprudence, 2nd Edition it is stated:

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> "In judicial proceedings under arbitration statutes ordinary rules of practice and procedure govern where none are specified; and even those prescribed by statute are frequently analogous to others in common use and are subject to similar interpretation by the courts."

18. It is true that the intention behind Section 9 of the Act is the issuance of an order for preservation of the subject matter of an arbitration agreement. According to learned counsel for Adhunik Steels, the subject matter of the arbitration agreement in the case on hand, is the mining and lifting of ore by it from the mines leased to O.M.M. Private Limited for a period of 10 years and its attempted abrupt termination by O.M.M. Private Limited and the dispute before the arbitrator would be the effect of the agreement and the right of O.M.M. Private Limited to terminate it prematurely in the circumstances of the case. So viewed, it was open to the court to pass an order by way of an interim measure of protection that the existing arrangement under the contract should be continued pending the resolution of the dispute by the arbitrator. May be, there is some force in this submission made on behalf of the Adhunik Steels. But, at the same time, whether an interim measure permitting Adhunik Steels to carry on the mining operations, an extraordinary measure in itself in the face of the attempted termination of the contract by O.M.M. Private Limited or the termination of the contract by O.M.M. Private Limited, could be granted or not, would again lead the court to a consideration of the classical rules for the grant of such an interim measure. Whether an interim mandatory injunction could be granted directing the continuance of the working of the contract, had to be considered in the light of the well-settled principles in that behalf. Similarly, whether the attempted termination could be restrained leaving the consequences thereof vague would also be a question that might have to be considered in the context of well settled principles for the grant of an injunction. Therefore, on the whole, we feel that it would not be correct to say that the power under Section 9 of the Act is totally independent of the well known principles governing the grant of an interim injunction that generally govern the courts in this connection. So viewed, we have necessarily to see whether the High Court was justified in refusing the interim injunction on the facts and in the circumstances of the

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A case.

19. No doubt, there is considerable dispute as to whether Rule 37 of the Mineral Concession Rules, 1960 has application. The District Court and the High Court have *prima facie* come to the conclusion that the said Rule has no application. Whether the said Rule has application, is one of the aspects B to be considered by the arbitrator or the Arbitral Tribunal that may be constituted in terms of the arbitration agreement between the parties. We do not think that it is proper for us at this stage to pronounce on the applicability or otherwise of Rule 37 of the Mineral Concession Rules, 1960 and its impact on the agreement entered into between the parties. We therefore leave open C that question for being decided by the arbitrator. The attempt made by O.M.M. Private Limited to rely upon some other arbitral award in support of its claim that Rule 37 of the Mineral Concession Rules, 1960 would apply, is neither here nor there. We are concerned with what the arbitrator who may be appointed will hold in the present case and not what some other arbitrator held in some other arbitration and some other contract even if it be between D the same parties. Moreover, in our adjudication, we cannot be bound by what an arbitrator might have held in an arbitration proceeding unless it be that the said award operates as a bar between the parties barring either of them from raising a plea in that behalf.

20. The question here is whether in the circumstances, an order of E injunction could be granted restraining O.M.M. Private Limited from interfering with Adhunik Steels' working of the contract which O.M.M. Private Limited has sought to terminate. Whatever might be its reasons for termination, it is clear that a notice had been issued by the O.M.M. Private Limited terminating the arrangement entered into between itself and Adhunik Steels. In terms of F Order XXXIX Rule 2 of the Code of Civil Procedure, an interim injunction could be granted restraining the breach of a contract and to that extent Adhunik Steels may claim that it has a *prima facie* case for restraining O.M.M. Private Limited from breaching the contract and from preventing it from carrying on its work in terms of the contract. It is in that context that the High Court has held that this was not a case where the damages that may G be suffered by Adhunik Steels by the alleged breach of contract by O.M.M. Private Limited could not be quantified at a future point of time in terms of money. There is only a mention of the minimum quantity of ore that Adhunik Steels is to lift and there is also uncertainty about the other minerals that may be available for being lifted on the mining operations being carried on. These H are impoundables to some extent but at the same time it cannot be said that

at the end of it, it will not be possible to assess the compensation that might be payable to Adhunik Steels in case the claim of Adhunik Steels is upheld by the arbitrator while passing the award. A

21. But, in that context, we cannot brush aside the contention of the learned counsel for Adhunik Steels that if O.M.M. Private Limited is permitted to enter into other agreements with others for the same purpose, it would be unjust when the stand of O.M.M. Private Limited is that it was canceling the agreement mainly because it was hit by Rule 37 of the Mineral Concession Rules, 1960. Going by the stand adopted by O.M.M. Private Limited, it is clear that O.M.M. Private Limited cannot enter into a similar transaction with any other entity since that would also entail the apprehended violation of Rule 37 of the Mineral Concession Rules, 1960, as put forward by it. It therefore appears to be just and proper to direct O.M.M. Private Limited not to enter into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings. B C

22. At the same time, we see no justification in preventing O.M.M. Private Limited from carrying on the mining operations by itself. It has got a mining lease and subject to any award that may be passed by the arbitrator on the effect of the contract it had entered into with Adhunik Steels, it has the right to mine and lift the minerals therefrom. The carrying on of that activity by O.M.M. Private Limited cannot prejudice Adhunik Steels, since ultimately Adhunik Steels, if it succeeds, would be entitled to get, if not the main relief, compensation for the termination of the contract on the principles well settled in that behalf. Therefore, it is not possible to accede to the contention of learned counsel for Adhunik Steels that in any event O.M.M. Private Limited must be restrained from carrying on any mining operation in the mines concerned pending the arbitral proceedings. D E F

23. We think that we should refrain from discussing the various issues at great length since we feel that any discussion by us in that behalf could prejudice either of the parties before the arbitrator or the arbitral tribunal. We have therefore confined ourselves to making such general observations as are necessary in the context of the elaborate arguments raised before us by learned counsel. G

24. We therefore dismiss the appeal filed by O.M.M. Private Limited leaving open the questions raised by it for being decided by the arbitrator or Arbitral Tribunal in accordance with law. We also substantially dismiss the appeal filed by Adhunik Steels except to the extent of granting it an order of H

A injunction restraining O.M.M. Private Limited from entering into a transaction for mining and lifting of the ore with any other individual or concern making it clear that it can, on its own, carry on the mining operations in terms of the mining lease.

25. We think that the arbitration proceedings must be expedited. We are B told that the application for appointment of an arbitrator made before the Chief Justice of the Orissa High Court under Section 11(6) of the Act is pending for over two years without orders. Normally, we would have requested the Chief Justice of the Orissa High Court or his nominee to take up and dispose of the application under Section 11(6) of the Act expeditiously. But C we put it to the parties that it would be more expedient if we appoint an arbitrator in this proceeding itself, so that further delay can be avoided. The parties have agreed to that course. We therefore think that it would be in the interests of justice if we appoint here and now a sole arbitrator to adjudicate on the dispute between the parties. Hence we appoint Mr. Justice R.C. Lahoti, former Chief Justice of India as the sole arbitrator to decide the dispute D between the parties. The arbitrator will be free to fix his terms in consultation with the parties. We confidently expect the sole arbitrator to enter upon the reference and pronounce his award expeditiously.

26. The appeals are disposed of as above. We make no order as to costs.

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V.S. Appeals disposed of.