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

% **Reserved on : 18th April, 2023**
Pronounced on: 24th May, 2023

\+ O.M.P.(I) (COMM.) 41/2023 and I.A. Nos. 4029/2023, 6536/2023 and 6537/2023

ROADWAY SOLUTIONS INDIA INFRA LIMITED

..... Petitioner

Through: Mr.Rajiv Nayar, Senior Advocate with Mr.Nirav Shah, Mr.Sourabh Seth, Ms.Prachi Garg, Mr.Varun Kalra and Mr.Krishan Kumar and Mr.Saurabh Seth, Advocates

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Respondent

Through: Mr.Parag P. Tripathi, Senior Advocate with Mr.Ankur Mittal, Mr.Abhay Gupta, Ms.Vasundhara and Mr.Raushal Kumar, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

JUDGMENT

CHANDRA DHARI SINGH, J.

1. The instant petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter "the Act") has been filed on behalf of the petitioner seeking the following reliefs:

> *"(a) Pass an order staying the operation and effect of the Notice dated 31.01.2023 of intent to terminate the*

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Contract issued by the Respondent to the Petitioner, and restrain the Respondent from acting upon the said notice pending the completion of the dispute resolution process set out in Clause 67 of Conditions of Particular Application in the Contract;

(b) Issue ex-parte ad interim stay to restrain the Respondent, its principal officers, servants, agents and all other acting for, and on their behalf, from invoking and encashing the following bank guarantees submitted by the Petitioner and its group concerns:

a. Performance Security Bank Guarantee dated 27.06.2022 bearing No. TTGGPGE221780068 issued for an amount of Rs. 12,29,10,754/- by the Petitioner;

b. Additional Performance Security Bank Guarantee dated 27.06.2022 bearing No. TTGGPGE221780066 issued for an amount of Rs. 3,51,37,643/- by the Petitioner.

(c) Direct the Respondent to maintain status quo with respect to the Performance Security Bank Guarantee dated 27.06.2022 and Additional Performance Security Bank Guarantee dated 27.06.2022, pending determination of subject matter of dispute between the parties in accordance with the terms of the Contract;

(d) Pass ad-interim orders reliefs in terms of the above prayer;

(e) Pass any other order/direction which this Hon'ble Court may deem just, fair and equitable in the circumstances."

FACTUAL MATRIX

2. The petitioner i.e. Roadway Solutions India Infra Limited is a company incorporated under the provisions of the Companies Act, 2013, having its registered office at SN-29 HN-20 Kondhwa Kd. Nr. Kubex Soc. Nr. Shera School, Pune, Maharashtra - 411048. The petitioner is a construction company having a wide experience in the construction of

roadways. The respondent i.e. National Highway Authority of India was set up by the NHAI Act, 1988, as an autonomous agency of the Government of India. The respondent invited bids for strengthening/overlaying on Six Lane Gurgaon – Kotputli – Jaipur section of NH-48 (Old NH-8) from Km 107+100 to Km 273+000 of main carriage way (MCW) and additionally, about 312 Km both sides of service road project in the State of Rajasthan at the risk and cost of Concessionaire on item rate basis (percentage basis project). In August 2021, the petitioner also took part in said bid and being the lowest bidder, the Letter of Award No. NHAI/NHDP-V/MC-II/Gur-Jpr/Raj/Item Rate/2021 (Pt-1)/E-138079/55406 dated 30th May, 2022 (LOA) was issued in favour of the petitioner.

3. On 19th July, 2022, the petitioner and respondent entered into item rate Contract/Agreement (Contract), thereby materializing the terms and conditions to carry out the works under the project. On 27th July, 2022, the respondent issued the Notice of Commencement and declaration of commencement date, whereby 27th July, 2022 was declared as the date of commencement of the project. In terms of Clause 41.1 of the Conditions of Particular Application (CoPA), the petitioner was supposed to commence the works as soon as possible after the receipt of a notice from the engineer.

4. The petitioner submitted the Performance Security dated 27th June, 2022 and Additional Performance Security dated 27th June, 2022, amounting to Rs. 12,29,10,754/- (Rupees Twelve Crores Twenty Nine Lakhs Ten Thousand Seven Hundred and Fifty Four Only) and Rs. 3,51, 37, 643/- (Rupees Three Crores Fifty One Lakhs Thirty Seven Thousand

Six Hundred and Forty Three Only) respectively to the respondent in the form of bank guarantees in accordance with the Contract.

5. The petitioner commenced the maintenance work after 18th August, 2022. On 30th August, 2022, the Ministry of Road, Transport and Highways (MoRTH) issued a circular with the objective of *"adopting worldwide best practice in engineering techniques in design, construction and maintenance of highways, bridges and tunnels"*. On 24th December, 2022, the petitioner submitted the mixed design of Reclaimed/Recycled Asphalt Pavement (RAP) along with the Construction Methodology of RAP for review and approval of the respondent. The petitioner sent a reminder letter dated 3rd January, 2023 to the respondent seeking review and approval of the RAP methodology for laying the road but the respondent rejected the proposal for use of RAP.

6. The team leader/engineer issued a letter dated 11th January, 2023 to petitioner stating therein that Dense Bituminous Macadam (DBM) work has been suspended by petitioner and asked for submission of work programme. The respondent, on 17th January, 2023, rejected the use of RAP material for DBM works stating that the same is not part of the Bill of Quantities (BOQ) under the Contract.

7. The petitioner was not satisfied with the decision by which the use of RAP material was rejected vide letter dated 17th January, 2023, hence, the petitioner issued the Mediation Notice dated 19th January, 2023 and the Disputes Notice dated 19th January, 2023 to the respondent as per the Contract.

8. On 20th January, 2023, the petitioner also raised objections towards rejection of the use of RAP material for DBM works by the respondent.

9. The petitioner, in terms of Clause 60 of the Contract and Sub-Clause 60 of the CoPA, had submitted the Interim Payment Certificate (IPC-01) on 6th October, 2022 seeking release of 75% of the net payment for the works done by the petitioner. The respondent did not consider the request for releasing the payment to the petitioner in terms of Sub-Clause 60.2 of CoPA and only released 50% of the amount on 9th November, 2022. The 50% of the amount was accepted by the petitioner under protest vide letter dated 04th January 2023.

10. The respondent, on 17th January, 2023, sent a Notice alleging defaults of the petitioner under the Contract. In reply to the notice, the petitioner sent a letter dated 24th January, 2023 and denied all the allegations mentioned in the notice.

