2026:DHC:5474-DB

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

% Judgment reserved on: *10.04.2026*
Judgment delivered on: *09.07.2026*
Judgment uploaded on: *As per Digital Signature~*

\+ **FAO(OS) (COMM) 137/2025 & CM APPL. 56772/2025**
\+ **FAO(OS) (COMM) 152/2025 & CM APPL. 60827/2025**

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)
.....Appellant

versus

SOUTH INDIAN BANK LTD AND UNION BANK OF INDIA LTD & ANR. .....Respondents

Advocates who appeared in this case

For the Appellant : Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Nishant Awana, Ms Rini Badoni and Ms. Ankita Singh, Advs.

For the Respondents : Mr. Sandeep Sethi, Sr. Advocate with Mr. Manish Dembla Adv. Mr. Shubham Kaushik Advocate for R1.

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO
HON'BLE MR. JUSTICE VINOD KUMAR

JUDGMENT

V. KAMESWAR RAO, J.

1. These appeals have been filed by the appellant under Section 37 of the Arbitration and Conciliation Act, 1996 ('the Act', for short) challenging the common judgment passed by the learned Single Judge in *O.M.P (Comm.) Nos.125/2025 & 126/2025*, whereby the learned Single Judge has

dismissed the petitions filed by the appellant/National Highways Authority of India (NHAI) under Section 34 of the Act challenging the Arbitral Awards dated 13.11.2024. The appeals are filed with the following prayers:-

FAO(OS) (COMM) 137/2025

"A. Set aside the Order dated 01.07.2025 ("Impugned Judgement") passed by the Ld. Single Judge of this Hon'ble Court;"

FAO(OS) (COMM) 152/2025

"A. Set aside the Order dated 01.07.2025 ("Impugned Judgement") passed by the Ld. Single Judge of this Hon'ble Court in O.M.P. (COMM.) 126/2025;"

2. Since the issues in both the appeals arise out of a common impugned judgment, against the Awards passed by the Arbitral Tribunal ('Tribunal') both the appeals have been heard and decided together.

FACTS

3. On 12.07.2010, the appellant and the respondent no.2 entered into a Concession Agreements ('CAs') for Two-laning of the Trichy-Karaikudi Road Section of NH-210 (10.00 Km to 94.00 Km), including the Trichy bypass (110.016 Km to 135.930 Km) ("Concession Agreements I", CA-I for short) & Two-laning with paved shoulder of Dindigul-Theni Section from Km 2.750 to Km 73.400 of NH -45 (Extn.) and Theni-Kumili Section of NH-220 from Km 215.500 to Km 273.600 ("Concession Agreements II", CA-II, for short), in Tamil Nadu under NHDP Phase III" ('Project') on a Design, Build, Finance, Operate and Transfer ("DBFOT") Annuity basis.

4. On 08.01.2011, the respondent No. 1 (Lender) and the respondent No.2 (the concessionaire) entered into a Common Loan Agreements ('CLA',

for short) vide which the respondent No.1 agreed to make available financial assistance to tune of ₹ 198,00,00,000/- & ₹ 187,00,00,000/- to the respondent No. 2.

5. On 04.05.2011, An Escrow Agreement (EA) was executed between the appellant, respondent no.1/Lenders & respondent no.2.

FACTS IN FAO(OS) (COMM) 137/2025

6. In terms of CA-I, the Scheduled Completion Date was 31.08.2013. The Annuity Payment was to start from 07.07.2013 and to end on 07.01.2032, subjected to modification, contingent upon the appointed date and compliance of the terms of the CA-I.

7. On 27.07.2011, the appellant under the CA-I, out of the total 133.793 Km of land required for construction of the Project, handed over 85.150 km of land to respondent No. 2 as per the Joint Memorandum signed by the appellant and respondent No.2, i.e., handed over 63.64% of the land to respondent No. 2. The parties agreed that as per the CA-I, the appointed date is 01.09.2011 and deemed the said date as commencement of concession period and commencement of the construction. On 31.05.2013, a Substitution Agreement ('SA') was entered into between the appellant, the respondent No. 1 and 2 for granting substitution rights to the respondent No. 1 in case of occurrence of financial default by the respondent No. 2.

