(2012) 09 CAL CK 0088

Calcutta High Court

Case No: AP No. 245 of 2012

Synergy Ispat Private Limited		APPELLANT
	Vs	
Orissa Manganese and Minerals Limited		RESPONDENT

Date of Decision: Sept. 5, 2012

Acts Referred:

- Arbitration and Conciliation Act, 1996 - Section 11, 9
- General Clauses Act, 1897 - Section 27
- Specific Relief Act, 1963 - Section 14

Hon'ble Judges: Sanjib Banerjee, J

Bench: Single Bench

Advocate: S.N. Mookerjee, Sr, Mr S. Chaudhary, Mr P. Mukherjee and Deepak Agarwal, for the Appellant;I.M. Chagla, Sr Advocate, Mr Abhrajit Mitra, Mr Abhijeet Sinha, Mr Jishnu Chowdhury, Mr B.N. Joshi, Mr Amit Agrawal and Mr D. Saha, for the Respondent

Judgement

Sanjib Banerjee, J.

The principal ground urged on behalf of the respondent at the final hearing of this petition u/s 9 of the Arbitration and Conciliation Act, 1996 was not canvassed at the ad interim stage of this matter which prompted the court to deliberate on other aspects which now pale into insignificance. The respondent''s choice of not putting forth the weighty argument on a substantial issue led the court, at the ad interim stage, to be needlessly bogged down by matters of prejudice and the perceived dishonest stand of the respondent. The respondent obtained a mining lease to extract iron ore from an area in Ghatkuri in the Singhbhum (West) District, now in the state of Jharkhand. On February 17, 2005 the parties entered into an agreement under which the respondent agreed to sell to the petitioner the entire iron ore excavated from the leasehold area as per the terms and conditions contained therein. The agreement was valid for a period of seven years from the commencement of the mining operations at the Ghatkuri mines and provided for

renewal thereafter on mutually agreed terms and conditions. The effective date for the commencement of the agreement was to be determined from the date of obtaining the permission for beginning the mining activities. The petitioner claims that notwithstanding the agreement having been executed early in 2005, the necessary permissions for the commencement of mining operations were not obtained for a substantial period thereafter and, at any rate, the respondent did not inform the petitioner prior to the petitioner''s query late in 2009 of any temporary or final permission having been obtained by it to undertake the mining activities.

2. The petitioner claims that it was only in December of 2009 that the petitioner came to be aware that operations had apparently been commenced at the Ghatkuri mines. The petitioner wrote a letter of December 24, 2009 suggesting that it had "discreet information" that the respondent "in violation of the stipulations contained in the Selling Agreement commenced supply of iron ore to some third party." The petitioner demanded in such letter that the respondent should let it know of the "correct factual position" within three weeks, failing which the petitioner would infer that the respondent was in breach of the agreement. The respondent replied on January 11, 2010, asserting that it had issued two letters of June 22, 2007 and August 1, 2008 on the subject to the petitioner wherein the respondent had "clearly indicated the legal impediment in performance of these Agreements in view of their complete and direct violation on Rule 37 making them void ab initio and also returned the advance paid by you to our Company as per books of accounts amounting to Rs.1,67,50,000/- ..." The petitioner claims that it did not receive either previous letter referred to in the respondent''s reply of January 11, 2010 and suggests that the postal receipt referred to in the reply did not evidence service of either previous letter on the petitioner. The petitioner proceeds to discredit the respondent''s assertion that the respondent had terminated the agreement on any ground or had informed the petitioner of such alleged termination at any point of time prior to issuing the letter of January 11, 2010. The petitioner insists that it is entitled to specific performance of the selling agreement of February 17, 2005, that the bogey raised under Rule 37 of the Mineral Concession Rules, 1960 is an eye-wash and that, in the unlikely event of a tentative view being taken that specific performance of the agreement may not be granted in the arbitral reference, it is entitled, nonetheless, to enforce the negative covenant running through the agreement and crystallised in Clause 14.1 thereof. Much of the petitioner''s effort in obtaining the order that it seeks has been expended in its endeavour to demonstrate that neither letter of June 22, 2007 and August 1, 2008 had been issued by the respondent or received by the petitioner.

3. The main plank of the defence is founded on the selling agreement of February 17, 2005 being only a part of a larger agreement executed on the same day. The respondent suggests that it would be misleading to treat the selling agreement that the petitioner seeks to enforce as a stand-alone agreement entered into at arm''s length between the parties. The respondent shows, and it is also admitted by the

petitioner, that there was another agreement executed on February 17, 2005 between the respondent and one Metsil Exports Private Limited. According to the respondent, such other agreement - styled as a raising agreement - along with the selling agreement executed in favour of the petitioner, formed a composite agreement for Metsil and the petitioner herein to jointly conduct the mining operations and the sale of the extract therefrom. The respondent asserts that the composite agreement, willy-nilly, amounted to the licence obtained by the respondent being assigned to the combine of Metsil and the petitioner herein, with the respondent agreeing to receive a commission based on the quantum of ore extracted from the Ghatkuri mines. The respondent submits that such agreement was in abject derogation of the ethos of Rule 37 of the 1960 Rules and amounted to the licence obtained by the respondent being traded in favour of the combine of Metsil and the petitioner with the respondent reserving a cut unto itself based on the extent of the produce from the mines.