11. The respondent issued a notice of termination dated 31st January, 2023 under Clause 63.1 of CoPA, giving a notice of 14 days, upon the expiry of which the respondent was automatically entitled to terminate the contract. The petitioner sent a reply to the said notice vide response dated 4th February, 2023. Thereafter disputes arose between the parties. It is the respondent's case that due to non-performance on the part of the petitioner which showed no progress in executing works even after lapse of six months (from 27th July, 2022 to 31st January, 2023) and after repeated reminders, the respondent was left with no option but to issue Notice of Intention To Terminate (NITT). This contention was vehemently refuted by the petitioner and it is under these circumstances that the petitioner, aggrieved by such action, has approached this Court through the present petition.

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SUBMISSIONS

(On behalf of the petitioner)

12. Mr. Rajiv Nayar, learned senior counsel appearing on behalf of the petitioner submitted that vide letter dated 18th August, 2022, the petitioner asked for review and approval, the Work Program, Quality Assurance Program and Construction Methodology, to the respondent in terms of Clause 14.1 of the Contract. It is also submitted that the respondent unilaterally took the decision regarding fixing the date of commencement of the project on 27th July, 2022 despite there being no clarity on the items to be executed, the stretch where work was to be executed and quantities of the materials to be deployed. The petitioner thereafter commenced the maintenance work such as pothole filling, patchwork, drain cleaning, median maintenance, dewatering of stagnant water from water-logged areas in MCW, etc.

13. Mr. Nayar, learned senior counsel appearing on behalf of the petitioner submitted that on 30th August, 2022, the Ministry of Road Transport and Highways (MoRTH) issued a circular with the objective of *"adopting worldwide best practice in engineering techniques in design, construction and maintenance of highways, bridges and tunnels"*. He also referred to the aforesaid circular and relied upon some provisions which are relevant for the purpose of maintenance and construction of the highways which are as follows:

> *"Further, the need is felt to adopt value engineering practices in design, construction and maintenance with regards to use of materials and technology as an n important and vital step to meet the sustainable development of the NH network throughout the country in a cost-effective manner*

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with improved durability & safety, de-carbonise & grow, reduction in project execution timeline, increase in quality and reduction in maintenance.

2. The value engineering is very crucial for sustainable highway development. It is a systematic method to achieve the targeted function of the highway at the lowest whole-of-life cost without compromising on functionality, quality, performance, safety and aesthetics. Value Engineering practices aim at optimizing the value of the project at various stages viz. project inception, project preparation, Project bidding stage, project implementation and maintenance management to achieve at least one or all of the .following objectives:

> *a. Increasing the speed of construction without compromising the quality*
> *b. Reducing the cost of construction and maintenance*
> c. *Improving asset durability*
> *d. Improving aesthetics*
> *e. Enhanced safety*
> *f. Promoting environmental sustainability*
> *g. increasing resilience to climate change and*
> *h. Lowest life cycle cost*

3. Value engineering can be applied at any point in a project, even in construction. However, the earlier it is applied the higher is the return of the time and effort invested and also the acceptance. As per the World Bank report on the Indian Road Construction Industry, it has been established that the savings realized by undertaking value engineering exercises can be in the order of 10.15% of the cost of the originally designed project.
……………

5.3. Further during implementation, the concessionaire/ contractors shall be allowed to propose value-engineered alternative design/material/technology. IE/AE shall review

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> *the proposed value-engineered design and if it is not reviewed within the stipulated time period specified in the contract/concession Agreement or rejected for any frivolous reason, Authority may take appropriate action against the IE/AE*
> …………
>
> *7.4 Reuse of Reclaimed Bituminous layer material (RAP) of existing flexible Pavement"*

14. It is also argued that since the MoRTH Circular was binding on all ongoing and upcoming projects with immediate effect, pursuant to the MoRTH Circular dated 30th August, 2022, on 24th December, 2022, the petitioner submitted the mixed design of Reclaimed/Recycled Asphalt Pavement (RAP) alongwith the Construction Methodology of RAP for review and approval of the respondent. The respondent had not sent any response to the said letter. The petitioner again sent a reminder letter to the respondent seeking review and approval of the RAP methodology for laying the road. On 7th January, 2023, the engineer/team leader, in terms of its duties under Clause 2.1 of the Contract, gave its recommendations for the use of RAP for the use of DBM works in the Project. It is vehemently submitted that almost after a period of two months, the respondent rejected the proposal for use of RAP contrary to MoRTH Circular despite the approval given by the engineer/team leader vide letter dated 7th January, 2023.

15. It is submitted that while adjudication of RAP technology was pending before the respondent, the team leader/engineer proceeded to issue a letter dated 11th January, 2023 to the petitioner stating therein that

the DBM work has been suspended by the petitioner which is clearly contrary to the facts of the case.

16. Learned senior counsel appearing on behalf of the petitioner referred to the minutes of meeting dated 16th January, 2023 and submitted that the petitioner and respondent discussed the use of RAP material for DBM works in the said meeting. Initially, the respondent took a stand that the use of RAP material is not a part of the BOQ under the Contract. However, after hearing the petitioner's explanation and considering various circulars and notifications of the respondent and MoRTH, the respondent instructed the petitioner to start the milling works and gave them two days to provide the approvals of the said usage of RAP material for doing DBM works.

17. It is vehemently submitted that the respondent rejected the use of RAP materials on 17th January, 2023. Thereafter, the petitioner was left with no option but to issue the Mediation Notice dated 19th January, 2023 and the Disputes Notice dated 19th January, 2023 to the respondent.

18. Learned senior counsel appearing on behalf of the petitioner submitted that the Interim Payment Certificate (IPC-01) was issued on 6th October, 2022 seeking release of 75% of the net payment, for the work done by the petitioner. The engineer/team leader scrutinized and determined the value of the work done by the petitioner and recommended the respondent for processing IPC-01 dated 12th October, 2022. It is also pointed out that in its email dated 19th October, 2022, the respondent gave certain observations on the IPC-01. The same was duly clarified by the engineer/team leader vide letter dated 19th October, 2022 and again recommendation was made by the engineer/team leader to the

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concerned authority. The respondent again raised certain objections on 21st October, 2022 for the release of IPC-01.

19. It is submitted that the engineer/team leader had recommended to the respondent to release of Rs. 12,61,99,153/- (Rupees Twelve Crores Sixty One Lakhs Ninety Nine Thousand One Hundred Fifty Three Only) in favour of the petitioner. It is further submitted that the respondent did not consider the same in terms of Sub-Clause 60.2 of CoPA and released only 50% of the amount i.e. Rs. 6,30,06,116/- (Rupees Six Crores Thirty Lakhs Six Thousand One Hundred and Sixteen Only) on 9th November, 2022. The amount, which was released by the respondent contrary to the provisions of the Contract, was accepted by the petitioner under protest and the respondent was requested to release the remaining amount of the IPC-01.