8. According to the appellant, the appellant has handed over 110.177 Km of the total land to respondent No. 2 as on 31.12.2013, meaning 82.34% of the total land had been handed over to the respondent No.2. Despite

handing over of 82.34% of the land, from April 2013 till March 2014, the progress on the Project site was a dismal (1.83%). By December 2013, the work on the Project site had come to a complete stop.

9. On 15.04.2014, 16.04.2014, 21.01.2015, and 25.02.2015, the Independent Engineer ('IE', for short) and the Project Director of the appellant issued letters to respondent No. 2, calling upon it to resume the work on the Project site, however, was of no avail. On 28.02.2015, the appellant had handed over 100% of the land *qua* the Project to the respondent No. 2, i.e., a stretch of 133.793 Km.

10. During the safety audits conducted by the road safety consultant for the Project, the consultant notified several deficiencies and lapses in the maintenance of the highway to respondent No.2 vide a letter dated 19.03.2015. On 10.06.2015, the appellant invoked Article 37.1 of the CA and issued a Cure Period Notice thereby detailing the non-compliance of the provisions of the CA and directed respondent No.2 to immediately cure the defaults enumerated in the said notice within 60 days there from, failing which the appellant would exercise its rights and remedies under the CA.

11. On 13.08.2015, the Notice of Intention to Terminate was issued by the appellant to respondent No. 2 under Article 37.1.2 of the CA, and gave last and final opportunity to send its representation within 15 days, as to why the CA should not be terminated. The appellant under Article 37.1.3 issued a copy of the Notice of Intention to Terminate to respondent no.1 inviting it to state its intention to substitute respondent No. 2 in accordance with the SA.

12. On 27.08.2015, the respondent No. 1 and 2 entered into a second Supplementary CLA. On the commitments of the respondent No. 2 and assurances of the respondent No.1, the appellant vide letter dated 28.09.2015 to respondent No.2 decided to the keep the Intention to Terminate Notice under abeyance for 90 days, thereby allowing respondent No.2 to resume work at the Project site.

13. On 08.12.2016 the IE issued the '*Provisional Completion Certificate*' ("PCC") to respondent No.2. On 17.12.2016, the IE informed the respondent No. 2 that the PCC is kept in abeyance until the completion of the Theni Bypass, as was agreed by respondent No.2 qua the Supplementary Agreement.

14. On 31.03.2018, the account of respondent No. 2 was classified as a Non-Performing Asset ('NPA') as per RBI guidelines. On 11.10.2018, the appellant issued 'Suspension Notice' under Article 36.1 of the CA. The respondent No. 1 issued a Notice of Financial default dated 26.03.2019 to the respondent No.2. On 01.04.2019, the respondent No.1 issued Notice of Financial Default to the appellant informing it about the material breach of the terms of the CLA and "Event of Default" under Clauses 7.1 (a) & 7.1 (b) of the CLA.

15. The respondent No. 1 requested the appellant to terminate the CA on account of "Financial Default" under Article 5.1 of the SA by issuing Termination Notice in accordance with the provisions of CA.

16. On 22.05.2019, under Article 36.5 of the CA, the same was terminated w.e.f. 09.04.2019. The appellant issued Termination Notice to

respondent No.2, and informed respondent No.2 that, it had taken over the Project. On 04.11.2019, the respondent no.1/Lenders filed a petition under Section 9 of the Act being ***OMP (I) COMM. No.406/2019***, against the appellant to deposit the Termination Payment in the Escrow Account.

