

VIA VIDEO CONFERENCING

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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision:-18.06.2020

+ **O.M.P.(I)(COMM) 117/2020**
RASHMI CEMENT LTD.

..... Petitioner

Through: Mr. Arvind Kr. Gupta & Mr. Rishi
Bhardwaj, Advs.

versus

WORLD METALS & ALLOYS (FZC) & ANR. Respondent

Through: Mr. Zarir Bharucha, Adv. with
Mr.Bimal Rajasekhar, Mr.Shrey
Patnaik, Mr.Umang Thakur,
Mr.Chandrasekhar Haridh, Mr.Rohaan
Pajnigar Advs. for R-1.

+ **O.M.P.(I)(COMM) 118/2020**
RASHMI CEMENT LTD.

..... Petitioner

Through: Mr.Sudhanshu Batra, Sr. Adv. with
Mr. Arvind Kr. Gupta, Mr. Rishi
Bhardwaj & Ms.Suditi Batra, Advs.

versus

WORLD METALS & ALLOYS (FZC) & ANR. Respondent

Through: Mr. Zarir Bharucha, Adv. with
Mr.Bimal Rajasekhar, Mr.Shrey
Patnaik, Mr.Umang Thakur,
Mr.Chandrasekhar Haridh, Mr.Rohaan
Pajnigar Advs. for R-1.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J (ORAL)

I.A. 4136/2020 & I.A. 4137/2020 in O.M.P.(I)(COMM) 117/2020

I.A. 4139/2020 & I.A. 4140/2020 in O.M.P.(I)(COMM) 118/2020

1. Allowed, subject to all just exceptions.
2. The applicant will deposit the court fees within two weeks of the normal functioning of the Court being restored.

O.M.P.(I)(COMM) 117/2020 & I.A. 4135/2020

O.M.P.(I)(COMM) 118/2020 & I.A. 4138/2020

3. The present petitions under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act'), both filed by M/s. Rashmi Cement Ltd. seek a direction to the respondents, i.e., World Metals and Alloys (FZC) and its agent, to forthwith release its cargo comprising of Manganese Ore Lumpy without claiming any demurrage.
4. For the sake of convenience, the facts as noted in O.M.P.(I)(COMM) 118/2020 have been referred to in this decision.
5. The petitioner entered into a contract with respondent no.1 on 13.12.2019 to purchase 3000 M.T. of Manganese Ore lumpy at USD 4.05 per Dry Metric Ton Units (DMTU). The cargo was to be transported by vessel 'Vega Aquarius' between the agreed upon loading point, i.e., Port Gabon and the discharge point at Haldia Port, Kolkata. On 15.01.2020, in accordance with Clause 15 of the contract, the petitioner opened a Letter of Credit (LC) for a sum of USD 510300 in favour of respondent no.1. Thereafter, the respondent no.1 issued a commercial invoice No.13570 in favour of the petitioner on 08.02.2020 and the quantity of ore agreed to be supplied was confirmed. Subsequently, the vessel containing *inter alia* 3000 MT of Manganese Ore left the port at Gabon and arrived at the Haldia Port on 25.03.2020.

At 20.30 hours on the same day, a notice of readiness was tendered by the Captain of the vessel, but the petitioner claims that in view of the national lock down announced w.e.f. 24.03.2020, it could not accept delivery of the cargo at that stage, which information had already been communicated to the respondent no.1 on 23.03.2020. In this email, the petitioner informed respondent that owing to the pandemic caused by COVID-19, a state emergency had been declared by the Government of India and there was a complete stoppage of work at the Haldia Port till 27.03.2020.

6. The petitioner, vide its letter dated 05.04.2020, invoked the Force Majeure clause contained in paragraph 23 of the contract between the parties and informed the respondent no.1 that lay time ought not be counted for this period. In this letter, the petitioner relied on the circulars dated 24.03.2020 and 31.03.2020 issued by the Ministry of Shipping, Government of India wherein guidelines had been issued to all major ports to consider exemption from penalties and invocation of force majeure. Soon thereafter, a trade circular was also issued by the Kolkata Port Trust on 05.04.2020 announcing waiver of port charges and other remissions to be granted by the port. This was followed by another circular issued by the Ministry of Shipping 21.04.2020 wherein, owing to disruptions in logistical chains attributable to the lockdown, certain concessions were announced for affected parties by way of directions to all major ports.