4. The respondent refers to the agreement between Metsil and the respondent and, in particular, to the following clauses:

3.1.1 METSIL shall enter into the leasehold area and take all such steps and perform all such functions as are pre-requisite, essential and integral for commencement of mining operations.

3.1.2. METSIL shall employ and depute inter-alia all necessary qualified mining personnel including but not limited to Foreman, Blaster, Driller, Mate as may be required under Mines Act 1952, Mines & Minerals (Development & Regulation) Act 1957 and the Rules & Regulations made there-under for technical guidance and supervision. Such personnel shall be deemed to be METSIL''s employee for all legal effects and purposes. METSIL shall have the right to recall and/or replace all or any deputed personnel at any point of time as it may deem fit and proper without assigning any reason. All payments of salaries, wages and other emoluments to such personnel shall be borne by METSIL. After the expiry of this agreement METSIL shall remove all the people appointed by them with full and final payment to them.

3.1.4 METSIL shall, on behalf of OMM and wherever required on their behalf, sign and file such applications, declarations, affidavits and other papers as may be necessary before the competent authorities for undertaking mining operations from the leasehold area and to represent OMM before various authorities including the judicial, quasi judicial, statutory and local authorities.

4.2 All costs, charges, expenses, and liabilities in connection with the mine and mining operations till the commencement of mining operations appointing METSIL as raising contractor shall be borne and payable by OMM. During the validity of this Agreement any liability arising out of and/or in connection with the mining operations shall be borne and payable by METSIL. Both the parties indemnify and continue to keep other party indemnified in this regard to the extent provided

herein.

4.3 METSIL shall, during the period of this contact, bear all expenses incurred in carrying out mining operations and for excavation of IRON ORE, which shall inter-alia include but not limited to expense relating to machines, preparation of mining plans from time to time, rents of all plots, development, blasting, raising of minerals, sizing of minerals, analysis, transportation within the leasehold area, labour dues, provident fund, gratuity and tax deducted at source etc.

4.5 METSIL shall cooperate and assist OMM in getting renewal of mining'' lease and DRP for and on behalf of OMM. Any expenses incurred with approval of OMM in obtaining such permission(s) and approval(s) shall be reimbursed by OMM.

4.6 METSIL shall ensure payment on behalf of OMM within the stipulated time for all Government revenue such as royalty, forest cess, dead rent, sales tax and any other new levies, etc payable by OMM so that mining operations are carried out uninterruptedly and OMM shall reimburse the same to METSIL.

6.6. OMM shall notify the name of person(s) as per applicable mining laws in consultation and approval thereof for METSIL for the purpose of representation before the Indian Bureau of Mines, Labour Enforcement Officer, District Magistrate, Department of Mines Safety and such other authorities as are legally required."

(OMM is the respondent)

5. The excavation charges for iron ore under the raising agreement provided for payment for iron ore lumps at Rs.350 per MT and for iron ore fines at Rs.150 per MT. The respondent emphasises on the following clause in the annexure to the raising agreement that governs the payment envisaged to be made thereunder:

Excavation charges shall be payable by OMM to METSIL only after realisation of sales proceeds by OMM.

6. The parties have, for varying purposes, referred to the selling agreement which is the subject-matter of the present proceedings. The petitioner insists that not much should be read into the reference to Metsil in the selling agreement since the raising agreement, with Metsil as the raising contractor therein, was executed on the same day and merely because the respondent chose to engage a raising contractor and another selling contractor would not necessarily lead to the inference that the raising contractor and the selling contractor were, in reality, a joint entity. The respondent seeks to read the selling agreement as being subservient to or dependent on the raising agreement and suggests that a meaningful reading of the selling agreement would reveal that it was incapable of being performed de hors the raising agreement. The following recitals and clauses of the selling agreement are of immediate relevance:

AND WHEREAS OMM has approached SIPL with the proposal to exclusively sell the entire iron ore excavated by its RAISING CONTRACTOR on their behalf from their leasehold area.

AND WHEREAS OMM has approached SIPL to set up a Plant in collaboration and association to partially and captively use Iron Ore within the State of Jharkhand and OMM shall take all such steps as are required for the said purpose.

AND WHEREAS on this specific and unequivocal promise of OMM to sell exclusively to SIPL the entire IRON ores excavated by Raising Contractor from their leasehold area, SIPL intents to install and set-up a Plant for value addition of mined ore at a substantial cost in the State of Jharkhand.

AND WHEREAS relying upon the said promises, representations and assurances of OMM and believing the same to be correct, SIPL has agreed to purchase exclusively the entire excavated iron ore from leasehold area raised by RAISED CONTRACTOR from leasehold area of OMM on the terms and conditions mutually agreed contained herein.

AND WHEREAS proposed Joint Venture has agreed to commence production in its plant within two years from the effective date of commencement of Mining operation. In the event the plaint is not set up within the period aforesaid and mining lease is cancelled due to this reason this agreement shall stand terminated and all accounts with SIPL shall be settled by OMM.

2.1 This Agreement is valid for a period of 7 years from the effective date of its coming into force or commencement of Mining Operation and thereafter the same may be renewed on mutually agreed terms & conditions.

2.2 The effective date of coming into force of this Agreement shall be determined from the date of obtaining TWP/DRP/Court Order/Working Permission from concerned Department.

3.1 OMM shall during the currency of this agreement as mentioned in Clause No.2 hereinabove sell exclusively to SIPL the entire iron ore excavated by RAISING CONTRACTOR from the leasehold area of OMM.