17. On 26.11.2019, the respondent No. 2 issued a notice to the appellant invoking arbitration under the CA. On 28.01.2020, respondent No. l issued a Notice invoking the arbitration under Clause 10 of the EA and Clause 8 of the SA. The respondent No.1 preferred a petition under Section 11 of the Act on 25.08.2021, seeking appointment of 3rd Arbitrator. The petition under Section 9 of the Act was disposed of vide order dated 12.05.2022, to agitate the same before the learned Tribunal. The learned Tribunal stood constituted *vide* order dated 12.05.2022.

18. As the respondent No.2 did not enter appearance before the learned Tribunal, it was proceeded *ex-parte*. The learned Tribunal framed the following issues for its consideration:-

> *"78. The final issues based on these amended pleadings were finalized on 9.8.2023by the Tribunal, as follows:*
>
> > *"1. Whether the present arbitral proceedings are liable to be terminated on the ground that the claims of the Claimant are beyond the scope of Escrow Agreement and/or the Substitution Agreement?*
> > *2. Whether the Claimant is entitled to seek Termination Payment or 90% Debt Due and interest thereon from the Respondent No. 2 having invoked the arbitration under the Escrow Agreement and/or the Substitution Agreement?*
> > *3. Whether the issue of "Debt Due" can be termed as a "dispute" under the arbitration clause of the Escrow Agreement or the Substitution Agreement?*

4. Whether the issue of "Debt Due" was referred to arbitration in accordance with notice under Section 21 of the Arbitration and Conciliation Act, 1996?
5. Whether the Claimant is entitled to a declaration that the letter dated 17.12.2016 issued by I.E purportedly keeping the PCC dated 08.12.2016 in abeyance was non-est, void ab-initio and beyond the scope and powers of I.E and Respondent No.2?
6. Whether the Claimant is entitled to a declaration that Respondent No. 2 is liable to deposit in the Escrow Account i.e., account no. 0246073000005523 with the Secunderabad Branch of SIB, the termination payment?
7. Whether the Claimant is entitled to a declaration that Respondent No. 2 is liable to deposit an amount of Rs. 393,49,97,509/- or any other amount as termination payment in the Escrow Account as claimed in the Statement of Claim?
8. Whether the Respondent is liable to deposit a total termination payment of Rs.393,49,97,509/- on account of termination of the Concession Agreement?
9. Whether Respondent No. 2 is liable to pay 90% of Debt Due of Rs.258,13,11,357/- or any other amount to the Claimant as damages for non-deposit of Termination Payment in the Escrow Account?
10. Whether the Claimant can claim damages on account of default of Respondent if the contract provides for interest?
11. Whether the Claimant is entitled to pre-reference interest of Rs.95,21,85,647/- on 90% Debut Due at the rate of 12% p.a. for the period 16.04.2019 to 12.05.2022 as damages for non-deposit of Termination Payment in the Escrow Account?
12. Whether the Claimant is entitled to pendente lite interest on 90% Debt Due as damages for non-deposit of Termination Payment in the Escrow Account? If so, from which date and at what rate?
13. Whether the Claimant is entitled to future interest? If so, at what rate?
14. Costs?""

19. On 13.11.2024, the learned Tribunal passed the award in favour of the respondent no.1/Lenders and directed the appellant to deposit the Termination Payment in the Escrow Account, as under:-

> *"308. For the reasons provided above, the Tribunal DECIDES, DIRECTS and ORDERS as follows:*
>
> *i. Respondent No. 2 is directed to deposit into the Escrow Account, by way of Termination Payment, a sum of Rs. 229.50 crore, along with interest thereon at the rate of 3% above the Bank Rate with effect from 16.4.2019 till the date of such deposit.*
>
> *ii. Respondent No. 2 is directed to pay the Claimant a sum of Rs. 91,38,274/- towards costs.*
>
> *iii. Respondent No. 2 is directed to pay the Claimant simple interest at the rate of 9% per annum on the costs, to be calculated from the date of the award till the date of realisation."*

20. The appellant under Section 33 of the Act, 1996, sought modification/correction in the Arbitral Award with regard to the non-deposit of the arbitral fee by the appellant. The learned Tribunal rejected the said application under Section 33 of the Act, on the ground that the same was filed after the passage of 30 days from the date of the Award. However, the Award offered to refund the excess amount paid by the respondent No. 1 on the condition that respondent No.1 would not recover the said amount from the appellant.