20. Learned senior counsel appearing on behalf of the petitioner further submitted that the petitioner is not responsible for the delays in the aforesaid project and is willing to complete the entire work as awarded expeditiously. It is also submitted that the delay was caused due to the reasons as stated above on behalf of the respondent.

21. Learned senior counsel appearing on behalf of the petitioner submitted that in sheer violation of the terms of the Contract, the respondent, instead of acting in terms of the arbitral mechanism envisaged under Clause 67 of the CoPA and Contract and without addressing the grievance raised in the Mediation Notice dated 19th January, 2023, unilaterally and arbitrarily issued the notice of intent to terminate dated 31st January, 2023 under Clause 63.1 of CoPA giving a

notice of 14 days, upon the expiry of which it was entitled to terminate the Contract.

22. It is submitted that in the aforesaid notice of intent to terminate dated 31st January, 2023, the respondent made false allegations against the petitioner pertaining to delay in carrying out of works at the project owing to (i) shortage and non-availability of Bitumen at site, (ii) non-submission of detailed drawings, (iii) breakdown of HMPs (Hot Mixing Plants), and (iv) non-achievement of deadlines as per work program dated 18th August, 2022.

23. It is further submitted that the allegation made in the notice of intention to terminate were denied by the petitioner in the reply dated 4th February, 2023.

24. Learned senior counsel appearing on behalf of the petitioner submitted that it had been falsely alleged that there was shortage and non-availability of Bitumen at Site. It is submitted that the petitioner had, at all times, the requisite material. However, since the process of carrying out works i.e., the usage of RAP methodology for DBM works, was not confirmed by the respondent, the material could not be brought to site. It is further submitted that in fact, appropriate amount of Bitumen was always available on site, the HMPs capacity was only 240 tonnes and for the remaining work, the Bitumen could not be procured owing to the pendency of approval of RAP. The Bitumen has certain requirements of storage as per the plant's storage capacity, and hence cannot be stored elsewhere.

25. It is submitted that the petitioner vide letter dated 1st November, 2022 submitted the third-party tests results for VG-40 for which a formal

source approval is still awaited from the respondent. However, the Job Mix Formula (JMF) was only approved by the respondent on 23rd November, 2022. It is submitted that therefore, without the source approval or JMF approval of the material to be procured, the Bitumen could in no way be brought to the site.

26. It is submitted that petitioner's work progress was severely affected for want of design and drawings of the balance works from the Concessionaire, design and drawings of reconstruction stretches, and the overlay stretches as per the engineering surveys which remained under review with the engineer/team leader except for a 15 km. stretch for which approval was received. Despite the same, the petitioner made all the efforts for continuity of the works at the Project site and never abandoned section of work. In fact, the petitioner mobilized additional resources than required.

27. Learned senior counsel appearing on behalf of the petitioner submitted that upon a bare perusal of the various correspondences, it is evident that the respondent acted in a high-handed manner *de hors* the provisions of the Contract and the applicable law. It is submitted that the petitioner is not in default of any of its obligations under the Contract and has always complied with the instructions of the respondent and the team leader. The petitioner has expended huge costs for the performance of the contract and has always been ready and willing to perform the contract.

28. It is submitted that the notice of intent to terminate the Contract was issued by the respondent subsequent to the invocation of the dispute resolution clause in the Contract by the petitioner to suppress lapses on the part of the respondent. The said notice of intent to terminate was

issued without any application of mind and without consideration of the various correspondences of the petitioner dealing with all baseless allegations made by the respondent. It is submitted that the respondent being machinery of the State is bound to act fairly and reasonably. It is submitted that the petitioner has made out a *prima facie* case, thereby making them entitled to the reliefs as prayed in the instant petition.

29. Learned senior counsel appearing on behalf of the petitioner submitted that the instant Contract is at pre-termination stage and currently not terminated, therefore, interim relief by way of Section 9 of the Act may be granted.

30. It is submitted that there is no basis for issuance of Notice of Intent to Terminate dated 31st January, 2023 as none of the provisions in the Contract entitled the respondent to issue such a notice in the facts and circumstances of the instant case. It is vehemently submitted that the Contract is not *per se* a determinable contract and in any event, the Government contracts are to be treated differently as there is an obligation to act fairly and in an unarbitrary manner. It is submitted that in the instant case, it is evident that the respondent has acted in arbitrary, *mala fide,* illegal and unjust manner which is in derogation of the Contract entered into between the parties. It is submitted that the present Contract is still under effect and the petitioner is also ready and willing to perform the Contract. In support of his arguments, he has placed reliance on the following judgments i.e., ***A. Murugan and Ors. v. Rainbow Foundation Ltd* , 2019 SCC OnLine Mad 37961, *DLF Home Developers Limited Vs. Shipra Estate Limited and Ors*, O.M.P. (I) (COMM.) 209/2021 dated 08th November, 2021, *Jumbo World***

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Holdings Limited and Anr vs. Embassy Property Developments Private Limited*, 2020 SCC OnLine Mad 61, *Golden Tobacco Limited Vs. Golden Tobie Private Limited* O.M.P. (I) (COMM.)182/2021 dated 24th September, 2021, *Atlas Interactive (India) Pvt. Ltd. Versus Bharat Sanchar Nigam Limited & Anr.* 2005 SCC OnLine Del 190, *T.O. Abraham Vs. Jose Thomas and Ors. R.F.A. No. 695 of 2015* dated 17th October 2017, *Kerala High Court, Indian Medicines Pharmaceuticals Corporation Ltd. v. Kerala Ayurvedic Cooperative Society Ltd. & Ors.* 2023 SCC OnLine SC 5, *Gwalior-Jhansi Expressway Limited v. National Highway Authority of India* 2014 SCC OnLine Del 1124, *Pioneer Publicity Corporation v. Delhi Transport Corporation,* (2003) 103 DLT 442, *Simplex Infrastructures Ltd. v. National Highways Authority of India O.M.P.(I) Comm. 69/2023 dated 03rd March, 2023 , Delhi High Court and Yassh Deep Builders LLP v. Sushil Kumar Singh & Anr. 2023 SCC OnLine Del 1499.

31. It is submitted that the respondent is responsible for delaying the approval of work programme, pending which, the petitioner cannot be expected to continue carrying on the works in project. It is submitted that the works were delayed as petitioner was asked to divert its resources from Jaipur to Haryana, hence, the petitioner was required to expend huge monies in mobilization of its resources and machinery based on the directions of respondent, despite the same being outside scope of Contract. The petitioner was further directed to execute works in Rajasthan after completion of works in Haryana on account of emergency flood like situation in Haryana.