3.2 SIPL shall purchase the entire iron ore excavated by RAISING CONTRACTOR from the leasehold area of OMM. SIPL shall have sole and exclusive rights to purchase the ores excavated by RAISING CONTRACTOR from the leasehold areas of OMM. In the event OMM sells the said ore to any of the parties nominated by SIPL, different gain/loss, if any, shall be on account of SIPL.

8.1 OMM shall during the currency of this agreement as mentioned in Clause No.2 hereinabove sell exclusively to SIPL the entire iron ore excavated by RAISING CONTRACTOR from the leasehold area of OMM.

9.10 OMM shall not in any manner whatsoever do or cause to be done either directly and/or indirectly any act, deed or thing whereby SIPLs'' right to get continuous and uninterrupted supply of ores under this contract shall or may in any manner whatsoever, be impaired and/or jeogpardized or become ineffective, unenforceable and/or void at any time during the subsistence of this agreement.

14.1 Exclusivity It is unconditionally agreed by and between the parties that during the currency and validity of this agreement, OMM shall sell the entire Iron Ore excavated from the mining lease hold area exclusively to SIPL alone. OMM shall not sell or deal in any manner or in any form or way directly or indirectly whatsoever any other party in respect of the Iron ore under this agreement.

(SIPL is the petitioner)

7. There is also a longish clause in the selling agreement that records that iron ore is not an ordinary article of commerce and gives the petitioner herein the right to seek specific performance of the agreement. The arbitration and jurisdiction clauses in the selling agreement remain undisputed. Annexure A to the agreement indicates the payments terms. The petitioner was to pay Rs.550 per MT for all grades of ore in lump and Rs.250 per MT for iron ore fines. The break-up of the amounts indicate a raising cost of Rs.350 per MT for iron ore lumps and Rs.200 per MT as margin to the respondent; and Rs.150 per MT as raising cost for iron ore mines and Rs.100 per MT as margin to the respondent. The annexure records that the price of lump had been arrived at on the basis of the market price of iron ore lump at Rs.1100 per MT for plus 65% grade of iron ore extracted from certain named mines and that any increase or decease of the market price of lump would entail an increase or decrease in the margin payable to the respondent at the rate of 21% of the price difference. The clause on price difference was to come into operation from the second year of the start of the extraction and the market price was to be reviewed on annual basis thereafter.

8. There is a history to this matter that needs first to be recorded. A previous petition u/s 9 of the 1996 Act seeking almost the same orders as sought in this petition was carried to the court in November, 2011. At the ad interim stage of the previous petition, AP No. 922 of 2011, no order was passed upon it being noticed that it was the petitioner''s case that it came to be aware of the respondent operating the mines in breach of the agreement sometime in December, 2009. Ad interim orders were refused since the petitioner had waited for nearly two years after coming to know of the breach before applying to court. Directions were issued for filing affidavits in AP No. 922 of 2011 on November 14, 2011. Upon the previous petition coming for final hearing after affidavits on March 14, 2012, it was disposed of without any effective order by recording the respondent''s submission that the respondent was not operating the mines nor undertaking any mining activity thereat in view of the restrictive orders of the appropriate authority being in operation. The respondent was, however, directed "to issue notice to the petitioner,

at least seven days in advance addressed to advocate on record representing the petitioner, before the respondent commences its mining operations."

9. A request u/s 11 of the 1996 Act was also taken up on March 14, 2012. Since the respondent did not dispute the existence of the arbitration agreement or that there were live disputes to be carried to a reference, the petitioner''s request was directed to be placed before the Hon''ble the Chief Justice for constituting an arbitral tribunal in accordance with the arbitration agreement between the parties to adjudicate upon the disputes covered thereby. It may be of some relevance that the Judge taking arbitration matters in this Court is authorised, by dint of the business allocated by the Chief Justice, to adjudicate on a request u/s 11 of the 1996 Act, but the Judge taking arbitration matters is expressly precluded, again by virtue of the business allocated, to name the arbitrator or constitute the arbitral tribunal. Traditionally, the Chief Justice of this Court or a Judge other than the Judge taking arbitration matters has been assigned the business of naming an arbitrator or constituting an arbitral tribunal. Be that as it may, in view of a subsequent agreement between the parties as recorded in an order dated April 17, 2012 passed at the ad interim stage of an appeal arising out of the ad interim order of March 29, 2012 on this petition, the parties have already commenced the arbitral reference before an arbitrator of their choice.

10. Within days of the previous petition u/s 9 of the 1996 Act being disposed of, the petitioner brought the present petition on which a substantive order was passed at the ad interim stage on March 29, 2012. The opening paragraph of the order of March 29, 2012 recorded that though the order was being made at the ad interim stage of a petition, it was a veritable rerun of a previous matter in which affidavits had already been exchanged on the substance of the disputes between the parties. The order of March 29, 2012 dwelt primarily on whether the letters of June 22, 2007 and August 1, 2008 had been issued to or received by the petitioner. However, it is unnecessary to refer to any observation or tentative finding recorded in such ad interim order of March 29, 2012 since it was substantially modified in appeal. Further, the appellate order of May 9, 2012 was challenged by way of a SLP before the Supreme Court and the Supreme Court in disposing of the petition, observed, inter alia, that "the learned Trial Judge shall hear and decide Section 9 application on its own merit uninfluenced by the Division Bench or the observations made by him in the order under appeal before the Division Bench." The Supreme Court order of July 27, 2012 required the petition u/s 9 of the 1996 Act to be decided "as expeditiously as may be possible and preferably within eight weeks from the date of production of the order of this Court." The Supreme Court order was placed by the department before this Court on or about August 13, 2012, but prior thereto the parties had brought such order to the notice of this Court on August 2, 2012 when the matter was directed to appear a fortnight thereafter since the directions issued by the Supreme Court for affidavits and documents to be filed rendered the petition unripe for final hearing when it was called on in the usual course on August 2, 2012.