7. On 23.04.2020, the vessel began to discharge the cargo at Haldia Port, which process came to be completed on 25.04.2020. At this point, respondent no.2, who is an agent of respondent no.1 issued a debit note to the petitioner, in accordance with Clause 21.8 of the contract, for a

sum of USD 43016.94 towards demurrage for the period of 25 days during which the goods continued to be retained at Haldia Port on account of the petitioner's failure to pay for them. This debit note was in accordance with the agreed upon demurrage rate of USD 14000 per day for the delay of 24.5811 days. On 07.05.2020, the petitioner, who was in urgent need of the cargo, approached respondent no.1 with a request for part-delivery of the cargo, which was conditionally agreed to. Accordingly, while 1650 MT of the ore was released to the petitioner, the remaining 1350 MT was retained upon the petitioner's undertaking to pay demurrage after settlement of the disputes. As the petitioner has not paid the demurrage yet, the respondents have continued to withhold the cargo, resulting in the presentation of this petition under Section 9 of the Act before this Court.

8. On 02.06.2020, when the petition came up for preliminary hearing, the petitioner expressed its willingness to furnish a bank guarantee towards the amount demanded by the respondents as demurrage, till the question as to whether any such charge was payable at all was decided in arbitration proceedings which the petitioner proposed to invoke. Learned counsel for the respondents had prayed for and was granted time to obtain instructions on this aspect, but on the next date, i.e. 05.06.2020, the respondents expressed their unwillingness to accept the petitioner's offer and have therefore filed a detailed counter affidavit opposing this petition.

9. In support of the petition, learned senior counsel for the petitioner, Mr.Sudhanshu Batra submits that the delay on the petitioner's part in having the cargo discharged at Haldia Port on 25.03.2020 was a direct consequence of the national lockdown

announced on account of the COVID-19 pandemic. He submits that the Government of India had, vide an order dated 24.03.2020 passed in exercise of its powers under Section 6(2)(i) and Section 10(2)(i) of the Disaster Management Act, 2005, announced a complete shutdown of all commercial establishments. He further submits that this order announcing lockdown was followed by a circular dated 31.03.2020 from which it is evident that not only were all transport services suspended but the enforcing authorities were specifically directed to take penal action against those who violated the orders of lockdown. Therefore, the petitioner could not have been expected to retrieve the cargo from the port, in violation of these orders.

10. He submits that this sudden and unexpected suspension of all commercial establishments and transport services owing to a global pandemic constituted a force majeure event in terms of Clause 23 of the contract signed between the parties, the relevant portion whereof reads as under:

“23. FORCE MAJEURE

Neither party to this contract shall be liable for any delay in performing or failure to perform its obligations (except for delay or failure to pay money when due) due to events of Force Majeure including but not limited to war, blockade, revolution, riot, insurrection, civil commotion, strike, lockout, explosion, fire, flood, storm, tempest, earthquake, regulations or orders, including but not limited to prohibition of export or import and/or any other cause or causes beyond reasonable control of the Seller and / or Seller's supplier whether or not similar to the causes enumerated above. Failure to deliver or to accept delivery in whole or in part because of the occurrence of an event of Force Majeure shall not constitute a default hereunder or subject either party to liability for any resulting loss or damage.

Upon the occurrence of any event of Force Majeure, the party affected by the event of Force Majeure shall within 72 hours of the occurrence notify the other party hereto in writing of such event and shall specify in reasonable detail the facts constituting such event of Force Majeure. Where such notice is not given within the time required, Force Majeure shall not justify the non-fulfilment of any obligations under this contract.

...

In the event of Force Majeure preventing the Seller from shipping or delivering the material, or preventing the Buyer from accepting such material, respectively, deliveries shall be suspended for the duration of such Force Majeure event but if such Force Majeure shall last more than 90 (ninety) calendar days, the tonnage involved may be cancelled with immediate effect by the party not having declared Force Majeure by written notice to the other party.

Except by Seller's written agreement, the aforesaid shall not apply regarding material in respect of which the Seller has booked vessel space. In this case Buyer and Seller shall find a reasonable solution for both sides in a fair and equitable manner."

