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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment reserved on: 03.02.2025
Judgment pronounced on: 17.04.2025

\+ **ARB. A. (COMM.) 43/2024 & I.A. 36399/2024, I.A. 44028/2024**

NATIONAL HIGHWAYS AUTHORITY OF INDIA

.....Appellant

Through: Mr. Tushar Mehta, Solicitor General with Mr. Manish Bishnoi, Ms. Gunjan Sinha Jain, Ms. Muskaan Gopal, Mr. Khubaib Shakeel, Advs.

versus

HK TOLL ROAD PVT. LTD.

.....Respondent

Through: Mr. Mr. Parag Tripathi, Sr. Adv. with Mr. Vijayendra Pratap Singh, Mr. Aditya Jalan, Mr. Aditya Ganju, Ms. Shruti Garg, Mr. Pradyumna Sharma, Mr. Bharat Makan, Ms. Khushi Mittal, Ms. Mishika Bajpai, Advs.

CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH

J U D G M E N T

: JASMEET SINGH, J

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THE CHALLENGE

1. This is a petition filed under section 37 of Arbitration and Conciliation Act, 1996 (***"1996 Act"***) seeking setting aside of the order dated 08.08.2024 (***"impugned order"***) passed by the learned Arbitral Tribunal (***"AT"***) in the ongoing Arbitration Proceedings between ***HK Toll Road Pvt. Ltd. vs. National Highway Authority of India*** (***"NHAI"***) wherein the learned AT while deciding application filed under section 17 of 1996 Act by the respondent, directed as under:-

> ***28.*** *…… For all the foregoing reasons & in view of the legal position holding the field and given that the concerns raised by the Tribunal qua the financial*

wherewithal of the Claimant to execute Stage Construction Works stands addressed, this Tribunal issues the following directions:

28.1. *The operation of the Termination Notice bearing No. NHAI/HQ/TN Div./HK/E-175436 dated 22.01.2024 issued by the Respondent is stayed till final determination in the present arbitral proceedings or till such further orders as maybe passed by the Tribunal;*

28.2. *The toll collected from the users of the Highway shall be deposited in the Escrow Account maintained by the parties.*

28.3. *The Claimant will execute the balance Stage Construction Works and complete the same expeditiously.*

28.4. *The security furnished by the Claimant by way of demand drafts will be put in a non-lien account within 2 weeks from the date of this Order which would remain under the directions of the Tribunal.*

29. *The Tribunal clarifies that the views expressed in this Order are prima facie. All rights and contentions of the parties are left open to be advanced in relation to the issues that may fall for consideration before this Tribunal."*

FACTUAL BACKGROUND

2. On 02.07.2010, the appellant i.e. NHAI and the respondent entered into a Concession Agreement (***"Agreement"***) for construction, operation and maintenance (***"O&M"***) of the existing road on Hosur-Krishnagiri Section of NH-7 from KM 33.130 to KM 93.00 (Length -

KM 59.87) in the State of Tamil Nadu by Six-Laning thereof on design, build, finance, operate and transfer basis (***"Project Highway"***) for 24 years (***"Concession Period"***).

3. As per the Agreement, the respondent was granted the exclusive right and license by the NHAI to operate the Project Highway and demand, collect toll fee for 24 years from the vehicles using the Project Highway or any part thereof.

4. On 06.06.2011, NHAI *vide* its letter declared the Appointed Date of the Project Highway in terms of Clause 10.3.1 of Agreement to be 07.06.2011. Subsequently, on 01.02.2012, the parties and Canara Bank entered into a Substitution Agreement, for the substitution of the respondent on the occurrence of certain identified events. Thereafter, a Common Rupee Loan Agreement dated 17.02.2012 was executed between the parties and Canara Bank as the facility agent. The said Loan Agreement encapsulated the financial plan for the Project Highway.

5. NHAI approved deferment of payment of premium by the Concessionaire and both parties executed a Supplementary Agreement dated 17.06.2014. On 05.04.2016, Independent Engineer (***"IE"***) issued Provisional Completion Certificate (***"PCC"***) dated 05.04.2016 in terms of the Agreement.

6. NHAI issued a notice dated 16.12.2020 directing the respondent to carry out repair/remedial measures in accordance with the Agreement and rectify the notified defects within a period of 15 days. Again on 25.06.2021, NHAI issued second notice directing the respondent to rectify deficiencies and fulfil the O&M obligations.

7. IE *vide* letter dated 05.08.2021 to NHAI recommended damages amounting to INR 10,24,42,009/- to be imposed on the respondent for breach of maintenance obligation, formulated from the monthly site inspection report for the month of September 2020 to June 2021 up to end of 02.08.2021. Respondent *vide* its letter dated 12.08.2021 submitted the details of the work done by the respondent till 11.08.2021 regarding the maintenance of the Project Highway along with the monthly progress report for the month of September 2021 along with the O&M inspection report and requested NHAI to review the same. NHAI *vide* letter dated 19.08.2021 requested the same to IE.

8. NHAI *vide* its letter dated 01.09.2021 proceeded to take action for recovery of damages amounting to INR 10,24,42,009/- on the basis of the recommendation of the IE dated 05.08.2021, recoverable from the escrow account. The aforesaid letter was replied by the respondent informing the NHAI about the work being undertaken towards continuous maintenance/rectification of the Project Highway and explained the reasons for delay in maintenance of work.

9. In the meanwhile, on 08.10.2021, NHAI *vide* letter dated 08.10.2021 to Canara Bank requested the Bank to charge the damages amounting to INR 10,24,42,009/ from the escrow account of the respondent and to deposit the same in the account of the NHAI within one month in accordance of Clause 17.8.1 of the Agreement. On 22.10.2021, IE *vide* its letter dated 22.10.2021 recommended further damages amounting to INR 2,47,19,803 for the period of 02.08.2021 to 20.10.2021 for recovery as per Clause 17.8.1 of the Agreement.

10. Respondent *vide* letter dated 01.11.2021 requested NHAI to withdraw

their letter dated 08.10.2021 imposing damages. The respondent also addressed a letter to Canara Bank requesting them to not to initiate payment of the damages as claimed by NHAI as the respondent has disputed all the damages contained in the letter dated 08.10.2021.

11. On 10.01.2022, the respondent invoked the dispute resolution clause of the Agreement by serving notice under Article 44 of the Agreement to NHAI.

12. On 14.07.2022, NHAI issued another letter dated 14.07.2022 to Canara Bank *inter alia* directing the Bank to remit an amount of INR 65.06 Crores directly in the NHAI's account on account of alleged default of the respondent for non-payment of premium due to the NHAI and for default of non-compliance of its O&M obligations under the Agreement. In the interregnum period, the respondent issued numerous letters clarifying its stand.

13. Again on 16.12.2022, respondent disputed the allegations and invoked arbitration under Clause 44 of the Agreement.

14. NHAI issued various letters seeking payments of an amount of INR 13.66 Crores and INR 17.43 Crores for FY 2018-2019 and FY 2019-2020. The respondent had sought to adjust/waive the premium of INR 25.02 Crores *vide* its letter dated 13.02.2023, however, the NHAI rejected the said request *vide* its letter dated 29.12.2023 and demanded a sum of INR 74.94 Crores.

15. NHAI *vide* its letter dated 17.01.2023 issued the Cure Period Notice under Clause 37.1.1 of the Agreement to the respondent. Thereafter, NHAI *vide* email dated 12.05.2023, issued notice of Intention to Terminate the Agreement to the respondent and a notice to the Bank

under Clause 37.1.3 of the Agreement and Clause 3.3.1 of the Substitution Agreement.

16. On 08.08.2023, in accordance with arbitration clause, respondent nominated its nominee Arbitrator and requested NHAI to appoint its nominee Arbitrator. NHAI on 01.09.2023 nominated its nominee Arbitrator and requested both the nominee Arbitrators to appoint the Presiding Arbitrator.

17. NHAI *vide* letter dated 22.01.2024, issued Notice for Termination to the respondent thereby terminating the Agreement in question with immediate effect, took over the Project Highway and appointed M/s Racy Projects as user fee collection agency to collect user fee on behalf of NHAI. There were numerous letters exchanged between the NHAI regarding violation of the terms of the Agreement and denials by the respondent.

18. Termination of the Agreement led to the filing of a petition under section 9 of 1996 Act being O.M.P.(I) (COMM.) 32/2024 by the respondent seeking the following reliefs:-

> *"(i) Stay the Termination Notice bearing No. NHAI/HQ/TN Div./HK/ E-175436 dated 22.01.2024 issued by the Respondent No.1 and any further process to be undertaken in furtherance of the same;*
>
> *(ii) Direct the parties to maintain status-quo during the pendency and/ or until the Final disposal of the present petition u/s 9 of the Arbitration and Conciliation Act, 1996.*
>
> *(iii) Direct deposit of the Toll Revenue collected by the parties in a separate account and/ or the ESCROW A/c*

maintained by the parties until the final disposal of the of the present petition u/s 9 of the Arbitration and Conciliation Act, 1996"

19. This Court *vide* Order dated 25.01.2024 directed that section 9 petition should be treated as section 17 application which should be decided by the learned AT as expeditiously as possible. Further the respondent could use the amount lying in Escrow Account only for the purpose of payment of salaries to its employees and servicing the monthly interest component of the debt in respect of the Project Highway. The interim order was to hold the field until the AT passed orders, ad-interim or otherwise, on the application under section 17 of 1996 Act.