11. The petitioner insists that since the respondent cited the letters of June 22, 2007 and August 1, 2008 to suggest that the selling agreement of February 17, 2005 stood determined, if the petitioner can demonstrate, prima facie, that such letters had not been issued to or received by the petitioner, the interim protection that it seeks should follow. The petitioner asserts that it is not necessary to assess the respondent''s contention that the selling agreement was in contravention of Rule 37 of the 1960 Rules or that the agreement would be incapable of being enforced on such ground. The petitioner suggests that the issue as to whether the agreement falls foul of the relevant provision is a matter that ought to be left to the arbitrator. As to the perceived inaction on the part of the petitioner to even prod the respondent into taking steps for the commencement of the mining operations despite a period of nearly five years having elapsed from the date of the execution of the agreement till the petitioner sent its first missive on December 24, 2009, the petitioner explains that the selling agreement envisaged myriad permissions and approvals being obtained by the licencee; and, there was a tacit understanding between the parties that the petitioner would immediately be informed if the circumstances ripened for the mining operations to be commenced. It is on similar lines that the petitioner seeks to justify its conduct of not having taken steps to set up a plant in pursuance of, inter alia, clause 11.4 of the selling agreement. The petitioner, however, has not referred to any averment in such regard in the petition or the affidavits filed by it in the present proceedings.

12. The petitioner refers to the shifting stands of the respondent in the several sets of affidavits filed in course of the previous and the present proceedings. The petitioner insinuates that the respondent has laboured in every subsequent affidavit to improve on the case previously run, primarily to establish that the letters of June 22, 2007 and August 1, 2008 had, indeed, been issued to and received by the petitioner. The petitioner contends that, in any view of the matter, even if the court perceives that it is unlikely that the petitioner will obtain an award for specific performance of the selling agreement, it is entitled to an injunction to enforce the negative covenant contained in the agreement. The petitioner submits that, apart from the grounds that it has cited in support of its assertion that neither letter of June 22, 2007 and August 1, 2008 had been issued to it as noticed in the ad interim order of March 29, 2012, the contemporaneous conduct of the parties was grossly inconsistent with the allegation that either letter had been issued by the respondent. The petitioner suggests that it is inconceivable that the petitioner would have received the letter of June 22, 2007 and not reacted to it, even if only to demand repayment of the sum in excess of Rs.1.69 crore that it had advanced to the respondent. The petitioner claims that it would be absurd to lend credence to the respondent''s contention that it had forwarded a cheque for about Rs.1.67 crore which remained unencashed, but the respondent was not the least bit curious to ascertain why such cheque had not been banked. The petitioner says that apart from the dubious manner of the issuance and the service of the two letters of June

22, 2007 and August 1, 2008, the circumstantial evidence would completely discredit the respondent''s case. The petitioner sifts through the various pages in the several affidavits filed by the respondent in AP No. 922 of 2011 and in the present proceedings leading up to the recent supplementary affidavit filed by the respondent. The petitioner claims that not only are the averments in the respondent''s several affidavits at variance with each other, but the most recent affidavit has been fine-tuned upon the merits of the matter being deliberated upon in course of the protracted hearings at the ad interim stage of the present petition and the appeal arising therefrom. In particular, the petitioner refers to paragraph 40 of the latest affidavit filed by the respondent to dig holes in the defence now sought to be set up. The petitioner says that if there was a meeting between the representatives of the parties following the cancellation of the agreement in June, 2007 and the petitioner''s alleged acceptance thereof, such matter would have been recorded in contemporaneous correspondence, or even in the alleged letter of August 1, 2008, or, at any rate, in the respondent''s reply of January 11, 2010 or the further communication of February 15, 2010 issued by it. The petitioner emphasises that though the venue of the meeting is indicated in the respondent''s latest affidavit, the approximate date thereof is not mentioned nor has such alleged meeting being alluded to in any of the three previous affidavits filed by the respondent in this Court.

13. On the legal issues that arise, the petitioner submits that the mere delay on the part of a suitor seeking specific performance of an agreement would not defeat the claim if it is lodged within the period of limitation. As a corollary, the petitioner suggests that if the defence to a claim for specific performance of a contract is that the contract was void, the conduct of the claimant and the perceived delay in instituting the action are of no relevance. In such context, the plaintiff refers to a judgment reported at Madamsetty Satyanarayana Vs. G. Yellogi Rao and Others, where the Supreme Court referred to English judgments and authoritative texts to deduce as follows in paragraphs 10 and 12 of the report:

10. It is clear from these decisions that the conduct of a party which puts the other party in a disadvantageous position, though it does not amount to waiver, may in certain circumstances preclude him from obtaining a decree for specific performance.