11. Mr. Batra submits that this clause clearly stipulates that in situations where the buyer is prevented from accepting delivery of goods as a consequence of the force majeure event, such delivery shall remain suspended for the entire period during which the force majeure event subsists. He, thus, contends that when the vessel arrived at Haldia Port on 25.03.2020 and the petitioner received the notice of readiness, the nation-wide lockdown was in effect and the same qualifies a force majeure event. In these circumstances, the petitioner was, perforce, prevented from accepting delivery of the cargo and cannot be penalised for the same, which is exactly what the respondent no.1 is attempting to do by raising a demand for demurrage for the

period between 25.03.2020 to 26.04.2020. In doing so, the respondent is also completely dismissing the fact that when the restrictions brought on by the nation-wide lockdown were finally eased, the petitioner promptly took steps to seek discharge of the cargo.

12. Mr.Batra submits that in any event, in view of the guidelines contained in the circulars issued by the Ministry of Shipping on 24.03.2020, 31.03.2020 and 21.04.2020 directing all major ports to grant exemption from penalties on invocation of the force majeure clause, as also the trade circulars issued by the Kolkata Port Trust on 05.04.2020 and 28.04.2020 granting waiver of port charges during the lockdown period, neither the respondent no.1 nor the vessel owner are liable to pay demurrage and, therefore, the respondents cannot raise any demand to that effect against the petitioner.

13. Mr.Batra further submits that as per the terms of the contract, once payment of the goods has already been received by the respondent no.1 by way of an LC in accordance with Clause 15 of the contract, the title of the goods immediately passed on to the petitioner. For this purpose, he places reliance on Clauses 15 and 19 of the contract which envisages passing of the title of the goods to the buyer once the seller receives the requisite payment. These clauses, viz., 15 and 19 of the contract dated 13.12.2019 read as under:

“15. PAYMENT

By way of irrevocable letter of credit payable at sight. 90 days or 180 days usance letter of credit is acceptable and interest for usance period at libor + 3.5% per annum. (the letter of credit must receive on or before 05.01.2020 at seller's bank counter.

19. TITLE AND RISK

Title shall pass from Seller to Buyer upon receipt of 100% payment by the seller.

Risk shall pass from Seller to Buyer upon the Goods passing the vessel's rail at loading port in accordance with INCOTERMS 2010."

14. By relying on these two clauses, Mr Batra submits that at this stage, since the petitioner has already made payment, the cargo rightfully belongs to the petitioner and the respondent has no right in law to withhold delivery on the basis of its alleged demand for demurrage, which has been made in complete disregard of the prevalent climate brought on by the pandemic and the effect of the Force Majeure clause or clause 23 of the contract. He submits that the correctness of the respondents' demand for demurrages can only be decided in arbitration which is still at the stage of invocation and, therefore, for the time being, there is no reason to deny immediate release of the cargo into the petitioner's possession, when it is the rightful owner thereof. He submits that the respondent's refusal to release the cargo in favour of the petitioner without receiving payment of demurrage by relying on Clause 21.8 (iii) is wholly misconceived as the said clause is only applicable in normal circumstances, not in situations when force majeure stands invoked and the entire world, not just the petitioner, is facing hardships on account of COVID-19 pandemic. By placing reliance on the decisions of the Supreme Court in *Union of India Vs. D.N.Revri and Co. & Ors* (1976) 4 SCC 147 and *Nabha Power Ltd. (NPL) Vs. Punjab State Power Corporation Ltd. (PSPCL) & Ors.* (2018) 11 SCC 508 he submits that commercial contracts have to be interpreted by taking into consideration the prevailing circumstances and in a business sense and in that spirit,

since the force majeure clause was clearly applicable in the present case, the respondent's claim for demurrage is wholly misplaced.

15. Mr. Batra finally submits that the respondents are deliberately misinterpreting the contents of the petitioner's letter dated 07.05.2020 to mean that the petitioner undertook to pay the amount towards demurrage. He submits that this is completely incorrect as the petitioner only undertook to pay demurrage upon settlement of the dispute between the parties and not at the mere asking of the respondent. Even today, the petitioner is ready and willing to furnish bank guarantee towards the demand for demurrage, which bank guarantees can be encashed by the respondent no.1 in case its demand is upheld in arbitration. In support of his contentions, he relies on the decision of the Supreme Court in *Adhunik Steels Ltd. Vs. Orissa Manganese and Minerals Pvt. Ltd.* (2007) 7 SCC 125 and the decisions of this Court in *Bhubaneswar Expressways Pvt. Ltd. Vs. National Highways Authority of India* 265(2019) DLT 631, *Forbes Facility Services Pvt. Ltd. Vs. G.B. Pant Hospital OMP No. 129/2015* and *Ajay Singh & Ors. Vs. Kal Airways Private Limited & Ors.* 2017(4) ARBLR 186(Delhi) to contend that that this Court is empowered to pass directions of the kind as sought herein. He, thus, prays that the petition be allowed and the respondents be directed to forthwith release the cargo without insisting on payment of demurrage.