20. It is relevant to note that the constitution of this AT was completed on 29.01.2024 when the Presiding Arbitrator was appointed.

21. On 14.02.2024, the respondent moved an application under section 17 of 1996 Act and thereafter, NHAI filed a reply to the said application. Rejoinder was also filed to the said reply.

22. After hearing detailed arguments, order was reserved on 04.07.2024. It is pertinent to note that respondent filed its Statement of Claim (***"SOC"***) on 19.07.2024 before the impugned order was passed on 08.08.2024.

23. Learned AT *vide* Order dated 08.08.2024 passed the directions as reproduced above. Aggrieved by the impugned order, NHAI has preferred the present appeal.

RIVAL CONTENTIONS

On behalf of NHAI

24. Mr. Tushar Mehta, learned Solicitor General appearing for the NHAI

persuasively submits that NHAI had taken over the possession of the toll plaza of the Project Highway on 22.01.2024 i.e. date of termination of the Agreement, which is not disputed by the respondent. The relief granted by the learned AT under the impugned order has not even been prayed for by the respondent. The respondent had only prayed for maintaining *status quo* as an interim measure. The hearing of the respondent's section 17 application was concluded at a stage where the respondent had not even filed the SOC despite the said fact was being objected by the NHAI.

25. He further submits that despite there being no prayer for *status quo ante* in section 17 application filed by the respondent, the learned AT has passed the impugned order directing *status quo ante* to be restored and thereby restoring the Agreement in question after nearly 8 months of termination which is completely perverse to the settled law.

26. My attention is drawn to the directions passed by the learned AT and to the prayers made in the SOC to submit that the entire claim of the respondent stands allowed at an interim stage and nothing further remains to be done as, surprisingly, the learned AT has directed the respondent to conclude the work expeditiously, i.e. conclude the Agreement expeditiously. The AT has not taken note of the restoration/ maintenance works carried by the NHAI during the intervening period from 22.01.2024 till 08.08.2024 and has completely overlooked that NHAI has expended money from its pocket to keep the Project Highway in traffic worthy condition.

27. Learned Solicitor General placed reliance on several judgments to submit that the relief granted by way of an impugned order, is of final

nature which is legally not permissible under Section 17 of 1996 Act. The learned AT has not only restored the Agreement but has also directed *status quo ante* which is impermissible at an interim stage where the parties are still to file complete pleadings and to lead evidence to prove their respective case. The injunction granted is squarely against the settled law that a terminated contract cannot be restored even as a measure of final relief much less at interim stage and the remedy lies in the form of damages, even assuming that the termination is found to be illegal.

28. The learned AT also failed to appreciate that NHAI has already issued a tender for execution of the Stage Construction Works on 04.03.2024 and issued Letter of Award dated 28.03.2024 as well as Notice of Commencement of Works dated 08.04.2024 to a third party. The said fact was well within the knowledge of the learned AT which can be seen from para 11.11 of the impugned order.

29. Learned Solicitor General further argues that the relief granted by the learned AT is also against the provisions of the Specific Relief Act, 1963 (***"SRA"***). The Agreement in question is determinable in its nature as it provides for termination of Agreement by either of the parties, hence the relief granted by the learned AT is erroneous in nature in view of section 14(d) of SRA. Further, the impugned order is afoul ofsection 14(b) of SRA which prohibits injunction in a contract where the performance of a contract is a continuous duty which the Court cannot supervise.

30. He further relies upon section 20A and 41(ha) of SRA to urge that an injunction cannot be granted if it would impede or delay the progress

or completion of any infrastructure project or interfere with the continued provisions of relevant facility related thereto or services being subject matter of such project. The present case pertains to a contract relating to national highway road infrastructural project and thus, given the statutory prescription against grant of injunction, the interim order is wholly erroneous.

31. Learned AT, while relying on ***Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd., (2023) 1 SCC 355***, has wrongly held that the amended provisions of the SRA which came into force in 2018, would not apply to the Agreement in question as the same was executed on 02.07.2010, prior to the amendment. The said judgment has been set aside in Review Petition (C) No. 1565 of 2022 on 08.11.2024, and hence, the judicial dictum set out in said judgement is no longer good law and therefore cannot be relied upon for any purpose.

32. Learned Solicitor General further submits that assuming the amendment in SRA will apply prospectively, even then as per the admitted case of the respondent, it started the Stage Construction Works only in May 2023, much belatedly. As per the NHAI, the work ought to have been started in 2022 and completed by December 2023. It is an admitted position that the Stage Construction Work was required to be undertaken and completed post 2018 i.e. much after the amendment in SRA in 2018 and thus, the findings of the learned AT with regard to the non-applicability of these provisions are legally unsustainable.

33. If the interpretation of the learned AT is accepted, then all contract executed pre amendment would be out from the purview of these

provisions even if the project is implemented later. Further, in national highway projects, mere construction is not of paramount concern but the Project Highway is also required to be maintained through hosts of constant and regular activities which are ongoing works and hence, the same falls under these provisions.

34. The finding of the learned AT w.r.t. Section 20A of SRA would not be attracted to the present case as it negates the crucial aspect that the need for Stage Construction Work arose because the respondent failed to construct the Project Highway properly. The respondent constructed the pavement for a design life of l0 years instead of 20 years. The respondent had also given an undertaking dated 02.03.2016 to undertake and complete the Stage Construction Work in future. Thus, Stage Construction Work was integral part of the initial construction activity and the learned AT completely failed to appreciate the nature of stage construction activity.

35. Learned AT further failed to consider the grounds on which the Termination Notice was issued. The respondent designed the pavement for a design life of 10 years instead of 20 years as per the Clause 2.2 of Schedule B read with Clause 4.4.2 of the Manual for Six Laning. It became necessary to undertake strengthening of the pavement through Stage Construction Works. Further, the respondent failed to pay premium as per the annual review feature contained in the in-principle sanction, inasmuch as there remained a shortfall of Rs. 74.94 Crores by December 2023. The respondent was also not maintaining the Project Highway as per the terms of the Agreement and was in constant breach of the timelines set out in Schedule K of

the Agreement which is evident from the report of IE imposing damages for defaults in regular maintenance.

36. The learned AT also failed to consider that the NHAI has been carrying out maintenance on the Project Highway to ensure that safety of the road users is not endangered. However, the learned AT instead of taking into consideration the costs incurred by the NHAI, has directed that the toll be deposited into the Escrow Account. The learned AT has not considered the express terms of the Agreement which contemplate that the right of termination is independent and distinct from the damages which can be imposed by the NHAI on the Concessionaire i.e. respondent.

37. To buttress the above submissions, learned Solicitor General has *inter alia*, relied upon the following judgments:-

A. Inter Ads Exhibition (P) Ltd. v. Busworld International Cooperatieve Vennootschap Met Beperkte Anasprakelijkheid, 2020 SCC OnLine Del 351.

B. Indian Railways Catering & Tourism Corp. Ltd. v. Cox & Kings India Ltd., 2012 SCC OnLine Del 113.

C. National Highways Authority of India v. Panipat Jalandhar NH-I Tollway Pvt. Ltd., 2021 SCC OnLine Del 2632.

D. Supreme Panvel Indapur Tollways (P) Ltd. v. National Highways Authority of India, 2022 SCC OnLine Del 4491.

E. Ksheeraabd Construction (P) Ltd. v. National Highways & Infrastructure Development Corpn. Ltd., 2023 SCC

OnLine Del 3156.

F. National Highways Authority of India v. Panipat Jalandhar NH-1 Tollway (P) Ltd., 2021 SCC OnLine Del 5066.

<u>On behalf of the Respondent</u>

38. Refuting the above submissions, Mr Tripathi, learned Senior Counsel appearing for the respondent vehemently submits that NHAI has wrongly urged that Sections 20A and 41 (ha) of SRA are applicable in the present case since Stage Construction Work has not been completed. Section 20A and 41 (ha) of the amended SRA do not apply in the present case as the construction phase was already completed before the amendment of the SRA came into force on 01.10.2018 as the PCC was already issued on 05.04.2016.

39. The 2018 amendment to SRA has changed the language of Section 10 of SRA from "*specific performance of any contract may, in the discretion of the court, be enforced*" to "*specific performance of a contract shall be enforced subject to …….*". In view of the amendment, the language of Section 10 of SRA now mandates that specific performance of contracts shall be enforced by the Court.

40. My attention is drawn to several clauses of the Agreement to urge that Construction Period stands completed as on the date of issuance of PCC. Hence, sections 20A and 41(ha) of SRA do not apply to the present case since the construction has been completed before the amendment of the SRA came into force and the present Agreement in question is required to be specifically enforced.

41. In order to obtain a decree of specific performance, the plaintiff has to

prove his readiness and willingness to perform his part of the contract in terms of Section 16(c) of SRA. The respondent had been performing its obligations under the Agreement including routine maintenance of the Project Highway. In fact, the respondent has also completed Bituminous Concrete Overlay Work as notified by the NHAI on 24.09.2022. Further, it is an admitted position that 35% of the said Stage Construction Works had already been carried out by the respondent. The respondent has undertaken to complete it within a period of 8 months from the date of the Project being handed back to the respondent. The respondent had also procured funds through its Sponsor Company, Reliance Infrastructure Limited, in the form of Demand Drafts of an amount of INR 30 Crores to show its financial viability to carry out the Stage Construction Works. Learned AT has also satisfied itself with regard to the financial capacity of the respondent. Thus, the respondent is always ready and willing to perform its part of the contractual obligations.