12. The result of the aforesaid discussion of the case law may be briefly stated thus: While in England mere delay or laches may be a ground for refusing to give a relief of specific performance, in India mere delay without such conduct on the part of the plaintiff as would cause prejudice to the defendant does not empower a court to refuse such a relief. But as in England so in India, proof of abandonment or waiver of a right is not a pre-condition necessary to disentitle the plaintiff to the said relief, for if abandonment or waiver is established, no question of discretion on the part of the Court would arise. We have used the expression "waiver" in its legally accepted

sense, namely, "waiver is contractual, and may constitute a cause of action: it is an agreement to release or not to assert a right"; see AIR 1935 79 (Privy Council)). It is not possible or desirable to lay down the circumstances under which a court can exercise its discretion against the plaintiff. But they must be such that the representation by or the conduct or neglect of the plaintiff is directly responsible in inducing the defendant to change his position to his prejudice or such as to bring about a situation when it would be inequitable to give him such a relief.

14. There is a further matter on facts that the petitioner refers to which raises an issue larger than the present dispute. The petitioner refers to the balance-sheets of the respondent for the years ended March 31, 2009, March 31, 2010 and March 31, 2011 to insinuate that it was a regular practice of this respondent to enter into agreements relating to its mining operations only to renege on them after, possibly, having used the advances obtained in pursuance of the contracts. In the schedule to the balance-sheet and profit and loss accounts of the respondent for the year ended March 31, 2009, there is a reference first to two agreements entered into by the respondent with Adhunik Steels Limited and B. K. Coalfields Private Limited in 2003 and 2006, respectively, which the respondent terminated in 2003 and 2007 respectively, by citing the same Rule 37 of the 1960 Rules that has been asserted by the respondent in defence to the petitioner''s claim herein. Adhunik Steels Limited is said to have instituted an arbitral reference following the termination of its contract by the respondent and the arbitrator repelled the respondent''s contention that the relevant agreement was void. B. K. Coalfields Private Limited, however, failed to discredit the respondent''s contention in proceedings u/s 9 of the 1996 Act. The balance-sheet next refers to two agreements for sale of manganese ore to Futuristic Steels Private Limited and Monnet Ispat and Energy Limited executed in 2003 and 2006, respectively. These two agreements were terminated on the ground of Rule 37 of the 1960 Rules in 2003 and 2007, respectively. At the time that the relevant balance-sheet was prepared, the arbitral references relating to the two agreements were pending. The final reference in the said balance-sheet is to the agreements entered into by the respondent with Adhunik Steels Limited, the petitioner herein, B. K. Coalfields Private Limited, Futuristic Steels Private Limited, Monnet Ispat and Energy Limited and Metsil. The relevant note recorded that neither the petitioner herein nor Metsil had instituted any proceedings for enforcement of their contracts. The note also stated that arbitration petitions filed by Adhunik Steels Limited and Futuristic Steels Private Limited had been dismissed on the ground that the relevant contracts were violative of Rule 37 of the said Rules.

15. In the schedule to the respondent''s balance-sheet and profit and loss accounts for the financial year ended March 31, 2010, the information was updated. Futuristic Steels Private Limited had obtained an award where the respondent''s objection on the ground of Rule 37 of the 1960 Rules was scotched. The reference to the petitioner''s contract and that of Metsil in the schedule to the relevant balance-sheet remained unchanged from the previous year. In the schedule to the respondent''s

balance-sheet and profit and loss accounts for the financial year ended March 31, 2011, the same entries were carried by updating the information on some other contracts which are not relevant in the present context.

16. The reference to the several similar contracts entered into by the respondent as recognised in its balance-sheets was otherwise unnecessary, save for the purpose of it being deduced therefrom that by June, 2009 when the auditors'' report on the balance-sheet of the respondents for the year ended March 31, 2009 was signed, there was an assertion by the respondent in a document which was to become public in the next few months that the raising contract of Metsil and the selling contract of the petitioner herein had been terminated. But the issue has engaged the attention of the court for an entirely unrelated purpose. It would appear from the aforesaid disclosures in the respondent''s balance-sheets for the three successive financial years that the respondent had obtained a number of mining licences in its name. It would also be evident that the respondent had entered into agreements with several persons for the mining operations to be conducted and had subsequently cited Rule 37 of the 1960 Rules to annul the agreements. It is unnecessary in this context to infer that the respondent must have obtained substantial advances from the contractors and had subsequently annulled the contracts, since the facts pertaining to the advances and the return or retention of such advances have, naturally, not been presented in course of these proceedings. But it would do well to merely notice the plethora of mining licences - of, primarily, manganese and iron ores - obtained by the respondent and the respondent''s attempt to trade in such licences by entering into contracts with third parties therefor before resiling therefrom on the ground that the mining operations could not be assigned in view of Rule 37 of the 1960 Rules. But, more on this seemingly alarming aspect of the matter later.

17. The petitioner has referred to a Supreme Court pronouncement on a petition u/s 9 of the 1996 Act pertaining to the agreement between the respondent and Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd., of the report have been placed by the petitioner to demonstrate that the matter pertaining to Rule 37 of the 1960 Rules was left for the arbitrator to pronounce on and the observation that, in view of the agreement between the parties to that matter, the respondent herein was liable to be restrained from entering into a contract for mining and lifting of minerals with any other entity until the conclusion of the arbitral proceedings. There is a point of distinction between the reported case and the present matter; the contract in question before the Supreme Court was a raising contract and not a selling contract like the one in the present case.