16. On the other hand, Mr. Zarir Bharucha, learned counsel for the respondent no.1 vehemently opposes the petition by submitting that the petitioner is strictly bound by the terms of the contract executed between the parties whereunder the petitioner is not entitled to receive delivery of the cargo without paying the contractual price and

demurrage applicable, if any. For this purpose, he relies on clause 21.8(iii) of the contract which reads as under:

“21.8 DEMMURAGE/DESPATCH

(i) Demurrage rate at the discharge port as per prevailing duly signed charter party/vessel nomination but not exceeding USD 20000 per day pro rata.

(ii) Despatch rate shall be half of the demurrage rate per 24 hour day (pro-rated for part day).

(iii) Buyer should make the payment of Demurrage to the seller prior to releasing of delivery order by discharge port agent.”

He submits that the petitioner, in order to evade its contractual liability to pay demurrage at the rate agreed upon before seeking release of the goods, now wants this Court to rewrite the terms of the contract which the parties have voluntarily agreed into. This, according to Mr. Bharucha, is not permissible as both parties are strictly bound by the terms of the contract dated 13.12.2019.

17. Mr. Bharucha further submits that notwithstanding the fact that the petitioner has not been able to establish a *prima facie* case in its favour that it would suffer irreparable loss in case interim relief is denied, its contentions regarding applicability of the force majeure clause and that of being exempt from paying demurrage on account of the circulars issued by the Ministry of Shipping or the Kolkata Port Trust - are all claims which can only be decided in arbitration. He therefore contends that no interim relief is warranted in favour of the petitioner at this stage.

18. Without prejudice to his aforesaid submission, Mr. Bharucha submits that the force majeure clause is not even applicable in the facts of the present case.

19. The petitioner's own documents show that the Haldia Port remained operational even when the lockdown was announced, for which purpose he draws my attention to paragraph 7 of the circular dated 31.03.2020 issued by the Ministry of Shipping, Government of India and, therefore, contends that it is not as if the petitioner was prevented from taking delivery of the cargo if it so desired. He submits that even otherwise, as per Clause 23, the petitioner had to invoke the force majeure clause within 72 hours of the event which it perceives to be 'Force Majeure'. However, the petitioner, as per its own case, sought to invoke the clause only on 05.04.2020; he therefore submits that the reliance sought to be now placed on the letter dated 23.03.2020 is merely an afterthought. He submits that as a matter of record, on 23.03.2020, the petitioner did not invoke the force majeure clause, but had merely informed the respondent of the nation-wide lockdown.

20. Mr Bharucha further contends that at the very first instance, when the petitioner received the Notice of Readiness from the vessel, the clock on Laytime began to run 12.01 hours thereafter, for which purpose he relies on Clauses 21.3 and 21.6 of the contract which read as under:

21.3 NOTICE OF READINESS

(i) The Sellers will ensure that the master of the vessel/ Vessel Agents/Seller gives the Buyer notice of the ETA of the vessel at the Discharge Port. At all other times the Sellers or the master of the vessel/ Vessels Agent (for and on behalf of the Sellers) will promptly advise the Buyer of any significant change in the ETA.

(ii) The vessel to tender notice of readiness soon upon arrival at designated sand heads Anchorage whether in port or not, whether in free pratique or not, whether customs-cleared or not and laytime to commence counting to all receivers 12 hrs after Nor tendered.

(iii) NOR shall be tendered on SHINC Basis.

21.6 LAYTIME DEMURRAGE AND DESPATCH

(i) Laytime shall commence counting 12 hours after Nor Tendered by master of vessel.

(ii) If vessel berths within 12 hours after tendering NOR the time shall commence once the vessel berths.