42. Learned senior counsel further argues that determinability is a matter of construction and/or interpretation of a contract. A contract cannot be stated to be determinable solely because it can be terminated by a party if the other party is allegedly in breach of its obligations. In today's world, most agreements have a termination clause for breach of the agreement. If all such clauses are seen to be beyond the purview of judicial review, then it would mean that the suffering party, if it wins, can only seek damages and cannot seek specific performance. Such an interpretation would be contrary to the very radical shift in law which is sought to be introduced through the 2018 Amendment. In

the present case, learned AT has held that there exists a *prima facie* case in favour of the respondent and has also observed that if such interim relief is not granted, irreparable harm and injury would be caused to the respondent.

43. In the present case, stay of Termination Notice was warranted since the respondent has a strong *prima facie* case in its favour as the respondent had been diligently carrying out the rectification of the defaults as per the provisions of the Agreement, the respondent had also agreed to carry out the Stage Construction Works after the 10 years design life till the end of the Concession Period as per requirements and undeniably Premium payments have been made by the respondent. Despite the respondent having made the aforesaid compliances, the Termination Notice was issued by the NHAI at the stage when the Project had just become financially viable, and all the stakeholders were about to realise the benefits of the Agreement.

44. In response to the argument of NHAI that hearing of Section 17 application was concluded in the absence of SOC despite the objection being raised by the NHAI that there was no SOC, the hearing was concluded. It is submitted that the learned AT had dealt with this very issue in its Procedural Order dated 04.07.2024. In the said order, the learned AT had directed the respondent to file its SOC within 15 days. In compliance with the same, the respondent had filed its SOC on 19.07.2024. Thus, on the date of passing the impugned order dated 08.08.2024, the AT had the benefit of examining the entire issue and reliefs prayed for under the SOC.

45. Learned Senior Counsel further argues that the Courts have the

requisite power to grant a mandatory injunction including the grant of *status quo ante* in order to protect the rights of the parties specially when the *status quo ante* has been altered shortly prior to the legal action and the legal action was due to direct and proximate cause. A relief in the nature of a mandatory injunction can be granted to preserve the subject matter of the arbitral proceedings. Moreover, as has been explicitly provided under Section 17(1)(e) of 1996 Act, the AT has the same powers for making orders, as the Court has for the purpose of, and in relation to, any proceedings before it.

46. Reliance is placed on catena of judgments to show that the AT has wide powers to fashion appropriate interim orders including mandatory interlocutory injunction. Hence, it could not be said that the learned AT under Section 17 of 1996 Act did not have the power to grant interim mandatory injunction.

47. He further argues that the relief granted by the learned AT is *status quo* and not *status quo ante*. Section 21 of 1996 Act states that an arbitration is commenced when the Notice of Arbitration is issued. In the present case, the Notice of Arbitration was issued by the respondent on 08.08.2023 and the constitution of the learned AT was completed on 29.01.2024. Hence, irrespective of the fact that learned AT was constituted later in January 2024, what assumes significance is the date when the Notice of Arbitration was issued, i.e., 08.08.2023. Thus, the date of commencement of arbitral proceedings between the parties is 08.08.2023 and not 29.01.2024 when the constitution of the AT was completed. Hence, at the time of commencement of the present arbitral proceeding on 08.08.2023, the Agreement in question

was existing between the parties and the possession of the Project Highway was completely with the respondent. Therefore, essentially what the learned AT has done by granting a stay of the Termination Notice is that it has reversed the state of things to as they were on the date of commencement of arbitral proceeding, i.e., 08.08.2023. Therefore, the argument of the NHAI that impugned order is in the nature of *status quo ante* is completely erroneous.

48. Learned senior counsel further submits that no grounds as mentioned in section 37(2)(b) of 1996 Act have been made out to interfere in the impugned order. The primary concern under section 17 of 1996 Act is to safeguard the subject matter of the arbitration process, which in the present case is the toll collection. Terminating the rights of the respondent as a Concessionaire under the Agreement, including its right to collect toll, would cause serious financial injury. The AT has passed the impugned order which not only balances equities but also preserves the subject matter of dispute and sanctity of the arbitral process.

49. Learned senior counsel in support of his submissions has *inter alia*, relied upon the following judgments:-

A. Subodh Kumar Singh Rathour vs. Chief Executive Officer and Others, 2024 SCC OnLine SC 1682.

B. Global Music Junction Pvt. Ltd. v. Shatrugan Kumar, 2023 SCC Online Del 5479.

C. DLF Home Developers Ltd. v. Shipra Estates Ltd., 2021 SCC OnLine Del 4902.

D. Sanjay Arora vs. Rajan Chadha, 2021 SCC OnLine Del

4619.

E. Dinesh Gupta v. Anand Gupta, 2020 SCC OnLine Del 2099.

F. Ajay Singh v. Kal Airways Private Limited, 2017 SCC OnLine Del 8934.

G. NTPC Limited v. Jindal ITF Limited &Anr., 2017 SCC OnLine Del 11219.

Rejoinder on behalf of NHAI

50. Learned Solicitor General, in rejoinder, countered all the submissions of the respondents and submits that the validity/illegality of termination could have only been adjudicated after recording of evidence. Learned AT has pre-decided the issue relating to the validity of the termination, and has overstepped its jurisdiction by effectively passing an interim award, even when the application under consideration was not for passing of interim award under Section 31(6) of 1996 Act at all, but for interim reliefs under Section 17 of 1996 Act.

51. Lastly, learned Solicitor General submits that no such contention was urged before the learned AT that the respondent is entitled to *status quo* relating it back to the date of issuance of the Section 21 notice dated 08.08.2023 which is also evident from the prayers made in section 9 or in section 17 application. The respondent had various opportunities to approach this Hon'ble Court under Section 9 as the Cure Period Notice was issued on 17.01.2023. There was also no embargo on the respondent to approach this Hon'ble Court seeking an injunctive relief after the issuance of the Notice for intention to

terminate dated 12.05.2023. In fact, Section 9 is a remedy which can be availed by a party, prior to, in anticipation of and even after the arbitral proceedings have commenced in case approaching the AT is inefficacious.

ANALYSIS AND FINDINGS

52. I have heard the rival submissions advanced by the learned senior counsel for the parties and also perused the material available on record.

Scope of Section 37(2)(b) of 1996 Act

53. Before going into the merits of the contentions, it is necessary to outline the ambit and scope of section 37(2)(b) of 1996 Act. The said section is extracted below:-

> *"37.Appealable orders.—(1)[Notwithstanding anything contained in any other law for the time being in force, an appeal] shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely:—*
>
> *xxxxxxxxxxx*
>
> *(2) Appeal shall also lie to a court from an order of the arbitral tribunal—*
>
> *(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or*
>
> *(b) granting or refusing to grant an interim measure under section 17."*

54. The Hon'ble Supreme Court and this Court in catena of judgments have held that the powers of Appellate Court while exercising

jurisdiction under section 37(2)(b) of 1996 Act against orders passed by the Arbitral Tribunal is very restricted and narrow and the same should be exercised when the orders seems to be perverse, arbitrary and contrary to law. The judgment of ***Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727*** passed by the Hon'ble Supreme Court, followed by this Court, elaborate the ambit and scope of the appeals. Although the aforesaid judgment is not dealing with the arbitration proceedings but the same deals with the power of Appellate Court in Code of Civil Procedure, 1908 (***"CPC"***). Operative paras of the aforesaid judgment are extracted below:-

> *"13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.*
>
> *14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or*

perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Private Ltd. v. Pothan Joseph [(1960) 3 SCR 713 : AIR 1960 SC 1156] : (SCR 721)

> *"... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Jhanaton [1942 AC 130] '...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an*

individual case'."

The appellate judgment does not seem to defer to this principle."

55. The said judgment is consistently followed by this Court in ***Green Infra Wind Energy Ltd. v. Regen Powertech Pvt. Ltd., 2018 SCC OnLine Del 8273***; ***Sona Corporation India Pvt. Ltd. v. Ingram Micro India Pvt. Ltd., 2020 SCC OnLine Del 300; Dinesh Gupta (supra); Manish Aggarwal v. RCI Industries & Technologies Ltd., 2022 SCC OnLine Del 1285***; ***Supreme Panvel Indapur Tollways (P) Ltd. (supra)***; ***Tahal Consulting Engineers India (P) Ltd. v. Promax Power Ltd., 2023 SCC OnLine Del 2069*** and ***Handicraft & Handlooms Exports Co. of India v. SMC Comtrade Ltd., 2023 SCC OnLine Del 3981.***The above judgments are under the 1996 Act.