18. The petitioner has also relied on a Single Bench judgment of this Court reported at Vijay Minerals Pvt. Ltd. Vs. Bikash Chandra Deb, to emphasise on the observation in paragraph 77 of the report that when enforcement of a negative covenant is sought, the considerations of balance of convenience and adequacy of damages at

the appropriate stage are immaterial. The judgment was affirmed in appeal in the decision reported at Bikash Chandra Deb Vs. Vijaya Minerals Pvt. Ltd., though the Division Bench did not find occasion to specifically deal with such aspect of the matter or render any concurring pronouncement thereon.

19. The final ground urged on behalf of the petitioner is one of pure prejudice though it had weighed with the court at the ad interim stage. The petitioner refers to the conduct of the respondent immediately after the previous petition was disposed of and the attempt by the respondent to steal a march over the petitioner. As to whether anything turns on such seemingly undesirable conduct of the respondent has, however, to be assessed in the light of the defence now run by the respondent and the overwhelming perception that the choice here is not between which of the parties comes off better, but which comes through as worse.

20. The respondent claims that the petition should be rejected out of hand as the claim carried by the petitioner to the reference is barred by the laws of limitation. The respondent comments on the elaborate attempt by the petitioner to discredit the conduct of the respondent and remarks that such endeavour on the petitioner''s part is to gloss over the delay in the petitioner asserting the claim. The respondent says that though only a tentative view need now be taken by the court on the question of limitation, but if it is seen that a wholesome defence on such ground has been presented, the petition is liable to be rejected on such score. The respondent asserts that if the letter of June 22, 2007 had been despatched by the respondent in the usual course to the petitioner, the claim made in the year 2011 was beyond the prescribed period of limitation. The circumstantial evidence that the respondent refers to in support of its assertion that the selling agreement of February 17, 2005 stood determined in June, 2007 is intricately connected with the more substantial ground that it asserts for dismissal of this petition.

21. The respondent says that the raising contract with Metsil and the selling contract with the petitioner herein entered into by the respondent on the same day should be seen to be the two inseparable parts to a composite agreement. The respondent also suggests that the delay between the petitioner''s receipt of the respondent''s letter of January 11, 2010 and the institution of the first petition in November, 2011 should be regarded as laches amounting to acceptance on the petitioner''s part of not only the termination of the agreement, but also the annulment thereof in June, 2007. The respondent says that since it had indicated in its annual accounts for the year ended March 31, 2009 that the agreements executed by the respondent with Metsil and the petitioner had been terminated in June, 2007, such information was available in the public domain since September, 2009. The respondent explains that since it was a private limited company till the better part of financial year 2007-08, it was not required to disclose in its annual accounts during such time that the agreements with Metsil and the petitioner or, indeed, with several of the other contracting parties, had been terminated. The respondent relies on Section 14 of the

Specific Relief Act, 1963 to contend that the agreement of which the petitioner seeks specific performance is incapable of being enforced. Taking a cue from the appellate order of May 9, 2012 that gave the petitioner the first right of refusal of the ore extracted from the Ghatkuri mines at the prevailing market price, the respondent says that in the petitioner declining to accept the material offered by the respondent, it has acted contrary to the case run that iron ore is not an ordinary article of commerce or is not freely available in the market.

22. The respondent concedes that the question as to whether the selling agreement is in violation of Rule 37 of the 1960 Rules has to be adjudicated in course of the arbitral reference, but says that as in the case of every issue that is likely to arise at the trial, the court is entitled to take a prima facie view thereon at the interlocutory stage. Again, such argument is inexorably connected to the primary assertion of the respondent that the raising agreement with Metsil and the selling agreement with the petitioner herein formed a composite deal. The respondent says that since the respondent did all that was within its power to despatch the notice of termination of June 22, 2007 to the petitioner by way of a registered letter, the presumption under the General Clauses Act would come into play and the mere denial of the receipt thereof by the petitioner or the petitioner''s attempt to create a doubt by referring to the acknowledgement due card relating thereto should not hold good. The respondent submits that the manner of its attempt to effect service of the letter of August 1, 2008, as noticed in the ad interim order, may have been immature; but it cannot be conclusively held on affidavit evidence that the letter had not been issued at all.

23. In support of its assertion that the raising agreement and the selling agreement of February 17, 2005 were parts of a composite contract, the respondent has referred to several recitals and clauses from either agreement. The respondent points out that the tenures of the two agreements were concurrent. The respondent also seeks to demonstrate from a chart appended to its recent affidavit that the commonality of the directorial composition in Metsil and the petitioner during the relevant period would show that the controlling minds in both companies were the same.

24. Indeed, it is evident from the relevant charts at annexure C to the respondent''s most recent affidavit that for at least two years prior to 2005-06 and till several months after financial year 2005-06, the board of directors of Metsil comprised the same three persons. A fourth person was inducted on the board of Metsil in September, 2007 and a fifth person in March, 2009. Santosh Kumar Sharma and Suresh Kumar Sharma constituted the majority on the board of directors of Metsil from at least 2003-04 till September 7, 2007. These two Sharmas were also on the board of the petitioner from September, 2004. At the time that the agreements of February 17, 2005 were entered into, the two Sharmas were part of a three-member board of directors of Metsil and a five-member board of directors of the petitioner.