32. It is submitted that the petitioner has already expended approx Rs. 80 crores in the project till date and out of total invoiced amount of Rs. 55 Crores, the respondent has only paid an amount of Rs. 11 crores. Despite the huge outstanding amounts, the petitioner has always performed the Contract and is ready and willing to complete the works stipulated in the Contract.

33. Learned senior counsel appearing on behalf of the petitioner submitted that the issuance of the new tender to another contractor would be a heavy burden on the public exchequer. In fact, owing to huge variation in the quantities of Milling, WMM, DBM, and other safety items, the original BOQ price of Rs 409.76 Crores has increased by around Rs. 318.03 Crores taking the total cost of the Project to Rs 727.80 Crores. In case a new tender is floated, owing to paucity of time, the same would be awarded at the cost of over Rs 1000 Crores, therefore, costing the public exchequer Rs. 250 Crores more than the present contract value. It is further submitted that if a new tender is floated, it will take substantial time to appoint a new contractor which will be an antithesis to public interest.

34. Mr. Nayar, learned senior counsel appearing on behalf of the petitioner vehemently argued that the operation of the impugned Notice of Intention to Terminate dated 31st January, 2023 may be stayed till the adjudication of the disputes between the parties by the Arbitrator.

35. Mr. Nayar, learned senior counsel appearing on behalf of the petitioner mentioned the instant matter on 10th May, 2023 and supplied the judgment passed by this Court in ***Fedders Electric and Engineering Limited v. Srishti Constructions* 2023 SCC OnLine Del 2356.** He has

relied on paragraph 28 which is reproduced herein under:

> *"28. Under Section 9 (3) of the Act only in exceptional circumstances, during the arbitration proceedings, the Court should intervene only when the Arbitral Tribunal cannot render an effective remedy under Section 17 of the Act This position of law of law has been held and reiterated in a plethora of judgments Energo Engineering Projects Ltd. v. TRF Limited 2016 SCC Online Del 6560, M. Ashraf v. Kasim V.K (2018) SCC OnLine Ker 4913, Srei Equipment Finance Limited (Sefl) v. Ray Infra Services Private Limited & Anr. (2016) SCC OnLine Cal 6765 , Avantha Holdings Limited v. Vistra ITCL India Limited 2020 SCC OnLine Del 1717. Recently held by the Hon'ble Supreme Court in the case of Arcelor Mittal Nippon Steel India Ltd. v. Essar Bulk Terminal Ltd., Special Leave Petition (Civil) No.13129 of 2021, decided on 14th September 2021 as follows:*
>
> > *"62. Sub-Section (3) of Section 9 has two limbs. The first limb prohibits an application under sub-Section (1) from being entertained once an Arbitral Tribunal has been constituted. The second limb carves out an exception to that prohibition, if the Court finds that circumstances exist, which may not render the remedy provided under Section 17 efficacious.*
> > *63. To discourage the filing of applications for interim measures in courts under Section 9(1) of the Arbitration Act, Section 17 has also been amended to clothe the Arbitral Tribunal with the same powers to grant interim measures, as the Court under Section 9(1). The 2015 Amendment also introduces a deeming fiction, whereby an order passed by the Arbitral Tribunal under Section 17 is deemed to be an order of court for all purposes and is enforceable as an order of court.*
> > *64. With the law as it stands today, the Arbitral Tribunal has the same power to grant interim relief as the Court and the remedy under Section 17 is as*

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> *efficacious as the remedy under Section 9(1). There is, therefore, no reason why the Court should continue to take up applications for interim relief, once the Arbitral Tribunal is constituted and is in seisin of the dispute between the parties, unless there is some impediment in approaching the Arbitral Tribunal, or the interim relief sought cannot expeditiously be obtained from the Arbitral Tribunal."*

36. The learned senior counsel for the petitioner submitted that in the light of the judgment of this Court in ***Fedders(Supra)***, since the Arbitral Clause has already been invoked, therefore, this Court may pass the order that the instant petition under Section 9 of the Act may be treated as application under Section 17 of the Act before the learned Arbitrator.

(on behalf of the respondent)

37. Mr. Parag Tripathi, learned senior counsel appearing on behalf of the respondent vehemently opposed the instant petition and submitted that the instant petition is devoid of any merit and is liable to be dismissed. It is submitted that instant petition is premature since no cause of action has arisen in favour of the petitioner to file the same. It is submitted that as per Clause 63.1 of the CoPA, the termination after giving 14 days' notice is not inevitable but the use of the word 'may' clearly show that the employer may or may not terminate the agreement. Therefore, the respondent cannot be prevented from acting in terms of the Contract and take recourse to appropriate action based on process laid down therein.

38. Learned senior counsel appearing on behalf of the respondent, during the arguments, referred to the letter dated 31st January, 2023 and

submitted that the contents clearly show complete lack of performance on the part of the petitioner.

39. Mr. Tripathi submitted that the approval of the revised work programme by the team leader was withdrawn by the engineer concerned vide letter dated 15th February, 2023, therefore, the letter dated 8th February, 2023 issued by the team leader to revise programme no longer exists after withdrawal of the same by the engineer as stated above.

40. It is further submitted that as per the letter issued by the engineer, team leader was not even competent to approve the revised work programme as per Clauses 14.1/14.2 of the CoPA. As per the said clauses, the work programme is to be submitted to the engineer for his consent, therefore, any approval by team leader to any revised work programme is extra-contractual and *non-est*.

41. Learned senior counsel appearing on behalf of the respondent submitted that the revised work programme is not even realistic, inasmuch as, petitioner has shown much less quantity of work to be executed during the working season as compared to rainy season. During the arguments, learned senior counsel for the respondent referred the comparison chart which is as under:

As per revised work programme dated 18.01.2023											
item	**Working season**						**Rainy season**				
	Jan	**Feb**	**March**	**April**	**May**	**Avg. (per month)**	**June**	**July**	**Aug**	**Sept**	**Avg. (per month)**
GSB	0	1039	1039	1039	1039	**831.2**	1039	1039	1039	1039	**1039**
WMM	0	2138	2138	2138	2138	**1710.4**	2138	2138	2138	2138	**2138**
DBM	1445	2890	14452	16590	16590	**10393.4**	16590	16590	16590	23816	**18396.5**
BC G-I	0	0	0	0	24395	**4879**	12970	12970	24395	24395	**18682.5**
BC G-II	0	0	0	0	0	**0**	-	-	-	16612	**4153**

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DIC	0	0	0	200	200	**80**	200	254	-	-	**113.5**
PQC	0	0	0	0	333	**66.6**	333	352	-	-	**171.25**

42. It is submitted that the aforesaid chart sufficiently demonstrates that the revised work plan is unrealistic, impractical and without any basis and without considering the fact that there would be disruption in doing bituminous work during rainy season. It is further submitted that even as on date, the petitioner still does not have bitumen available at site. It is therefore submitted that the team leader had wrongly approved the revised work program being completely contrary to the ground reality and without looking into the facts that insufficient resources were available at the site.