56. A perusal of the aforesaid judgments show that the Appellate Court while exercising powers/jurisdiction under section 37 of 1996 Act and more particularly under section 37(2)(b) of 1996 Act has to keep in mind the limited scope of judicial interference as prescribed under section 5 of 1996 Act. Section 5 of 1996 Act clearly reflects the legislative intent to minmize judicial interference in the arbitration process. Unlike the appeals under other statutes, the appeals under 1996 Act against the orders passed by the Arbitral Tribunal are subject to strict and narrow grounds. The 1996 Act aims at minimal court involvement, thereby to uphold the autonomy and efficiency of the arbitration process. [Reference***: Paragraphs 64, 66, 68-70 of Dinesh Gupta (supra)***]

57. The Appellate Court is not required to substitute its views with the

view taken by the Arbitral Tribunal which is a reasonable or a plausible view except where the discretion is exercised arbitrarily or where the AT has ignored the settled principles of law. In fact, the whole purpose to bring the 1996 Act is to give supremacy to the discretion exercised by the AT. The Appellate Court is not required to interfere in the arbitral orders especially a decision taken is at an interlocutory stage. The Appellate Court is only required to see the whether the AT has adhered to the settled principles of law rather than re-assessing the merits of the AT's reasoning.

58. A co-ordinate bench of this Court in ***Tahal Consulting Engineers India (P) Ltd. (supra)*** has observed as under:-

> *"36. L & T Finance lays emphasis on the need of the appellate court to bear in mind the basic and foundational principles of the Act and that being of judicial intervention being kept at the minimal. It also correctly finds that the power conferred by Section 37(2)(b) is not to be understood as being at par with the appellate jurisdiction which may otherwise be exercised by courts in exercise of their ordinary civil jurisdiction. This clearly flows from the foundational construct of the Act which proscribes intervention by courts in the arbitral process being kept at bay except in situations clearly contemplated under the Act or where the orders passed by the Arbitral Tribunal may be found to suffer from an evident perversity or patent illegality.*
>
> *xxxxxxxxxxx*

38. It would thus appear to be well settled that the powers under Section 37(2)(b) is to be exercised and wielded with due circumspection and restraint. An appellate court would clearly be transgressing its jurisdiction if it were to interfere with a discretionary order made by the Arbitral Tribunal merely on the ground of another possible view being tenable or upon a wholesome review of the facts the appellate court substituting its own independent opinion in place of the one expressed by the Arbitral Tribunal. The order of the Arbitral Tribunal would thus be liable to be tested on the limited grounds of perversity, arbitrariness and a manifest illegality only."

59. To sum up, it is clear that in view of the limited judicial interference, the Appellate Court has to exercise its power only if the arbitral order suffers from perversity, arbitrariness and a manifest illegality.

Ambit of Section 17 of 1996 Act

60. Section 17 of 1996 Act reads as under:-

"17. Interim measures ordered by arbitral tribunal.—(1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal—

(i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or

(ii) for an interim measure of protection in respect of any of

the following matters, namely:—

(a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

(b) securing the amount in dispute in the arbitration;

(c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

(d) interim injunction or the appointment of a receiver;

(e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient,

and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.

(2) Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908 (5 of 1908), in the same manner as if it were an order of the Court."

(Emphasis added)

61. Section 17 empowers the AT to pass any interim order in respect of the subject matter of dispute during the arbitral proceedings. The list of interim measure is not exhaustive as clause (e) specifically states that the AT can pass such other interim measure of protection as may appear to be just and convenient. The purpose of giving interim relief is that till the time arbitral proceedings are going on, the subject matter of the arbitration dispute is preserved in order to protect the party from harm during arbitral proceedings and the Arbitral Award can be implemented effectively. By 2015 amendment in 1996 Act, the ambit of the AT has been clarified and is given the same powers as given to the Court while exercising jurisdiction under section 9 of 1996 Act.In other words, by virtue of the said amendment, section 17 is *pari materia* with section 9 of 1996 Act.[Reference: ***Arcelormittal Nippon Steel (India) Ltd. v. Essar Bulk Terminal Ltd., (2022) 1 SCC 712***]

62. The interim relief can take various forms depending on the nature of the dispute. One of the common forms of granting interim relief is in the nature of *status quo*. To grant interim reliefs under section 9 or 17 of 1996 Act, the ingredients as set out in the judgment of the Hon'ble Supreme Court in ***Arcelormittal Nippon Steel (India) Ltd. (supra)*** are to be satisfied. Relevant paragraph is extracted below:-

> *"89. The principles for grant of interim relief are (i) good prima facie case, (ii) balance of convenience in favour of grant of interim relief and (iii) irreparable injury or loss to the applicant for interim relief. Unless applications for interim measures are decided expeditiously, irreparable*

injury or prejudice may be caused to the party seeking interim relief."

63. At this juncture, it is also relevant to note that while granting interim relief under the 1996 Act, the provisions of CPC are not binding in nature, however, the same cannot be ignored. In ***Essar House (P) Ltd. v. Arcellor Mittal Nippon Steel India Ltd., 2022 SCC OnLine SC 1219***, the Hon'ble Supreme Court observed as under:-

"39. In deciding a petition under Section 9 of the Arbitration Act, the Court cannot ignore the basic principles of the CPC. At the same time, the power Court to grant relief is not curtailed by the rigours of every procedural provision in the CPC. In exercise of its powers to grant interim relief under Section 9 of the Arbitration Act, the Court is not strictly bound by the provisions of the CPC.

40. While it is true that the power under Section 9 of the Arbitration Act should not ordinarily be exercised ignoring the basic principles of procedural law as laid down in the CPC, the technicalities of CPC cannot prevent the Court from securing the ends of justice. It is well settled that procedural safeguards, meant to advance the cause of justice cannot be interpreted in such manner, as would defeat justice.

41. Section 9 of the Arbitration Act provides that a party may apply to a Court for an interim measure or protection inter alia to (i) secure the amount in dispute in the

arbitration; or (ii) such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it."

64. Mr. Tripathi, learned senior counsel for the respondent has argued that the Arbitral Tribunal has the power to grant interim mandatory injunction to preserve the subject matter of the arbitral proceedings, if need so arises as in the present case was. Reliance is placed on ***NTPC Limited (supra)*** and the relevant paragraphs are extracted below:-

"19. It was observed later, in the same judgment that:

"The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there

cannot be any rational basis for withholding the injunction."

20. Hence, in view of the above judgments, it is clear that the court has wide powers to fashion appropriate interim order including mandatory interlocutory injunction. Such powers could also be exercised under Section 17(1)(e) of the Act by the arbitrator. As noted above, exercise of power for grant of interim orders is a fact dependent exercise."

65. I am in complete agreement with the view taken in the aforesaid judgment as the powers of the AT to grant interim measures are *pari materia* with the powers of Court and also, sub clause (e) of section 17(1)(ii) gives power to AT to grant interim protection as may appear to be just and convenient. However, the said discretion cannot be exercised in a routine manner. The same has to be exercised in view of the facts of each case. The Hon'ble Supreme Court in ***Samir Narain Bhojwani v. Aurora Properties & Investments, (2018) 17 SCC 203*** has already observed that an interim mandatory injunction is not to be easily granted. Relevant paragraphs of the said judgment are extracted below:-

"25. The Court, amongst others, rested its exposition on the dictum in Halsbury's Laws of England, 4th Edn., Vol. 24, Para 948, which reads thus:

"948. Mandatory injunctions on interlocutory applications.—A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it

will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application."

26. The principle expounded in this decision has been consistently followed by this Court. It is well established that an interim mandatory injunction is not a remedy that is easily granted. It is an order that is passed only in circumstances which are clear and the prima facie material clearly justify a finding that the status quo has been altered by one of the parties to the litigation and the interests of justice demanded that the status quo ante be restored by way of an interim mandatory injunction. [See Metro Marins v. Bonus Watch Co. (P) Ltd. [Metro Marins v. Bonus Watch Co. (P) Ltd., (2004) 7 SCC 478] , Kishore Kumar Khaitan v. Praveen Kumar Singh [Kishore Kumar Khaitan v. Praveen Kumar Singh, (2006) 3 SCC 312] and Purshottam Vishandas Raheja v. Shrichand Vishandas Raheja [Purshottam Vishandas Raheja v. Shrichand Vishandas

Raheja, (2011) 6 SCC 73 : (2011) 3 SCC (Civ) 204] .]"

66. The interim mandatory injunction is an extraordinary relief and the same should not be granted unless there are clear and compelling reasons for it.

67. Having discussed above the principles with regard to the powers of the Appellate Court and the powers of the AT under section 17 of 1996 Act, I would now proceed to examine the contentions raised by the parties.

Whether SOC is sine qua non for filling section 17 application.

68. Learned Solicitor General has argued that in civil proceedings, the interim application is filed alongwith the suit so that other party gets to know as to what has been prayed for as final relief. Similarly, for deciding section 17 application, SOC is necessary for proper adjudication as the SOC will have the final relief and the interim prayer has to be dependent on the final prayer. In the present case, NHAI did not get the opportunity to respond to the SOC which was filed by the respondent after the impugned order has been reserved despite the objections being raised by the NHAI.

69. I am not in agreement with the said argument.

70. In ordinary civil law, the suit proceedings are commenced only on the institution of the plaint. If the plaintiff requires interim relief, an application for the same is filed either accompanied with the plaint or is filed after filing of the plaint. Thus, an interim relief is granted in a pending civil suit. Filing of a suit is a pre-requisite condition for seeking interim relief in a civil suit.

71. However, in 1996 Act, the situation is different. Section 9 and 17 deal

with interim measures under the 1996 Act. The legislature intent can be drawn from section 9 of 1996 Act. To grant interim measure under section 9 of 1996 Act, there is no requirement that SOC is to be necessarily filed before that or formal initiation of arbitration proceedings are mandatory. An application under section 9 of 1996 Act can be filed even before the initiation of the arbitration process i.e. before issuing notice under section 21 of 1996 Act. The purpose of section 9 of 1996 Act is expeditious remedy for preserving and protecting the subject matter of arbitral proceeding.