(iii) Laytime shall cease on completion of final Draft Survey of full cargo, removal of stevedore equipment & closing of hatches whichever is later at Sagar Anchorage/Haldia port.

(iv) Laytime will be calculated from 12.01 hours after Nor Tendered by master of vessel and completion of Lighterage of cargo and till final draft survey is done in haldia berth after completion of discharge of cargo in Haldia berth.

...

(vii) All time used for the opening and closing of hatches shall count as Laytime.

...

(ix) Once the Vessel is on demurrage it will remain on demurrage irrespective of any other stoppage or delay.

21. He submits that it was open for the petitioner, who was always aware of its own contractual liability for payment of demurrage, to take delivery of the cargo if it so desired. He further urges that it was the responsibility of the petitioner to take delivery of the cargo in a timely manner and in case of any delay, to indemnify the respondent for the

same. For this purpose, he relies on Clauses 21.2 (i) and (ii) which read as under:

“21.2 UNLOADING OF CARGO AT DISCHARGE PORT

(i) Discharge Port - The cargo shall be discharged at a Lighterage Anchorage/ Safe berth nominated by Buyer at the Discharge Port. This Lighterage Anchorage/ Safe berth shall be a normal berth/Lighterage Anchorage where the vessel can always approach, lie safely, discharge at and sail from, whilst always being afloat and at all states of tide and in any weather.

(ii) The Buyer shall indemnify the seller for any liability, penalty or other costs resulting from the Buyers failure to provide such Lighterage Anchorage/ Safe berth at discharge port. The Buyer will ensure that nominated berth is free and accessible at all times by the vessel for delivery of cargo. The buyer shall make all arrangements to immediately receive the cargo from the vessel on her arrival alongside the nominated berth.”

22. In support of his submissions that the petitioner was obliged to act strictly in accordance with the contractual terms, he places reliance on a recent decision of a co-ordinate Bench of this Court in *M/s Haliburton Offshore Services Inc. Vs. Vedanta Limited & Anr. OMP(I) (COMM) 88/2020*. He also places reliance on a decision dated 22.05.2020 in *M/s. Polytech Trade Foundation Vs. Union of India & Ors. WP(C) 3029/2020*, wherein this Court, while dealing with a similar plea by a petitioner claiming exemption on account of the same circulars on which the petitioner is seeking to rely, found the same to be wholly misplaced by holding that these circulars were merely advisories and could not exempt parties from performing their obligations under a valid contract. He, therefore, prays for this petition to be summarily rejected with costs.

23. I have heard learned counsel for the parties and perused the record with their assistance, including the terms of the contract dated 13.12.2019 and the relevant circulars issued by the Government of India and the Kolkata Port Trust.

24. In the light of the submissions made, what emerges is that the petitioner is seeking a direction to the respondent to release the cargo to the petitioner without insisting on payment of demurrage. The petitioner's primary ground for seeking the same is that it stood absolved of its contractual obligations to take delivery immediately on the arrival of the vessel at the Haldia Port on account of the nationwide lockdown and also of its liability to pay contractual demurrage by reason of the concessions granted by the Ministry of Shipping in its circulars. On the other hand, the respondent's stand is that the claim for payment of demurrage is being made strictly in accordance with the terms of the contract dated 13.12.2019 and since the force majeure clause is inapplicable to the present case, the petitioner is still bound by the terms of the contract. In the light of these diametrically opposite stands, the question before this Court is whether the respondent ought to be directed to release the cargo to the petitioner, without payment of demurrage till arbitration takes place, which is proposed to be invoked by the petitioner.

25. In fact, I find that the petitioner is not merely seeking a restraint order but also a direction by way of a mandatory injunction to the respondent to release the cargo without payment of demurrage. Undoubtedly, the ambit of interim protections which the Court is empowered to grant under Section 9 of the Act is broad, and the Court can pass protection orders as may appear to be just and convenient

including orders in the nature of mandatory injunctions. After all, the aim of an order under Section 9 is to protect the rights, which are or would be the subject matter of arbitration, from being frustrated. However, the Court has to exercise this power to grant interim reliefs on well recognized principles guiding grant of interim injunctions. One of the primary factors to be considered before passing any interim protection order is to examine whether, in the absence of such an interim order, the defendant/respondent is likely to, by its act, alter the existing situation in a manner which could have the effect of nullifying the outcome of the arbitration proceedings. In this way, it is quite similar to the exercise of power under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908. This discretionary power of the Court has to be exercised upon a consideration of the material brought on record by the party seeking the relief. It is only when, in the opinion of the Court, the party seeking interim reliefs under Section 9 of the Act satisfies the three pronged test for grant of the same, viz., prima facie case in its favour, balance of convenience in its favour and, most importantly, that it would suffer irretrievable injury unless such relief is granted, that interim protection is granted under this provision.