Upon two of the five directors on the petitioner''s board resigning by April, 2006, the two Sharmas formed the majority on the petitioner''s board of directors which continued unchanged till the close of financial year 2010-11. These facts remain undisputed. What is apparent from the charts is that the two Sharmas had the major say in the board of Metsil on February 17, 2005 and, though there were two other directors on such board in June, 2007, the two Sharma directors could not have been by-passed in any business decision that ought to have been taken by the board of Metsil in 2007-08. The two Sharma directors may not have constituted the majority on the board of the petitioner when the selling agreement of February 17, 2005 was executed, but they were in a position to hold sway in decisions pertaining to the petitioner in June, 2007 when the two agreements are alleged to have been terminated by the respondent. It may not be conclusive, but such fact goes a long way to sustain the respondent''s contention that the two agreements of February 17, 2005 were part of a composite arrangement. It would also follow that if Metsil did not object to the raising contract being annulled in June, 2007, which the two Sharma directors on Metsil ought to have been contemporaneously aware of, such directors comprising the majority on the board of the petitioner may also have been aware of the selling agreement with the petitioner having been simultaneously annulled.

25. More than the recitals and the clauses in the bodies of the two agreements of February 17, 2005, it is the pricing mechanism in either agreement that, prima facie, establish the link between Metsil and the petitioner and give credence to the respondent''s submission that the two agreements were part of a composite contract. Under the raising contract with Metsil, the respondent was to pay Metsil excavation charges for lumps and fines at the same rates as it was to receive as raising costs from the petitioner under the selling agreement. That, by itself, can neither be regarded as a coincidence or establishing a link between Metsil and the petitioner. If the respondent was obliged to pay the raising contractor excavation charges, it was only natural that such amounts would be included in its costing in the selling agreement. However, the supplemental clauses that follow the principal pricing clause in the annexure to either agreement clinch the issue. The raising agreement recorded that excavation charges would be payable by the respondent to Metsil only upon the realisation of the sales proceeds by the respondent. It would be difficult to accept that a prudent, commercially-minded entity rendering services under an agreement would subject its entitlement to receive payment therefor to the vagaries of some other act over which it had no apparent control. This rider to the pricing clause in the raising agreement suggests that Metsil would not be paid if the selling contractor, the petitioner, did not pay the respondent first; and Metsil could only have agreed to such condition if Metsil had control over the selling contractor. Seen from a slightly different angle, a composite arrangement appears to have been put in place by the two agreements of February 17, 2005 where the respondent would only receive its commission of Rs.200 per MT for iron ore lumps

and Rs. 100 per MT for iron ore fines. The clause that follows the principal pricing clause in the selling agreement is even more tell-tale. Such ancillary clause provided for only the margin payable to the respondent thereunder being increased or decreased upon the market price of crude iron rising or falling. There is a ratio indicated in the relevant clause which is irrelevant for the present purpose. The inescapable inference that needs to be drawn from the clause following the pricing clause in the selling agreement is that the raising costs would remain fixed for the duration of the agreement only because the increase in production cost of the raising contractor would be offset by the higher selling price obtained by the selling contractor. The inevitable corollary to such clause is that Metsil and the petitioner would share the increase or decrease in the selling price in such manner as they chose, but the respondent''s commission or cut would only be proportionately increased or decreased on account of the fluctuating market price of crude iron ore lumps.

26. If the selling contract is now seen as part of a composite arrangement, the petitioner must be regarded as wanting in candour in making out the case as it has. If Metsil was a party to a tripartite arrangement (more precisely, a bipartite arrangement with Metsil and the petitioner being one and the respondent being the other), the annulment of the raising agreement would, effectively, have implied the annulment of the selling agreement. At any rate, there is more to the matter than the simplistic version presented by the petitioner, particularly since the two Sharmas were the common directors on the board of Metsil and the petitioner in June, 2007. Given the association between Metsil and the petitioner as evident from the presence of the majority directors on the board of the petitioner in the board of Metsil, it is difficult to imagine that the petitioner would not have been aware of the respondent having commenced mining operations at the Ghatkuri mines after annulling the composite agreement with Metsil and the petitioner. In the light of the facts as now presented by the respondent, it was incumbent on the petitioner to either demonstrate that it had no connection with Metsil or explain why it woke up only in December, 2009. But it is understandable that the petitioner has made no endeavour to answer the questions that have arisen upon the respondent''s latest affidavit being filed, since no justification that it proffered could have detracted from its obvious tie-up and close link with Metsil as would be evident from the pricing clauses in the two agreements of February 17, 2005.

27. It is also evident that notwithstanding much having been made by the petitioner to obtain an order on the strength of the negative covenant contained in the selling agreement, there is no positive pleading in support of the negative covenant in the petition. The respondent rightly contends that if the composite agreements fell through, the negative covenant in the selling agreement cannot be pursued in isolation. In any event, the relevant clause recognised the petitioner''s exclusive right to receive the produce extracted by Metsil; and Metsil is no longer in the fray.