72. Similarly, section 17 of 1996 Act is akin to section 9 of 1996 Act by virtue of 2015 amendment. The amendment aligns the powers of the AT with the power of Court under section 9, allowing for the same type of interim relief to be granted by the AT. This reflects the intent of the legislature to ensure that both the Court and AT have the same authority and power to protect or preserve the subject matter of the arbitral dispute so as to not render the arbitral process infructuous. The only difference between section 9 and 17 is that under section 9, an application seeking interim relief will be considered by the Court and under section 17, the same will be considered by the tribunal. Hence, SOC is not sine qua non for consideration of section 17 application.

73. A co-ordinate bench of this Court in ***Sanjay Arora (supra)*** has also taken a view that SOC is not sine qua non for maintainability of section 17 application. Relevant paragraphs are extracted below:-

> *"57. Empirically, in ordinary civil law, an application for interlocutory relief would lie only in substantive proceedings, claiming the main relief. The arbitral protocol,*

under the 1996 Act is, however, somewhat peculiar in its dispensation. Section 9 itself envisages grant of interim protection, by a court, before institution of arbitral proceedings and can be invoked, in an appropriate case, even before the notice of arbitration, under Section 21, is issued. The reason is that, while considering the prayer for interim protection under the 1996 Act, whether under Section 9 or under Section 17, apart from the troika of a prima facie case, balance of convenience and irreparable loss, the court, or Arbitral Tribunal, is also required to preserve the sanctity of the arbitral process, which is the very raison d'être of the 1996 Act. All efforts to foster and promote the arbitral process, and prevent its interception or interdiction have, therefore, to be made. The court under Section 9, or the Arbitral Tribunal under Section 17 is also, therefore, empowered to grant interim protection where any possibility of the arbitral proceedings being frustrated is found to exist, whether such frustration be before the arbitral process is initiated, during the arbitral process or even after the passing of the award. If, therefore, before a statement of claim is filed, the situation that presents itself is such that interim protection has to be granted, to ensure the preservation of the arbitral process, the court under Section 9, and the Arbitral Tribunal under Section 17, is empowered to grant such protection. In view of this peculiar dispensation, unique to arbitration, I am of the opinion that

the filing of statement of claim under Section 23 cannot be treated as a sine qua non for the maintainability of an application for interim protection under Section 17."

74. In the present case, an application filed by the respondent under section 17 of 1996 Act has been decided by the learned AT based on the averments and the pleadings in section 17 application to which a reply was duly filed by the NHAI. Hence, there has been no prejudice caused to NHAI in the absence of SOC at the time of arguments on the said application.

Applicability of the provisions of amended sections of SRA.

75. One of the factors relevant for the purpose of deciding the present appeal is the interpretation and applicability of the sections of SRA. The observations of the learned AT in this regard, reads as under:-

"24. The parties have laid emphasis on the 2018 Amendment to the SRA in furtherance of their respective cases. The Claimant asserts that after the 2018 Amendment, there has been a shift in legislative intent from specific performance being discretionary to it being mandatory. Reliance in this regard was placed on Section 10 of the SRA which now requires courts and tribunals to issue directions to specifically enforce a contract. NHAI, relying on the 2018 Amendment, argues that infrastructure projects have been accorded a special status under Section 20A introduced by the said Amendment which proscribes courts and tribunals from granting any injunction involving a contract relating to an infrastructure project where granting such injunction

would impede or delay the progress of the said project. The Respondent also relies on corresponding amendments made to other provisions of the SRA with specific focus on infrastructure projects, in particular Section 41(ha). In the view of this Tribunal, the amended SRA would not apply to the subject Concession Agreement. The 2018 Amendment to the SRA has been held by the Hon'ble Supreme Court in Katta Sujatha Reddy v. Siddamsetty Infra Projects (P) Ltd., (2023) 1 SCC 355 to have created new rights & obligations and therefore could only be prospective in nature. The relevant excerpt from the said decision has been reproduced hereunder:

> *"57. In the light of the aforesaid discussion, it is clear that ordinarily, the effect of amendment by substitution would be that the earlier provisions would be repealed, and amended provisions would be enacted in place of the earlier provisions from the date of inception of that enactment. However, if the substituted provisions contain any substantive provisions which create new rights, obligations, or take away any vested rights, then such substitution cannot automatically be assumed to have come into force retrospectively. In such cases, the legislature has to expressly provide as to whether such substitution is to be construed retrospectively or not.*
>
> *58. In the case at hand, the Amendment Act contemplates that the said substituted provisions would*

come into force on such date as the Central Government may appoint, by notification in the Official Gazette, or different dates may be appointed for different provisions of the Act. It may be noted that 1-10-2018 was the appointed date on which the amended provisions would come into effect.

59. In view of the above discussion, we do not have any hesitation in holding that the 2018 Amendment to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to its coming into force."

Even otherwise, in the view of this Tribunal, Section 20A of the amended SRA which prohibits grant of injunction where such injunction 'would cause impediment or delay in the progress or completion of such infrastructure project' would not apply to the present case in as much as the Construction Period, as defined under the CA, already stands completed with the issuance of the Provisional Completion Certificate."

(Emphasis added)

76. The learned AT relied upon the judgment of ***Katta Sujatha Reddy (supra)*** to hold that the amendment of 2018 in SRA is prospective in nature. Hence, the said amendment will not apply to the facts of the present case as the Agreement in question was entered in 2010. Learned AT further observed that amended section 20A of SRA will also not apply as the Construction Period as per the Agreement has

already been completed after the issuance of PCC dated 05.04.2016.

77. At the outset, it is to be noted that the aforesaid judgment relied upon by the learned AT has been recalled by the Hon'ble Supreme Court in ***Siddamsetty Infra Projects (P) Ltd. v. Katta Sujatha Reddy, 2024 SCC OnLine SC 3214.*** Hence, the law laid down in ***Katta Sujatha Reddy (supra)*** is no longer a good law.

78. It is relevant to highlight the controversy behind the aforesaid two judgments.

79. In ***Katta Sujatha Reddy (supra)***, the High Court therein observed that the amendment of 2018 in SRA is procedural in nature and hence, the same operates retrospectively and not prospectively. The Hon'ble Supreme Court under challenge of the said judgment of the High Court therein held that the amendment of 2018 in SRA shall operate prospectively and cannot apply to those transaction that took place prior to its coming into force. Relevant excerpts of the above said judgment are extracted below:-

> *"14. Aggrieved by the aforesaid order of the trial court, the plaintiff purchaser approached the High Court by way of a first appeal, being AS No. 998 of 2010. The High Court framed 7 issues for adjudication of the matter which are as under:*
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> ***xxxxxxxxxxx***
>
> *(6) Whether Section 10 of the Act as substituted by Act 18 of 2018 is prospective or retrospective in nature?*
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> ***xxxxxxxxxxx***
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> *20. On Point (6), the High Court held that when a provision*

is replaced by way of substitution, the substituted legislation operates retrospectively and not prospectively. It further held that specific relief in essence is a part of the law of procedure, and hence it is a retrospective law. The High Court then went on to state that an appeal is a continuation of the suit, and hence any change in law between the date of passing of the decree and the decision of the appeal must be taken into consideration. Based on the above analysis, the High Court held that Section 3 of the amended Act is retrospective in nature and applies to pending proceedings.

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Issue B

43. At the outset, we may notice that this question assumes great significance as application of the 2018 Amendment Act to the present set of circumstances would determine whether specific performance ought to be applied mandatorily or the aforesaid decision is a discretion of the Court to examine whether equity demands such application instead of granting damages, if any.

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57. In the light of the aforesaid discussion, it is clear that ordinarily, the effect of amendment by substitution would be that the earlier provisions would be repealed, and amended provisions would be enacted in place of the earlier provisions from the date of inception of that enactment. However, if the substituted provisions contain any

substantive provisions which create new rights, obligations, or take away any vested rights, then such substitution cannot automatically be assumed to have come into force retrospectively. In such cases, the legislature has to expressly provide as to whether such substitution is to be construed retrospectively or not.

58. In the case at hand, the Amendment Act contemplates that the said substituted provisions would come into force on such date as the Central Government may appoint, by notification in the Official Gazette, or different dates may be appointed for different provisions of the Act. It may be noted that 1-10-2018 was the appointed date on which the amended provisions would come into effect.

59. In view of the above discussion, we do not have any hesitation in holding that the 2018 Amendment to the Specific Relief Act is prospective and cannot apply to those transactions that took place prior to its coming into force."

80. In ***Siddamsetty Infra Projects (P) Ltd. (supra)***, the Hon'ble Supreme Court in review jurisdiction recalled the aforesaid judgment i.e. ***Katta Sujatha Reddy (supra)*** and restored the judgment passed by the High Court therein. Hence, it is clear that the amendment of 2018 in SRA operates retrospectively and not prospectively. Meaning thereby, the said amendment shall apply to the facts of the present case also. For ease of reference, relevant paragraph of ***Siddamsetty Infra Projects (P) Ltd. (supra)*** is extracted below:-

"52. Having concluded that the errors apparent on the face

of the record identified above go to the root of the reasoning on both the issues of limitation and specific performance, we recall the judgment of this Court dated 25 August 2022. The judgment of the High Court dated 23 April 2021 is restored.