26. Now when I examine the facts of the present case in the light of the aforesaid legal position, what emerges is that on the one hand, it is the petitioner's case that once the lockdown was announced, it was prevented from taking delivery of the cargo. As a result, the Force-Majeure clause automatically came into effect thereby discharging the petitioner from its liability to pay any demurrage. On the other hand, the respondent contends that the petitioner cannot take benefit of the Force Majeure clause since it failed to invoke the same within the

stipulated period of 72 hours and has misrepresented its inability to take delivery of the cargo; even the circulars relied upon the petitioner show that when the cargo bearing vessel arrived at Haldia Port on 25.03.2020 the port was operational, albeit partly. In any event, the respondent contends that the petitioner cannot claim invocation of the Force-Majeure clause as it has failed to demonstrate the alternative steps it took to obtain delivery of the cargo.

27. It is well settled that the question regarding applicability of a Force Majeure clause cannot be decided in the abstract and has to be decided after an examination of the facts and circumstances of each case. Mere difficulty in performing the contractual obligations cannot be a ground for invoking a Force Majeure Clause. In the present case, the petitioner has claimed that as a result of COVID-19 and the consequent lockdown, the Force Majeure clause is squarely applicable. I am unable to agree with this contention. This question will be required to be determined in the arbitration proceedings after considering the stand of both sides, and keeping in view the well settled principle that a Force Majeure clause cannot be applied at the mere asking of a party. In this regard, reference may be made to a recent decision of a Coordinate Bench of this Court in *M/s Haliburton Offshore Services Inc. (supra)*, wherein the Single Judge while examining the plea of Force Majeure in the context of COVID-19 observed as under:-

“62. The question as to whether COVID-19 would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition. The Court would have to assess the conduct of the parties prior to

the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic.

63. It is the settled position in law that a Force Majeure clause is to be interpreted narrowly and not broadly. Parties ought to be compelled to adhere to contractual terms and conditions and excusing non-performance would be only in exceptional situations. As observed in *Energy Watchdog (supra)* it is not in the domain of Courts to absolve parties from performing their part of the contract. It is also not the duty of Courts to provide a shelter for justifying non-performance. There has to be a 'real reason' and a 'real justification' which the Court would consider in order to invoke a Force Majeure clause."

28. Further reference may also be made to paragraph 14 of the decision in ***Global Steel Philippines Vs. STC of India Ltd. FAO (OS) No. 186/200***, wherein a Division Bench of this Court held that the question regarding the applicability of the Force-Majeure clause to a particular case ought to be finally decided only in the arbitral proceedings:-

"14. There is no doubt that clause 21 does provide for force majeure clause and the manner of its invocation and as to how it would come into force. That is, however, a dispute between the parties to the contract as to whether the force majeure clause stood properly invoked and whether respondent No. 3 should have still proceeded to load the goods for shipment. Such disputes have to be settled in terms of clause 22 of the contract, which is the arbitration clause. We may once again note that the arbitration clause providing for the proceedings to be conducted in accordance with the London Maritime Arbitrators Association stand already invoked by respondent No. 3 and it is in those proceedings that this aspect would be settled."

29. At this stage it may be relevant to observe that besides the plea of applicability of Force Majeure, the petitioner has also sought to contend that demurrage is in fact not payable, for which purpose he has relied on the circulars issued by the Ministry of Shipping. However, in the light of a recent decision in *M/s Polytech Trade Foundation Vs. Union of India & Ors. WP(C) No.3029/2020* wherein a Coordinate Bench of this Court has expressed its prima facie opinion that these very circulars and advisories issued by the Ministry of Shipping may not be binding on private parties, even this plea may not be sustainable. Therefore, the petitioner's plea that these circulars exempt the vessel owner from paying demurrage, which are in turn being demanded from the petitioner, can only be decided in arbitration.