43. It is submitted that the petitioner had sought for approval for DBM only on 1st November, 2022 which was granted by SC/AE on 23rd November, 2022. It is further submitted that despite the approval on 23rd November, 2022, the petitioner was not able to complete the given stretch. As on 16th February, 2023, the progress on the above stretch was just 10.474 Km, therefore, there is no force in the contention of the petitioner that there was no delay on his part for completion of the project.

44. It is submitted that contract price for the said work is Rs. 409.77 Crores, and comprises of various maintenance works such as renewal and strengthening of pavement, repair and maintenance of earthen shoulder, establishment of shoulder, road furniture etc. in the entire stretch of six lane carriageway from Km. 107.100 to Km. 273.000 of NH-48. It is further submitted that the stipulated period for completion of work was 18 months and the commencement date of the project was 27th July, 2022.

45. It is submitted that the financial value of work done by the contractor upto 15th February, 2023 is Rs. 8.03 Crores i.e. only 1.95% of the total amount of Rs. 409 crores which have been spent and the physical progress of the work is 10.472 Km length of DBM on single side carriageway of 6-lane out of 161.2 km. It is vehemently submitted that the aforesaid facts and figures leave no scope of doubt that petitioner is far behind schedule and any overrated revised work programme without any basis, cannot meet up the pace to execute work of about Rs. 400 crores in the balance period of 11 months and make up for the loss of time.

46. Learned senior counsel appearing on behalf of the respondent submitted that there is no force in the argument of learned senior counsel for the petitioner that without invoking Clause 67, the notice under Clause 63.1 could not be issued. It is submitted that on mere perusal of the Clause 67, it is clear that there is no embargo on party to exercise its right under any other clause. i.e. Clause 63.1. It is also submitted that the petitioner raised dispute regarding non-approval of RAP, whereas, NHAI has been constrained to issue notice under Clause 63.1 due to non-performance of petitioner. It is further submitted that no dispute has been raised regarding alleged delay on the part of the respondent, therefore, merely because petitioner has invoked dispute resolution clause, it cannot restrain the respondent from exercising its rights as may be available to it under the Contract.

47. Learned senior counsel appearing on behalf of the respondent vehemently submitted that the Contract in question is determinable in nature, hence in view of specific statutory provision under the Specific

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Relief Act, 1963 no injunction could be granted to direct the respondent to specifically perform the contract. It is submitted that by virtue of Section 14(1)(c) of Specific Relief Act, 1963 (SRA), the contract which in its nature determinable cannot be specifically enforceable. He has relied upon several judgments to strengthen his arguments:

i. ***Indian Oil Corporation Ltd. v. Amritsar Gas Service,*** **1991 (1) SCC 533.**

ii. ***Rajasthan Breweries Limited v. The Stroh Brewery Company*****, 2000 SCC OnLine Del 481.**

48. It is also submitted that if eventually the termination is held illegal, then also, in view of provisions of Section 41(e) of SRA, the petitioner is not entitled for any interim order of stay of intention to terminate.

49. It is contended that the Clause 63.1 of the Contract Agreement provides for termination of the Contract, subject to a 14-days' notice by the respondent on account of concessionaire's default. It is further contended that the CoPA permits NHAI to terminate the agreement in two circumstances, firstly, under Clause 63.1(a) of CoPA, if the petitioner fails to carry out any obligation under the Contract and secondly, under Clause 63.1(f) of CoPA when the petitioner, despite previous warning from the engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the Contract.

50. It is submitted on behalf of the senior counsel for the respondent that NHAI and the engineer were repeatedly pointing out to petitioner that it has miserably failed to carry out its obligations under the contract. It is further submitted that despite multiple notices/ reminders including Independent Engineer letter no. 225 dated 03rd December 2022,

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Independent Engineer letter no. 237 dated 05th December 2022, Independent Engineer letter no. 285 dated 28th December 2022, Independent Engineer letter no. 344 dated 17th January 2023 and Independent Engineer letter no. 352 dated 20th January 2023, no progress was made by the petitioner. It is therefore, submitted that the respondent is well within its right to proceed with the intended termination of the contract. Under Section 14(d) of the SRA, such a determinable contract cannot be specifically enforced by seeking injunction against proposed action of termination of contract.

51. Learned senior counsel appearing on behalf of the respondent, in support of his arguments on the aspect that the Contract was determinable in nature, it could not be revived or restored by the Court and no specific performance of the contract could be directed. He placed reliance on the judgments of ***Inter Ads Exhibition v. Busworld International*** **2020 SCC OnLine Del 2485**, ***Indian Oil Corporation Ltd. (Supra)***, ***Rajasthan Breweries Ltd. v. the Stroh Brewery Co.*** **AIR 2000 Del 450,** ***MIC Electronics Ltd. v. Municipal Corporation of Delhi***, **2011 SCC OnLine Del 766,** ***D.R. Sondhi v. Hella KG Hueck & Co.*** **2011 SCC OnLine Del 1273,** ***Country Development v. Brookside Resort*** **2006 SCC OnLine Del 200,** ***Progressive Constructions Ltd. v. Chairman, National Highways Authority of India***, **2009 SCC OnLine Del 195,** ***Jindal Steel and Power Limited v. M/s SAP India Pvt. Ltd*** **2015 SCC OnLine Del 10067,** ***Bharat Catering Corporation v. IRCTC*** **2009 SCC OnLine Del 3434,** ***Bharat Catering Corporation v. IRCTC*** **2009 SCC OnLine Del 1613 and** ***Turnaround Logistics (P) Limited v. Jet Airways*** **(India) & Ors., 2006 SCC OnLine Del 1872.**

52. Learned senior counsel appearing on behalf of the respondent submitted that Sections 20A and 41(ha) of the SRA express the legislative intent to not grant injunctions in relation to Infrastructure Projects where delay may be caused by such an injunction. It is further submitted that in the present case if an injunction is granted by this Court to the petitioner who was a continuous non-performer, the same would lead to significant delays in the infrastructure project.

53. It is asserted that this Court in the case of ***Hari Ram Nagar v. DDA* 2019 SCC OnLine Del 9747** held that in a suit or proceedings, where an injunction may result in delay of the Infrastructure Projects, then the Courts shall in normal course not grant an injunction as per the SRA. It is humbly submitted as per the documents on record, the petitioner has failed to achieve their scheduled targets.

54. It is submitted that the contention of petitioner is erroneous as in a period of more than 8 months, the petitioner has only completed about 10.47 km (one side) of Main carriage way out of 322.4 km (both side). It is therefore submitted that, if any injunction is granted and petitioner, who is a complete non-performer, is allowed to work, such continuance would cause delay in the progress of infrastructure project.