53. The review petitions are allowed in the above terms."

81. In view of the said review judgment i.e. ***Siddamsetty Infra Projects (P) Ltd. (supra)***, the foundation of paragraph 24 of the learned AT quoted above no longer exists.

82. The legislature by way of 2018 amendment has made some key changes in SRA *inter alia*, with respect to infrastructural projects. The legislative intent clearly shows the immunity from injunctions to the infrastructural projects and continuous facilities and services covered by those projects as the same are closely linked to the development and progress of the nation. Thus, the legislature has put an embargo to the grant of injunction towards such projects.

83. Relevant provisions of SRA for the purpose of deciding the present controversy are extracted below:-

"Section 10

10. Specific performance in respect of contracts.—The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.

Section 14

14. Contracts not specifically enforceable.—The following contracts cannot be specifically enforced, namely:—

(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;

(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;

(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and

(d) a contract which is in its nature determinable.

Section 20A

20A. Special provisions for contract relating to infrastructure project.—(1) No injunction shall be granted by a court in a suit under this Act involving a contract relating to an infrastructure project specified in the Schedule, where granting injunction would cause impediment or delay in the progress or completion of such infrastructure project.

Section 41

41. Injunction when refused.—An injunction cannot be granted—

…….

(e) to prevent the breach of a contract the performance of which would not be specifically enforced

(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued

provision of relevant facility related thereto or services being the subject matter of such project."

(Emphasis added)

84. Section 10 pre amendment stated that the contracts are enforceable at the discretion of Court, however, by virtue of amendment, now the section states that a contract shall be enforced by the Court subject to certain provisions. Section 14(b) states that a contract which is in the nature of performance of continuous duty which the Court cannot supervise and section 14(d) states that a contract which in its nature is determinable cannot be specifically enforced. It is to be noted that the amended section 14(d) was even existing before the amendment of 2018 in SRA as section 14(1)(c) was in the same language. Section 20A specifically states that injunction should not be granted if a contract deals with infrastructure project where granting injunction would cause impediment or delay in the progress or completion of the project. Section 41(ha) extends the scope of section 20A and further states that injunction is to be refused where in addition to progress and completion, grant of injunction would interfere in the continued provision of the facility and services being the subject matter of the project.

85. The word "determinable" is not defined in SRA. As per the Black's Law 18th Edition, the said word means "liable to end upon the happening of a contingency", meaning thereby, if a contract is liable to be terminated by either of the parties to a contract in view of some future situation or events, then such contract can be termed as determinable in nature. There cannot be any straight jacket formula to

test whether a contract is determinable or not but the same has to be tested on the facts of the each case after taking note of the clauses of the said contract.

86. A co-ordinate bench of this Court in ***ABP Network Private Limited v. Malika Malhotra, 2021 SCC OnLine Del 4733*** after considering the judgments of the Hon'ble Supreme Court and various other High Courts, has observed as under:-

> *"26. The expression "in its nature determinable" is, to say the least, delightfully vague. The exact import of the words "in its nature" is not easy to discern. Nor is it easy to distinguish a contract which is "in its nature determinable", from a contract which is merely "determinable".*
>
> *30. A contract which was otherwise stipulated as being valid for a particular period of time, and was determinable prior thereto at the option of either of the parties to the contract was, therefore, held to be "in its nature determinable". No injunction, restraining breach of such a contract could, therefore, be granted.*
>
> *47. A contract which is determinable, whether by efflux of time or at the option of either of, or both, the parties, and whether preceded by the requirement of issuance of notice or any other pre-termination formality, or not, ise, therefore, to be regarded as "in its nature determinable", within the meaning of Section 14(d) of the Specific Relief Act."*
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> ***(Emphasis added)***

87. Also, a co-ordinate bench of this Court in ***Ksheeraabd Construction (P) Ltd. (supra)*** after considering various judgments, observed as under:-

> *"52. This Court is in any case bound by the enunciation of the legal position as embodied in the decisions of this Court in M/s Turning Around Logistics and National Highways Authority both of which had explained the injunct embodied in Section 14(d) of the SRA to be applicable to all revocable or voidable contracts. Those decisions in unequivocal terms explain the extent of the statutory embargo enshrined in Section 14(d) of the SRA as extending to contracts which can be revoked in terms of the stipulations contained therein. The principle appears to be founded upon the reasoning that a contract which could be revoked by either of the parties cannot be specifically enforced. T.O. Abraham and DLF were decisions dealing with contracts which contained clauses conferring a right on parties to seek specific performance notwithstanding an event of breach or default having occurred or seek other remedial reliefs. It was those clauses which appear to have weighed upon the Court to come to conclude that the contracts were not by their very nature determinable.*
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> ***xxxxxxxxxxx***
>
> *55. On an overall conspectus of the aforesaid, this Court finds itself unable to accede to the line of reasoning as suggested in Narendra Hirawat or T.O. Abraham. Neither*

the precedents noticed hereinabove nor the lexicons appear to lend credence to the word determinable being read as "inherently determinable" as propounded by the two decisions noticed above. Bearing in mind the above, the Court finds itself unable to hold or interpret Section 14(d) of the SRA to be confined only to those contracts where parties have the right to terminate without assigning any reason or where that power be exercisable even in the absence of an event or breach. As was held in the decisions afore noted, the power to terminate, whether it be for cause or otherwise, based on an allegation of breach or the happening of an event, if preserved would lead to the Court recognising such a contract falling within the scope of Section 14(d) of the SRA."

88. On perusing the above judgments, it is discernible that if a contract can be terminated by either of the parties whether for a specific breach or even without any cause and this right is based on an allegation of beach or happening of an event which is clearly stated in the contract, then the contract is determinable in nature and hence, cannot be enforced.

89. In light of the above, I shall now test whether the Agreement in question is "in its nature determinable". In this regard, the termination clause of the Agreement is extracted below:-

"ARTICLE 37

TERMINATION

37.1 Termination for Concessionaire Default

37.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (the "Concessionaire Default"), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure. The defaults referred to herein shall include:

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(c) the Concessionaire does not achieve the latest outstanding Project Milestone due in accordance with the provisions of Schedule-G and continues to be in default for 120 (one hundred and twenty) days;

(d) the Concessionaire abandons or manifests intention to abandon the construction or operation of the Project Highway without the prior written consent of the Authority;

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(g) the Concessionaire is in breach of the Maintenance Requirements or the Safety Requirements, as the case may be;

(h) the Concessionaire has failed to make any payment to the Authority within the period specified in this Agreement;

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(v) the Concessionaire has failed to fulfil any obligation, for

which failure Termination has been specified in this Agreement; or

(w) the Concessionaire commits a default in complying with any other provision of this Agreement if such a default causes a Material Adverse Effect on the Authority.

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37.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 37.1.3.

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37.2 Termination for Authority Default

3 7 .2.1 In the event that any of the defaults specified below shall have occurred, and the Authority fails to cure such default within a Cure Period of 90 (ninety) days or such longer period as has been expressly provided in this Agreement, the Authority shall be deemed to be in default of this Agreement (the "Authority Default") unless the default

has occurred as a result of any breach of this Agreement by the Concessionaire or due to Force Majeure. The defaults referred to herein shall include…..

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37.2.2 Without prejudice to any other right or remedy which the Concessionaire may have under this Agreement, upon occurrence of an Authority Default, the Concessionaire shall, subject to the provisions of the Substitution Agreement, be entitled to terminate this Agreement by issuing a Termination Notice to the Authority; provided that before issuing the Termination Notice, the Concessionaire shall by a notice inform the Authority of its intention to issue the Termination Notice and grant 15 (fifteen) days to the Authority to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice."

(Emphasis added)

90. On perusal, clause 37.1 grants the right to NHAI to terminate the Agreement if the concessionaire (respondent herein) commits any default whereas clause 37.2 grants the right to respondent to terminate the Agreement if NHAI commits any default. The above clauses make amply clear that both the parties herein have been given a right to terminate the Agreement, making the Agreement in question i.e. Concession Agreement 02.07.2010 a determinable contract.Hence, by virtue of section 14(d) of SRA, the Agreement is incapable of specific

performance and by virtue of section 41(e), an injunction cannot be granted.

91. This Court has time and again observed that once a contract is held to be determinable in nature, injunction cannot be granted.[1] The Division Bench of this Court in ***Rajasthan Breweries Ltd. v. Stroh Brewery Co., 2000 SCC OnLine Del 481*** has observed that if Court finds that the contract was illegally terminated, then the only remedy available to the aggrieved party is to seek compensation for wrongful termination and it cannot claim specific performance of the Agreement. Relevant paragraph reads as under:-

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

[1] ***IndianRailway Catering and Tourism Corporation Ltd. (IRCTC) v. Cox and Kings India Ltd. and Arup Sen, (2012) 186 DLT 552***; ***Jindal Steel and Power Ltd. v. SAP India Pvt. Ltd., (2015) 221 DLT 708***; ***National Highways Authority of India v. Panipat Jalandhar NH-I Tollway Pvt. Ltd., 2021 SCC OnLine Del 2632.***

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

92. This Court in ***Inter Ads Exhibition (P) Ltd. (supra)*** dismissed section 9 petition on the ground that contract therein was determinable in nature and since the contract was determinable, it could not be revived or restored by the court and no specific performance of the contract could be directed. Relevant paras are extracted below:-

44. I am fortified in my view by the judgment of a Co-ordinate Bench of this Court in Jindal Steel and Power Ltd. v. SAP India Pvt. Ltd., (2015) 221 DLT 708 where one of the questions before the Court was whether in view of the agreement having been terminated an injunction could be granted against the operation of the termination notice. The Court held that the contract being determinable could not be enforced due to the legal bar under the SRA. It answered the question in the negative holding that no injunction on the termination order could be granted, the same having

taken effect and damages was an adequate remedy.