30. Thus, even though the petitioner might have a plausible defense, the respondent's pleas that the demurrage would still be payable under the terms of the contract cannot be brushed aside. The petitioner's claim for exemption from payment of demurrage on account of the nation-wide lockdown, cannot be accepted at this stage as it will need to be determined whether the port was, in fact, partially operational or completely closed. Equally so, the respondent's defense that (1) the vessel had left the Gabon Port much before any communication whatsoever was given by the petitioner which implied that the respondent could not prevent its passage, (ii) the contract contains a stipulation for payment of demurrage by the petitioner and (iii) the demurrage, if any, incurred by the vessel owner at the Haldia Port would have to be paid by the respondent if the petitioner fails to make such payment, cannot be disregarded summarily and would need to be determined in arbitration.

31. On the basis of the submissions made before this Court and a perusal of the record, I am unable to find a prima facie case in the petitioner's favour on the applicability of the Force-Majeure clause or its claim for exemption from paying demurrage. In fact, notwithstanding extensive submissions made by the parties on the aspect of the applicability/non-applicability of the Force-Majeure clause in the present case, I have deliberately refrained from expressing any conclusive opinion in this regard, lest it cause prejudice to any party during the arbitration proceedings proposed to be invoked.

32. I have considered the petitioner's reliance on the decisions in *D.N.Revri (supra)* and *Nabha Power Ltd (supra)* which deal with the manner in which commercial contracts ought to be interpreted, but I am of the opinion that this aspect also ought to be decided only during arbitration. At this stage, in view of the limited material available on record and the scope of examination under Section 9, it would not be appropriate to hold that on account of the lockdown, the specific clause for demurrage would be inapplicable.

33. I have also considered the decisions in *Adhunik Steels (supra)*, *Bhubaneshwar Expressways (supra)*, *Forbes Facility (supra)* and *Ajay Singh (supra)* and find that all of them turn on their facts and do not forward the case of the petitioner. In fact, these decisions only reiterate the settled position that a Court, seized with a petition under Section 9 of the Act, is empowered to pass protection orders as may appear to be just; the power of a Court under this provision is very wide and only exercised for the purpose of safeguarding the rights of the parties. This may include not only grant of restraint orders but also directions to the respondent to make payments to the petitioner as an

interim measure, till final determination of the dispute between the parties by way of arbitration. There can be no quarrel with this proposition but ultimately, as observed earlier, the grant of relief under Section 9 is entirely dependent on the facts of each case.

34. Returning to the facts of the present case, not only have I been unable to find a prima facie case in the petitioner's favour, I find that even the balance of convenience is in favour of the respondent considering its plea that it would be liable to forthwith compensate the vessel owner for the payment made by way of demurrage. In fact, the only safeguard that the respondent has against the petitioner's default in paying demurrage stems from clause 21.8 of the contract dated 13.12.2019 which entitles the respondent to withhold release of the goods. Even the petitioner's offer to furnish a bank guarantee in exchange for payment of demurrage, is not a convincing ground in support of its case considering that the liability of paying demurrage has been placed on the petitioner under the express stipulations of the contract dated 13.12.2019. It would not be fair to direct the respondent to await conclusion of arbitration to receive demurrage as per the contract. This Court has to respect the sanctity of the contract signed between the parties and cannot, at this stage, permit demurrage payment to be substituted with a bank guarantee of the same amount, when the contract does not provide for it.

35. In fact, the petitioner, which claims to be a leading cement company in paragraph 5 of its petition, has failed to substantiate that it would incur irreparable injury or loss if the interim relief it seeks by way of this Section 9 petition is not granted by this Court. In these circumstances, I have no hesitation in holding that the petitioner has

failed to satisfy the parameters for grant of interim reliefs under Section 9 of the Act.

36. For reasons stated hereinabove, even though I find no merit in the petitioner's prayer for interim reliefs, it is directed that in case it were to be held in the arbitration proceedings that no demurrage was in fact payable by the petitioner or it turns out that the vessel owner is exempted from the liability of paying demurrage, the amount paid by the petitioner to the respondent by way of demurrage would be refunded with interest at a rate determined by the learned Arbitrator.

37. The present petitions, along with pending application, are accordingly dismissed with the aforesaid clarification with no order as to costs.

JUNE 18, 2020
sr/gm

REKHA PALLI, J