55. Learned senior counsel appearing on behalf of the respondent submitted that considering the importance of the subject Highway and the urgency in this regard, NHAI would re-tender the works in an expedited format within a period of 7 days.

56. It is lastly contended that if the petitioner is granted stay and is allowed to continue, it would tantamount to granting the final relief.

57. Learned senior counsel appearing on behalf of the respondent

further submitted that on other hand, if the action of respondent is held to be bad, eventually the petitioner can always be suitably compensated in terms of damages. Therefore, neither the balance of convenience is in favour of petitioner nor the petitioner would suffer irreparable loss in case the injunction is refused. Therefore, the instant petition has no merits and is liable to be dismissed.

ANALYSIS AND FINDINGS

58. Section 9 of the Arbitration and Conciliation Act, 1996 is set out hereinbelow for convenience:

> *"**9. Interim measures, etc., by Court.** (1) A party may, before or during 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 a court—*
> *(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 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.
(2) Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.
(3) Once the arbitral tribunal has been constituted, the Court shall not entertain an application under sub-section (1), unless the Court finds that circumstances exist which may not render the remedy provided under section 17 efficacious."

59. Section 9 as originally enacted has been renumbered as Section 9(1) by the Arbitration and Conciliation (Amendment) Act (Act 3 of 2016) with effect from 23rd October 2015. The said 2015 amendment also incorporated sub-section (2) and sub-section (3) as reproduced above.

60. While there is no denying of the fact by either party that the project has suffered immensely and there has been dismal progress in work, both the parties have claimed the reasons attributable for the same to the delays/omissions on the part of the other.

Relevant submissions made on behalf of the petitioner and respondent are briefly described hereunder for purpose of proper adjudication of the instant case:

61. It was contented by the petitioner that the petitioner always complied with the Contract and is ready to willing to perform the

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contract. However, since the Contract contained reciprocal obligations, until the respondent performed its obligations, the petitioner is unable to proceed further with the execution of works. It was also submitted that the respondent issued a Notice of Commencement without any readiness and preparedness. Despite this, the petitioner complied with the Contract and performed its obligations without any delay.

62. As per the petitioner, the delay in progress of works is attributable to respondent owing to delayed approvals. According to the petitioner, the work programme dated 18th August, 2022 was submitted in terms of original BOQ and with the consideration that the reciprocal obligations of the independent engineer/respondent were fulfilled before starting the construction works. While the contract was signed on 19th July, 2022 and the commencement date was fixed as 27th July, 2022, however, it is only on 23rd November, 2022 that the team leader gave approval for DBM and BC for km 107+100 to km 125+00 resulting in delay of 4 months. It is also argued on behalf of the petitioner that the respondent was also guilty of delaying the approval of work program, pending which, the petitioner could not have been expected to continue carrying on the work in project. The petitioner has also relied on the letter dated 8th February, 2023 to contend that upon approval of the revised work program by team leader, the entire basis of the dispute raised by the respondent through its NITT would stand negated and any termination after approval of the revised work program would be illegal. It was submitted by the respondent that the team leader had no authority to approve the revised work programme. It was submitted that the engineer had already issued a show cause notice/letter dated 13th February, 2023 to team leader to explain his

conduct in the peculiar circumstances and that the engineer *vide* its letter dated 15th February, 2023 had withdrawn/revoked the approval granted by team leader to the revised programme.

63. It was contended by the petitioner that despite the Circular issued by Ministry of Road and Transport on 30th August, 2022 mandating RAP technology, the respondent belatedly withdrew the approval granted for usage of RAP technology in execution of works. The time taken in initial approval and thereafter rejection of RAP technology resulted in huge wastage of time for no fault of the petitioner. *Per contra*, it is the respondent's case that when the petitioner sought approval for RAP, the team leader categorically recorded that RAP was not mentioned in BOQ. The team leader did not give any approval as has been suggested by the petitioner. It was further submitted that the petitioner on one hand alleged that work was to be executed under respondent's direction but at the same time extra-contractually insisted on RAP which was never approved.

64. It is also the case of the petitioner that it was required to expend huge monies in mobilization of its resources and machinery to Haryana based on the directions of the respondent despite the same being outside the scope of the Contract. The petitioner was directed to execute works in Rajasthan after completion of works in Haryana on account of emergency flood-like situation in Haryana. Having itself directed, the petitioner had to divert its resources i.e. equipment, machinery, personnel, etc. from the project site to Haryana because of the flood like situation, therefore, the petitioner could not be held responsible for any delay. It was also submitted that it is inconceivable as to how the respondent can make allegation of delay against the petitioner when the respondent itself

directed the petitioner to divert its resources from the project site to Haryana.

65. At last, the petitioner submitted that the issuance of the new tender to another contractor would cast a heavy burden on the public exchequer and is against public interest. Further, if a new tender is floated, it will take substantial time to appoint a new contractor, which will be an antithesis to public interest.

66. The petitioner also averred that the Contract is not *per se* a determinable contract. It was submitted that the present Contract is still under effect and has not been terminated and the petitioner is ready and willing to perform the Contract. As far as the NITT is concerned, it is merely communicating an intention to terminate the Contract and has been issued under Sub-Clause 63.1 of CoPA giving 14 days' time to the petitioner to show cause as to why the Contract should not be terminated. The said Notice has been duly replied to by the petitioner on 4th February, 2023. In support of his contention, the learned senior counsel for the petitioner relied upon several judgments and judicial pronouncement in the foregoing paragraphs. It is submitted that the contracts were classified in five broad categories which included contracts that are terminable unilaterally on "without cause" or "no fault" basis. Contracts that are terminable subject to a breach notice and granting an opportunity to cure the breach are not determinable in nature although they can be terminated under specific circumstances.

67. It was further contended on behalf of the petitioner that in any event, Government contracts are to be treated differently as there is an obligation to act fairly and in an unarbitrary manner, being a machinery

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of the State. Learned senior counsel for the respondent argued before this Court that the Contract is determinable in nature, hence, no injunction can be granted by way of specific performance. As per the respondent, Clause 63.1 of the Contract provides for termination of the Contract subject to a 14 days' notice by respondent on account of concessionaire default. Clause 63.1 (a) and (f) permits respondent to terminate the agreement in the following event i.e. (i) Clause 63.1(a) fails to carry out any obligation under the contract and (ii) Clause 63.1(f) despite previous warning from the engineer, in writing, is otherwise persistently or flagrantly neglecting to comply with any of his obligations under the contract. The respondent and the engineer were repeatedly pointing out to the petitioner that it had miserably failed to carry out its obligations under the Contract and that despite multiple notices/reminders including Independent Engineer letter dated 3rd December, 2022, 5th December, 2022, 28th December, 2022, 17th January, 2023 and 20th January, 2023, no progress was made by the petitioner. Thus, the respondent was well within its right to proceed with the intended termination of the Contract. In view of Section 14(d) of the SRA, such a determinable Contract cannot be specifically enforced by way of seeking injunction against proposed action of termination of Contract. In support of his arguments, the respondent also relied on several judgments as mentioned in the foregoing paragraphs.