45. I may now refer to the judgment of a Division Bench of this Court in Indian Railway Catering and Tourism Corporation Ltd. (IRCTC) v. Cox and Kings India Ltd. and Arup Sen, (2012) 186 DLT 552 which although has been relied upon by the petitioner, but in the opinion of this Court enures to the advantage of the respondent. The controversy in the said case was similar and the facts were very close to the present case. The issue was whether a direction in the nature of mandatory injunction amounting to specific performance or directing continuation of an arrangement which stood terminated, could be given.

46. A Joint Venture Agreement was terminated by one party to the contract. The Division Bench relying on the judgment in the case of Rajasthan Breweries Ltd. (supra) as well as Section 14 of the SRA held that once the lease had been terminated, passing of mandatory injunction would amount to first creating an agreement between the parties and then enforcing the same. The Division Bench set aside the judgment of the learned Single Judge whereby the learned Single Judge had by way of an interim measure allowed the running of the train under the contract in question on the ground of irreparable loss to the Company and inconvenience to public. The Division Bench held that the interim arrangement was neither justified nor legally sustainable. Reliance was placed on para 19 of the

judgment in the case of Rajasthan Breweries Ltd. (supra), which has been quoted in the earlier part of this judgment.

47. It is clear that in law, once termination of contract takes effect the operation cannot be stayed by an interim injunction. Thus, the second relief sought in the present petition cannot be granted and is hereby rejected."

93. The aforesaid judgment was assailed before the division bench in an appeal and the division bench dismissed the appeal and upheld the aforesaid judgment passed by the learned single judge.

94. In somewhat similar circumstances and more particularly the termination clause being the same, this Court in ***Supreme Panvel Indapur Tollways (P) Ltd. (supra)*** dismissed the appeal and upheld the order passed by the AT under section 17 wherein the AT had dismissed the interim application on the ground *inter alia*, the contract being determinable contract and if termination found illegal, the aggrieved party can seek damages and once the appellant therein had already been dispossessed from the project, granting stay of termination would amount to final relief. Relevant paragraphs of the said judgment are extracted below:-

"11. The Tribunal has rendered the following prima facie findings:—

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g. In the context of amendments to Sections 14, 20A and 41(ha) of the SRA, the Tribunal observed that the CA being determinable, is incapable of specific performance by virtue of Section 14(d) of the SRA. It is

a commercial contract which can be determined and terminated, under Clause 37 of the CA, by either side on occurrence of conditions mentioned therein.

h. If the determination of the CA is ultimately found to be illegal, the aggrieved party would have to be compensated by payment of damages.

i. The grant of stay of termination which has been in operation since 17.11.2021, at this stage, when the appellant has already been dispossessed from the project, would amount to final relief being granted at the interim stage.

j. On the basis of above discussion, the Tribunal came to a conclusion that the appellant may have an arguable case but it does not have a strong prima facie case warranting stay of termination. The loss and injury, if any, suffered by the appellant was also found to be compensable in money.

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45. On the question of determinability of the contract, which concededly remains a ground to deny specific performance, the Tribunal relied upon the decisions of the Supreme Court in Indian Oil Corpn. Ltd. v. Amritsar Gas Service and of this Court in Inter Ads Exhibition Pvt. Ltd. v. Busworld International and Bharat Catering Corporation v. Indian Railway Catering and Tourism Corporation Ltd. To the extent that the judgment of the Division Bench in Bharat

Catering Corporation specifically holds that a contract which has already been terminated ought not to be restored pending arbitral proceedings, the said decision militates against the grant of injunction to the appellant."

95. Coming back to the facts of the present case, NHAI terminated the Agreement in question on 22.01.2024. Consequently, the respondent moved section 9 petition which was converted into section 17 application *vide* order dated 25.01.2024. There is no dispute to the fact that on 22.0.1.2024, on the date of termination, NHAI took the possession of the Project Highway. Thereafter, NHAI invited tender for strengthening the existing carriageway i.e. Project Highway and on 28.03.2024, SD Infra Private Limited being the successful bidder was given Letter of Acceptance by the NHAI. This fact was in knowledge of the learned AT and was duly recorded in para 11.11 of the impugned order which reads as under:-

"11.11.<u>NHAI has already awarded the contract for Stage Construction to M/s SD Infra Pvt. Ltd. ('SD Infra') after following a competitive bidding process and a Letter of Acceptance dated 28.03.2024 stands issued.</u> The Respondent has also impugned the credibility of the contractor engaged by the Claimant, SYMS to complete Stage Construction Works. Furthermore, the Respondent submitted that while the Claimant states that a Work Order dated 30.10.2023 has been issued to SYMS for Stage Construction, the same was never disclosed to NHAI, which falls foul of the CA. The essential technical expertise,

credibility and authenticity of SYMS Construction, as per the Respondent, is highly dubious and the same is an important consideration for the Respondent at this stage, to ensure that there is no impediment and delay in carrying out works relating to Stage Construction which have been inordinately delayed."

(Emphasis added)

96. In view of the settled law and for the reasons recorded above, I have no hesitation to hold that the Agreement in question is a determinable contract and thus, the specific performance of the Agreement cannot be enforced and by virtue of bar created by section 41(e) of SRA, no injunction can be granted by staying the termination notice as the same amounts to enforcement of the Agreement which already stood terminated. Even if the termination of the Agreement is found to be illegal, the only remedy available to the respondent is to seek compensation and damages and not specific performance of the Agreement.

97. The directions passed by the learned AT in the impugned order are contrary to the settled law and bar created by the provisions of SRA. With greatest respect to the members of the learned AT, the directions passed in the impugned order ought not have been passed and more particularly para 28.3 which states that the respondent will execute the balance Stage Construction Work and complete the same expeditiously, as the same amounts to restoration of the Agreement despite the same having been terminated and thereafter, enforcement of the Agreement ignoring the fact that the respondent was

dispossessed from the Project Highway and SD Infra Private Limited was appointed to carry out balance Stage Construction Work. The said direction amounts to final relief. By passing such directions, the learned AT has rewritten the terms of the Agreement and has overstepped its jurisdiction. The ground i.e. determinable contract was specifically raised by the NHAI in paragraphs 11.6 and 11.7 of reply filed against section 17 application filed by the respondent.

98. Mr Tripathi, learned senior counsel for the respondent has submitted that the directions passed by the learned AT is *status quo* and not *status quo ante* by placing reliance on section 21 of 1996 Act that arbitration commenced from the date of issuance of notice invoking arbitration. The said argument has become redundant in view of the findings noted above that the Agreement in question is a determinable contract and no injunction could have been granted much less staying the operation of the Termination Notice dated 22.01.2024.Further, a division bench of this court in ***Bharat Catering Corpn. v. Indian Railway Catering and Tourism Corpn. Ltd., 2009 SCC OnLine Del 3434*** has observed that pending arbitral proceedings, terminated contract should not be restored.

99. Learned senior counsel for the respondent has argued that if the aggrieved party can only seek damages and not specific performance, the same would be against the principles of 2018 amendment in view of section 10 of SRA wherein the court is required to specifically enforce the Agreement. Section 10 is subject to sections 11, 14 and 16 as is evident from the bare reading of the section. With the amendment, the leaning of the Court should be towards enforcing the

contract provided the same is not hit by the exceptions carved out under sections 11, 14 and 16 including 20A and section 41(ha).

100. Reliance placed on ***Global Music Junction Pvt. Ltd. (supra)*** is misconceived as the said judgment says that the Courts will now grant specific performance unless the claim for relief is barred under limited grounds. I am also of the view that the case of the NHAI falls within the exceptions carved out under the statute. Operative paras of the said judgment read as under:-

> *"38. This Court is of the view that the Amendment Act, 2018 introduces a paradigm shift in law regarding contractual enforcement in India. A glaring instance of the legislative shift is the amendment of Section 14 of Act, 1963 which deletes the earlier sub-clause (a) which prescribed that the contracts for the non-performance of which compensation in money was an adequate relief would not be specifically enforced, meaning thereby that the plea that a party could be compensated in monetary terms as damages for breach of the contract and resultant refusal of interim injunction on the said ground, is no longer a ground to refuse specific performance of the contract. Consequently, the Amendment Act, 2018 does away with the primacy given to damages as a relief over specific performance. It shifts the focus from the previous default remedy of award of damages for breach of contract to enforcing specific performance of contracts……*
>
> *39. This Court is of the view that by virtue of the changes*

brought about by the Amendment Act, 2018, the Courts will now grant specific performance unless the claim for relief is barred under limited grounds prescribed in the statute. This change is aimed at providing greater protection of contractual expectations by ensuring that a non-defaulting party can obtain the performance it bargained for. The Amendment Act, 2018 intends to discourage errant parties who may deem it more viable to breach a contract than perform it, as the cost of damages may still be less than the cost of the performance."