28. The respondent has also relied on several judgments. A decision reported a M/s. Madan and Co. Vs. Wazir Jaivir Chand, has been referred to for the proposition that the presumption u/s 27 of the General Clauses Act would fall into place once a postal article is despatched by registered post and the mere denial of the receipt thereof would be inadequate rebuttal of the presumption. A yet unreported Supreme Court judgment rendered on July 5, 2012 (Cox & Kings Ltd v. Indian Rly. Catering & Tourism Corporation Ltd) has been placed by the respondent for the proposition that upon the termination of an agreement, the remedy generally would be in damages. Apropos the Vijaya Minerals case, the respondent has referred to a judgment of this Court reported at Farinni Vs. Dream Food Products and Others, where, upon noticing the Supreme Court pronouncement in at least two celebrated decisions, the court observed that the opinion in Vijaya Minerals that the question of balance of convenience does not come into play when a negative covenant is sought to be enforced, may have been couched in words wider than the Supreme Court dictum on such aspect would warrant. Paragraph 15 of the report has been placed:

15. The Supreme Court judgment could not have been considered by the learned Single Judge in the Vijaya Minerals case as it is a later judgment. The absolute view expressed in the Vijaya Minerals case, that the question of balance of convenience would be immaterial in the enforcement of a negative covenant, does not appear to be in consonance with the principle enunciated by the Supreme Court.

29. The petitioner is not entitled to any interlocutory injunction in aid the claim for specific performance of the selling agreement that it has carried to the arbitral reference. In the light of the prima facie view taken that the Metsil and the petitioner combine had entered into a composite arrangement with the respondent, the petitioner''s knowledge of the alleged breach of the agreement by the respondent would date back several months before it made the polite enquiry with the respondent by its letter of December 24, 2009. Such delay would amount, in the circumstances to laches and conduct encouraging the respondent to believe in the petitioner''s endorsement and acceptance of the breach. The petitioner is not entitled to any order in furtherance of its claim on account of the negative covenant since the selling agreement cannot be seen to be a stand-alone contract. In any event, the negative covenant in clause 14.1 of the selling agreement entitled the petitioner to exclusively obtain the ore extracted from the Ghatkuri mines by Metsil and the petitioner ought to have been aware, in the light of the facts now brought on record by the respondent, that the raising agreement with Metsil had been terminated by the respondent.

30. Though the petitioner has not sought any lesser order than an injunction in aid of its claims for specific performance of the agreement and its exclusive rights thereunder, the respondent is liable to be burdened with the pay-out that it proffers to have offered. In view of the respondent''s categorical assertion that it had

forwarded a cheque for Rs.1,67,50,000/- to the petitioner under cover of its letter of August 1, 2008, the respondent should be held to its bargain and required to deposit such sum, together with interest thereon at 10% per annum from August 1, 2008 till the date of the deposit to be made within three weeks from today. Such deposit should be made with advocate representing the petitioner at the final hearing which advocate representing the petitioner will hold as Receiver without remuneration, free from any lien or encumbrance, and invest on annual basis by way of a fixed deposit in a nationalised bank, subject to the orders or the award that may be made in the arbitral reference.

31. Neither party is deserving of costs; more so, by reason of the perception reflected in the footnote that appears hereafter. AP No. 245 of 2012 is disposed of without any order as to costs.

32. Footnote: Three decades or so ago, a few great Indians in whose reflected glory the judiciary basks even today, firmly founded the great epistolary jurisdiction. This momentous judicial device came as a beacon of light and hope to millions of voiceless citizens who had been seared in the flames of withering injustice. Over the years it ushered in an air of reform from pavements to jails, from the greens of the forests to what we breathe in the cities. More rewardingly for the ordinary citizens, it shone the arclights into the seemingly black holes of intrigue as it sought to install accountability ahead of the mumbo-jumbo of political and commercial expedience; it discovered a missing dimension to give more meaning to constitutional democracy. In some measure it may have assuaged the misgivings of the countrymen for an earlier perceived institutional failure when they stood denuded of their basic rights.

33. If the constitutional command to the judiciary is to bring about a social revolution and act in the larger public good, one would be missing the wood for the trees if one fails to recognise the symptom of the social malaise that screams from behind the scenes of this inane skirmish that the parties have presented in this matter. For sure, courts of law in this country decide disputes; but that is only a part - albeit, a major facet - of the role of courts, individually and collectively as an institution. In the constitutional scheme of things, courts are the protectors of citizens'' rights.

34. The purpose of this digression is to highlight what cries for attention beyond the immediate facts that the parties have harped on. The respondent appears to have been adept at obtaining mining licences only to trade in them. The notes to the respondent''s balance-sheets appended to its latest affidavit abound in the reference to the respondent''s unerring modus operandi. In the respondent obtaining one mining licence after another, spread over a basket of minerals, and thereafter not operating the mines and outsourcing the work for a cut, there is a story to catch. And, it is such story that appears to be worthy of pursuit to arrest its repetition and ensure that what belongs to all Indians - never mind the immediate

traditional rights of the tribal folk and the locals - are not dealt with for the illegitimate benefit of a few. It appears that the respondent in its old avatar, prior to its management being taken over by Adhunik Metaliks Ltd early in 2007, specialised only in procuring mining licences, not in mining operations. The respondent could not have been the only specialist at this typically Indian game, akin to the mythical rope-trick. That may be worth inquiring into for the larger good. At a time when screaming newspaper front-page headlines and photographs over the recent months fuel a perception - in some cases, needlessly - of the servility of servants of the Constitution to other masters, it may be a commendable duty to undertake, if only to instill confidence in the institution and wean away the disbelievers from the other disagreeable fora of dispute resolution.

35. This matter had reached the highest level at the ad interim stage and will, doubtless, be carried there again. This footnote is only an expression of hope for then. Urgent certified photocopies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.