68. It is also the case of the petitioner that the respondent had not issued the NITT in terms of Clause 46.1 and that as such its issuance was illegal. As per the petitioner, issuance of NITT required the respondent to issue the notices under Clause 46.1 and Clause 37.4 of the GCC which were not complied with by the respondent. Further, NITT could not have

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been issued pending dispute resolution mechanism invoked by the petitioner prior to issuance of the NITT. *Per contra*, learned senior counsel for the respondent submitted that no notice under Clause 46.1 was required before issuing NITT for 14 days and reliance was placed on Clause 63.1 to show that communication under the Clause 46 was non-conjunctive or a pre-requisite to Clause 63.1, in case, the respondent chose to invoke Clause 63.1(b)(ii). However, the NITT referred to various warning letters from Independent Engineer including letters dated 28th November, 2022, 3rd December, 2022, 5th December, 2022, 28th December, 2022, 17th January, 2023, 19th January, 2023, 20th January, 2023, 25th January, 2023 and 27th January, 2023 to the petitioner and thus, it is contended that the NITT was issued in terms of the Contract.

69. I think that I should refrain from discussing the various issues at great length since I feel that any discussion by me in that behalf could prejudice either of the parties before the Arbitrator or the Arbitral Tribunal. I have, therefore, confined myself to making such general observations as are necessary in the context of the elaborate arguments raised before me by the learned counsel.

70. Without going into the merits of the aforesaid contentions, in my view, the best case of the petitioner is that the NITT is wrongful and not in terms of the Contract for which it can be adequately compensated by way of damages. If the petitioner is aggrieved by the letter of intention of termination of the Contract and is advised to challenge the validity thereof, the petitioner can always invoke the arbitration clause to claim damages, if any, suffered by the petitioner. In my view, this Court under Section 9 of the Act cannot give direction to a party for not terminating

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the contract or to continue with the Contract. If the Contract is terminated, the applicant/petitioner shall have rights as available to it under law. It is the right of a party not to continue with a Contract and the Court cannot force a Contract on somebody under Section 9 of the Act irrespective of it being terminated in accordance with the terms of the Contract or not which is for the Arbitral Tribunal to determine.

71. In so far as the rival contentions on merits of the matter including reasons for delay in progress of works and/or the party responsible for the same are concerned, this Court is of the view that it is only an Arbitral Tribunal which can adjudicate upon the same after thorough examination of the pleadings and the materials placed on record and it is not for the Court to comment on Section 9 of the Act and/or make any observations regarding the same. The short question that comes up for consideration before this Court is *"whether the said Contract is terminable or not"*. The question as to whether material breach/delay has been committed or not or if there is any breach/delay at all is not to be gone into for the reason that it is not the question for determination in the petition under Section 9 of the Act before the Court. Further, the petitioner's contention that the respondent has a duty to act in fair, just and prudent manner being a State machinery is also not tenable in the present case to go into as the petition is based only on breach of contract and remedies flowing therefrom and thus, the matter must be decided strictly in the realm of private law rights governed by the general law relating to contracts with reference to the provisions of the SRA providing for non-enforceability of certain types of contracts.

72. With respect to the Contract being determinable or not, this Court took note of the very eloquently put petitioner's submissions that the Contract in question is not determinable and that the judgments relied by the respondent are related to the case where termination has already taken place, whereas in the present case it is only NITT that has been issued and termination has yet not taken place. Having examined the competing views, I am of the opinion that the contention of petitioner that present Contract is not determinable is misconceived. The language of Clause 63.1 leaves no manner of doubt that the agreement can be terminated by the respondent and this Court is inclined to go with the argument put forth by the respondent in this regard. It is important to note that in a similar contract provision, the Division Bench of this Court in ***NHAI v. Panipat Jalandhar NH-Tollway Pvt. Ltd*** in FAO(OS) No. 55/2021 dated 13th April, 2021 while dealing with ***Jumbo World Holding Limited (supra)*** held as under:

> *"25. The Articles and Clauses of the CA leave no manner of doubt that the CA is determinable. Just as in Indian Oil Corporation Ltd. (supra), both parties have been given a right to seek termination of the CA by issuing a notice under Article 37 and specifically, Clause 37.1.2. (NHAI's right) and Clause 37.2.2 (Concessionaire's right). Termination under Article 37 would be on account of the various concessionaire's defaults or Authority default. Various time periods ranging from 15 days to 90 days have been provided under Clause 37.1.1 and Clause 37.2 for removal of defaults by the defaulting party, and the failure to remove such defaults within the time specified would give the other party a right to issue a termination notice of 15 days."*

73. Even in the present case, NHAI could terminate the Contract for default of petitioner, therefore, contract is certainly determinable and no interference as such is warranted in the facts of the case. Thus, ***Simplex Infrastructure v. NHAI (Supra)*** which in any case was an ad-interim order and ***Yassh Deep Builders LLP (Supra)*** are not *per se* applicable since whether the contract has been terminated or not, bears little or no relevance once it is determined that the Contract by its very nature is determinable, which is the case in the present case. The other judgments relied upon by the petitioner on this issue also have no applicability, to the facts of the case. The Division Bench of this Court in ***Panipat Jalandhar case (Supra)*** has negated similar contention by respondent therein to the effect that since the agreement provides for termination of contract on account of a default, it is not *per se* determinable contract. Similarly, in ***Inter Ads Exhibition vs Busworld International (Supra)***, another Division Bench of this Court negated the contention to aforesaid effect, and held the contract to be determinable by holding as under:

> *"40. Suffice it is to state that in either event, the agreement was terminable and therefore, the conclusion arrived at by the learned Single Judge that specific performance of the Contract could not be granted and nor could any injunction be issued restraining the respondent from giving effect to the notice dated 15th March, 2019, as that would in effect amount to enforcement of the contract beyond the said date i.e. 15th March, 2019, cannot be faulted."*

74. The learned Single Judge has rightly relied on a decision of this Court in ***MIC Electronics Ltd. (Supra)***, to hold that legality of the termination and the justification of the appellant for not paying the

balance due to the respondent, would have to be examined by the learned Arbitrator.