101. Further, the judgment of ***Subodh Kumar Singh Rathour (supra)*** relied by the learned senior counsel for the respondent is of no assistance as in that case, the tender was cancelled at the behest of the concerned Minister in an arbitrary manner which is not the same in the present case. Further, the provisions and interpretation of the SRA was not the scope of the said judgment.

102. Additionally, it is also relevant to consider the arguments raised by the parties w.r.t. section 20A and 41(ha) of SRA.

103. Mr Tripathi, learned senior counsel for the respondent has argued that the aforesaid sections are not applicable in the present case as the PCC dated 05.04.2016 has already been issued to the respondent before the amendment came into effect and thus the construction period as per the Agreement stood completed.

104. Learned Solicitor General, while placing reliance on section 20A and 41(ha) of SRA, submits that the present case pertains to a construction of national highway and thus, by virtue of statutory bar, injunction

cannot be granted. Further, mere construction of the Project Highway is not the only concern but the same has to be regularly maintained bycarrying out Stage Construction Work which is an integral part of the Agreement. Learned AT failed to appreciate the same.

105. Relevant clauses of the Agreement are extracted below:-

"ARTICLE 2

SCOPE OF THE PROJECT

2.1 Scope of the Project

The scope of the Project (the "Scope of the Project") shall mean and include, during the Concession Period:

(a) construction of the Project Highway on the Site set forth in Schedule-A and as specified in Schedule-S together with provision of Project Facilities as specified in Schedule-C. and in conformity with the Specifications and Standards set forth in Schedule-D;

(b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and

(c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement.

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ARTICLE 14

COMPLETION CERTIFICATE

14.1 Tests

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14.2 Completion Certificate

Upon completion of Construction Works and the Independent Engineer determining the Tests to be successful, it shall forthwith issue to the Concessionaire and the Authority a certificate substantially in the form set forth in Schedule-J (the "Completion Certificate").

14.3 Provisional Certificate

14.3.1 The Independent Engineer may, at the request of the Concessionaire, issue a provisional certificate of completion substantially in the form set forth in Schedule-J (the "Provisional Certificate") if the Tests are successful and the Project Highway can be safely and reliably placed in commercial operation though certain works or things forming part thereof are outstanding and not yet complete. In such an event, the Provisional certificate shall have appended thereto a list of outstanding items signed jointly by the Independent Engineer and the Concessionaire (the "Punch List") provided that the Independent Engineer shall not withhold the Provisional Certificate for reason of any work remaining incomplete if the delay in completion thereof is attributable to the Authority.

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ARTICLE 17

OPERATION AND MAINTENANCE

"17.1 O&M obligations of the Concessionaire

17.1.1 During the Operation Period, the Concessionaire shall operate and maintain the Project Highway in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Project Highway to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and confirm to Specifications and Standards and Good Industry Practice. The obligations of the Concessionaire hereunder shall include:

(a) permitting safe, smooth and uninterrupted flow of traffic on the Project Highway during normal operating conditions;

(b) collecting and appropriating the Fee;

(c) minimising disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Highway by providing a rapid and effective response and maintaining liaison with emergency services of the State;

(d) carrying out periodic preventive maintenance of the Project Highway;

(e) undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement markings, lighting, road signs and other traffic control devices;

(f) undertaking major maintenance such as resurfacing of pavements, repairs to structures, and repairs and refurbishment of tolling system and other equipment;

(g) preventing, with the assistance of concerned law enforcement agencies, any unauthorised use of the Project Highway;

(h) preventing, with the assistance of the concerned law enforcement agencies, any encroachments on the Project Highway;

(i) protection of the environment and provision of equipment and materials therefore;

(j) operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project Highway;

(k) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies; and

(l) complying with the Safety Requirements in accordance with Article 18.

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ARTICLE 48

DEFINITIONS

"Construction Period" means the period beginning from the Appointed Date and ending on the Project Completion Date;

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"Construction Works" means all works and things necessary to complete the Project Highway in accordance with this Agreement;

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"Project Completion Date" means the date on which the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14.

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"Tests" means the tests set forth in Schedule-I to determine the completion of Six-Laning in accordance with the provisions of this Agreement;"

106. On perusal of the above clauses, issuance of PCC does not indicate that the responsibilities of the respondent being the Concessionaire come to an end. Project completion, by issuance of completion certificate or PCC, only means that the Project Highway, if the tests are successful, can be safely and reliably placed in commercial operation. Once the Project Highway is in operation, as per the Agreement, the respondent is required to operate and maintain the Project Highway which obligates the respondent to modify, repair or otherwise make improvements to the Project Highway to comply with the provisions of this Agreement. This *inter alia* includes permitting safe, smooth and uninterrupted flow of traffic on the Project Highway during normal operating conditions and carrying out periodic preventive maintenance of the Project Highway. Even if it is assumed that after the issuance of PCC, the Construction Period is completed then also the Project Highway requires continuous maintenance work.

107. Hence, *prima facie*, I am of the view that the construction of the Project Highway was not the only scope of the Agreement. To operate and maintain the Project Highway including the balance Stage

Construction Works are all in the nature of services being the integral part of the Agreement. Issuance of PCC does not end the Agreement or responsibilities of the respondent. The fact that PCC was granted before the amendment came into the effect as observed by the learned AT and argued by the learned senior counsel for the respondent would render the provisions qua O&M otiose.

108. As noted above, section 20A read with section 41(ha) of SRA states that no injunction shall be granted w.r.t the infrastructure project where it would "delay the progress" or completion or interfere with the "continued facility or services being the subject matter of the project". From the aforesaid, I am of the view that the Agreement contemplates providing continued services under the O&M clause by the respondent and hence, the scope of the Agreement is covered within the scope of section 41(ha) of SRA. NHAI has already entered into a fresh agreement with SD Infra Private Limited to carry out balance Stage Construction Work and hence, grant of injunction by the learned AT, to my mind, is contrary to the provisions of section 20A and more specifically section 41(ha) of SRA.

On Merits qua Termination Notice dated 22.01.2024.

109. Mr Tripathi, learned senior counsel for the respondent states that the respondent is always ready and willing to perform its obligation as per the Agreement. The Stage Construction Work has already been completed by 35% and the remaining work shall also be completed within 8 months from the date of Project Highway being handed back. Also, the respondent has arranged funds to complete the said work and, in this regard, the learned AT has satisfied itself before passing

the directions. Despite complying with all the obligations, NHAI wrongly terminated the Agreement.

110. On perusal of the termination clause quoted above and more particularly Clause 37.1.1, if the concessionaire i.e. respondent herein fails to cure the default within the cure period then the NHAI will be entitled to terminate the Agreement unless the default has solely occurred as a result of any breach of the Agreement by the NHAI or due to Force Majeure. Further, Clause 37.1.2 states that before issuing Termination Notice, NHAI shall issue a notice of intention to terminate the Agreement and grant 15 days time to the respondent to make a representation and may after expiry of the said period, issue Termination Notice.

111. In the present case, on 17.01.2023, NHAI issued Cure Period Notice to the respondent on the ground that the respondent is not complying with the provisions of O&M i.e. Clause 17, default in payment of premium and non-payment of amount towards damages. The defects forming part of the Cure Period Notice were to be rectified in 60 days. As per the NHAI, defects were not cured and hence, *vide* email dated 12.05.2023, NHAI invoked Clause 37.1.2 of Agreement and issued Notice of Intention to Terminate the Agreement to the respondent. After considering the reply dated 26.05.2023 of the respondent to the said notice, NHAI terminated the Agreement on 22.01.2024 by issuing Termination Notice. *Prima facie*, I am of the view that the procedure and the timelines as mentioned in the Agreement have been complied with by the NHAI.

112. The Termination Notice dated 22.01.2024 was issued on the following

grounds:-

A. *Non-payment of premium*

B. *Non-Execution of the Overlay for improving roughness and riding quality of the project road.*

C. *Execution of Stage Construction Work in violation of Provisions of Concession Agreement.*

D. *Routine Maintenance*

E. *Non-Payment of Damages.*

F. *Non-availability of funds with the Concessionaire as highlighted by Canara Bank.*

113. Considering that the matter is at an interim stage and evidence is yet to be led by the parties, I need not delve further into the merits/demerits of the Termination Notice as it is the sole jurisdiction of the learned AT and giving my observations at this stage may prejudice either of the parties.

CONCLUSION

114. For all the reasons noted above, having greatest respect to the members of the learned AT and their legal acumen, I am unable to agree with the directions passed by the learned AT which are contrary to and against the settled principles of law and more particularly, the provisions of SRA. Thus, in my limited scope of jurisdiction, I am constrained to interfere with the impugned order. Consequently, the impugned order dated 08.08.2024 passed by the learned AT is set aside.

115. Needless to add, my observations are only for the purpose of deciding the present appeal and shall not have any bearing on the merits of the

arbitration proceedings.

116. The present petition alongwith pending applications, if any, are disposed of.

JASMEET SINGH, J

APRIL 17th, 2025/(MSQ)

117. After pronouncement of the judgment, Mr. Tripathi, learned Senior Counsel for the respondent states that he would like to challenge the same in accordance with law and request that the judgment may be not given effect for a period of ten days from today.

118. Mr. Tushar Mehta, learned Solicitor General, on instructions, states that *status quo* shall be maintained for a period of ten days from today.

119. The statement is taken on record and the NHAI is bound by the same.

JASMEET SINGH, J

APRIL 17th, 2025/(MSQ)