75. In so far as ***DLF Home Developers Ltd. (Supra)*** is concerned, the issue before the Court was regarding specific performance of an Agreement to Sell of an immovable property (ATS). Clause 10 of the Agreement to Sell which expressly stated in unambiguous terms that DLF would be entitled to specific performance. An ATS in relation to immovable property stands on a different footing in law, in view of provisions of Section 10 of the SRA and hence, cannot come to the rescue of the petitioner. Similarly, ***T.O Abraham v. Jose Thomas (Supra)***, related to a contract to transfer equity shares of a company. All the sellers except one, pursuant to agreement had already transferred their shares. This was again completely a different fact situation as compared to the present one. In ***Atlas Interactive (India) (Supra)***, the subject matter was a Franchise Agreement for proving broadband on the existing copper wires of BSNL. This service was unique and the first of its kind in India for BSNL only. Thus, the Court held that the unique opportunity, the expenditure and return on the contract cannot be estimated, and damages cannot be said to be an adequate remedy. This is not the case in the present circumstances where damages would be adequate remedy. In ***Golden Tabacco Ltd. (Supra)***, the Court was approached by Golden Tabacco (GT) seeking an injunction on production and supply of cigarettes under the Trademarks of GT. The dispute related to obligations of the parties under the Trademark License Agreement, which had been terminated by GT due to non-payments of royalties. The Court after considering the termination clause within the Agreement held that the

question whether a contract is determinable in its nature is required to be examined in the facts of each case. The Court held that the *"Trademarks License Agreement granted GTPL the right to use the Exclusive Brands of GTL in perpetuity. Clearly, a contract of this nature cannot be considered as determinable in absence of any agreement entitling the party to terminate the same without cause or default on the part of the other party"*.

76. At this juncture, it is also relevant to state that Sections 20A and 41(ha) of the SRA express the legislative intent not to grant injunctions relating to infrastructure projects where delay may be caused by such an injunction. The whole purpose and objective introduced this provision by way of amendment was to promote foreign investment and build investor confidence in the infrastructure sector of India. Public Private Partnerships have long suffered due to the prolonged delays and cost-overruns in timely execution of infrastructure projects. One cannot deny the fact that infrastructure has a significant role in the growth and development of a nation and helps in the development of overall production and the GDP contribution of the nation. Hence, an obstruction in the development of infrastructure would yield negative consequences for the whole nation, leading to stagnancy in the economy and the downfall of the nation's position in the global market. The amendment was aimed at improving India's global standing in terms of enforcing contracts and ease of doing business which would further increase FDI. Any public work must progress without interruption. Thereby, the role of courts in this exercise is to interfere to the minimum extent so that public work projects are not impeded or stalled. In my considered view, Sections

20A and 41(ha) of the SRA squarely apply to the present case and an injunction would tantamount to further delaying the infrastructure project.

77. The decisions of this Court in ***Hari Ram Nagar (Supra)*** further highlight that whenever suit or proceedings where an injunction is sought may lead to delay in the subject Infrastructure Projects, the operation of the SRA gets attracted and that Courts should in normal course grant no injunction. In the present case, it is clear that the scheduled targets of progress have not been achieved. The petitioner's arguments that Section 20A deals with situation where injunction is being sought which may result in not letting the work go on or that the respondent would take months to tender the work after removal of petitioner do not hold much ground. It is an admitted position that in a period of more than 8 months, only about 10.47 km (one side) of main carriage way out of 322.4 km (both side) of the works have been carried out, thus, if any injunction is granted and petitioner is allowed to continue, such continuance would cause impediment and delay in the progress or completion of infrastructure project. Even otherwise, the time to be consumed in the process of inviting fresh bids cannot be a reason to continue with petitioner especially with a meagre physical progress of 3.08% in the last 8 months.

78. The petitioner during the arguments had further tried to impress upon this Court that vide the present petition under Section 9 of the Act, the petitioner has sought a stay on the NITT and not on Termination of the Contract. However, the petitioner falls short in its argument as under the present Contract, it is necessary for the respondent to issue a NITT at least 14 days prior to the termination. A stay on the NITT would mean

stay on termination, inasmuch as, unless NITT is issued, the respondent in such contracts will never be able to terminate the Contract. The petitioner cannot seek to achieve something indirectly which it cannot achieve directly. The petitioner in its petition has itself pleaded, *"if at the present stage, the respondent terminates the Contract with the petitioner, considerable loss and prejudice will be caused to the petitioner.... Further, if the respondent terminates the Contract, it will lead to grave loss of public money and inconvenience to the daily commuters of the national highway."* Thus, the trinity test of granting an injunction as per the petitioner's own case has rested on the termination of the Contract. Further, this Court agrees with the argument put forth by the respondent that the petitioner by making such argument is attempting to seek a relief which otherwise cannot be granted directly. A court of law has to act within the statutory command and not deviate from it. It is a well-settled proposition of law what cannot be done directly, cannot be done indirectly. While exercising a statutory power, a Court is bound to act within the four corners thereof.

CONCLUSION

79. In view of the foregoing discussion on the facts and law, this Court cannot grant the reliefs as sought for. The petitioner by way of present petition has sought for stay of NITT and any such stay would result into petitioner continuing the project and would tantamount to granting of final relief which cannot be granted by this Court in the instant proceedings under Section 9 of the Act. On the other hand, if the action of respondent is held to be bad eventually, the petitioner can always be suitably compensated in terms of damages.

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80. I am also of the opinion that neither the balance of convenience is in favour of the petitioner, nor the petitioner would suffer any irreparable loss in case the reliefs as sought are not granted.

81. The petitioner has attempted to bring attention of this Court, the judgment passed in ***Fedders Electric and Engineering Limited (Supra)*** after almost 22 days from the date when the instant matter was reserved for judgment on 18th April, 2023, suggesting that the arbitration proceedings have commenced and the present petition be sent to the learned Arbitral Tribunal for it to consider and adjudicate upon relief sought by way of Section 9 of the Application under Section 17 of the Act. The said argument is also not of much assistance to the petitioner for the same cannot be done without the consent of both the parties as in the present case and no consent has been sought from the respondent in this regard.

82. Considering the aforesaid, I am of the view that the petitioner has miserably failed to make out any case for granting interim injunction in the instant matter.

83. Accordingly, the instant petition, being bereft of any merit, is dismissed along with the pending applications, if any.

84. Before parting, I would like to clarify that whatever has been stated hereinabove in this order/judgment is not in any manner intended to be a reflection, much less a finding on the merits of the case of either party which should be available to be determined on evidence and material brought on record in duly constituted legal proceedings, whether before the Arbitral Tribunal or Arbitrator. All that has been said hereinabove is

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by way of *prima facie* observation confined to the disposal of the present petition.

85. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

MAY 24, 2023
gs/db