<u>FACTS IN FAO(OS) (COMM) 152/2025</u>

21. In terms of the Concession Agreement-II ('CA-II'), the Scheduled Completion Date was 14.05.2013. The Annuity Payment was to start from 07.07.2013 and end on 07.01.2026 subject to compliance of the terms of the

CA. The appellant made certain modifications in the CLA, which were incorporated through the Supplementary CLA dated 15.04.2011.

22. On 06.03.2013, a SA was entered by the appellant and the respondent No. 1 and 2 for granting substitution rights to the respondent No. 1 in case of occurrence of financial default by the respondent No. 2.

23. On 17.02.2014, the PCC was granted to the respondent No. 2 and the respondent No. 2 was notified of certain Punch-List items which remained to be completed by the respondent No. 2. The Punch-List items remain unexecuted by the respondent No. 2.

24. According to the appellant, from 17.02.2014 till 17.08.2017, the appellant paid a total of ₹149.415 Crores (paid ₹ 139.294 Crores after deduction of ₹ 10.12 crores towards default of the concessionaire to the respondent No. 2) in 7 installments. Despite the same, no substantial progress of the project was achieved. Details of the Annuity payments recommended by the IE were as per Article 27.1.1. and Schedule M of the CA-II.

25. Due to the pace of execution of the works at the Project which remained abysmally low and no positive action, the appellant invoked Article 37.1.1 of the CA and issued a Cure Period Notice dated 10.08.2015 and directed the respondent No.2 to immediately cure the defaults as enumerated in the said notice within 60 days therefrom, failing which the appellant would exercise its rights and remedies under the CA-II.

26. The respondent No. 2 was found not performing the work. Accordingly, 3rd Supplementary Agreement dated 30.01.2018 was entered. The respondent No. 2 failed to complete the Project in its entirety including the punch list items.

27. On 31.03.2018, the respondent No. 1 declared the Project loan account as NPA as per RBI guidelines. On 05.10.2018, appellant issued 'Suspension Notice' under Article 36.1 of the CA. On 26.03.2019 respondent No. 1 issued a Notice of Financial default dated 26.03.2019 to respondent No.2 detailing the events of defaults.

28. On 01.04.2019, the respondent No. 1 requested the appellant to terminate the CA-II on account of "Financial Default" of the respondent No.2 under Clause 5.1 of the SA by issuing Termination Notice.

29. The respondent No. 2 vide its letter dated 29.04.2019 replied to the respondent No.l's Notice of Financial Default and stating that the delays were on account of reasons beyond its control. On 31.05.2019, the appellant issued Termination Notice terminating the CA-II w.e.f. 03.04.2019 and informed respondent No. 2 that it had taken over the Project.

30. On 16.07.2019, the appellant issued a letter to the respondent No. 2 informing that, it would appropriate a sum of ₹19,43,569/- from the upcoming Annuity Payment on account of maintenance works, etc. being carried by it on the Project through another agency. The appellant issued another letter dated 17.07.2019 to the respondent No.2 informing it of various defects in the Project. It informed that, to cure such defects, the cost

has been estimated by the IE as ₹ 13.27 Crores. The respondent No. 2 was directed to cure these defects within 15 days.

31. On 09.08.2019, the appellant issued a letter to the respondent No. 2 that the IE had identified certain defects and deficiencies in the Project Highway. It was further informed that the IE has directed the respondent No. 2 to deposit a sum of ₹ 328.18 crores against the damages / recoveries and also directed the respondent No. 2 to maintain retention money of minimum of 5% of the Annuity in the Escrow Account to take care of the defects.

32. The respondent no.1/Lender filed a petition under Section 9 of the Act, being ***OMP (I) COMM. No. 275 of 2019***, seeking directions against the appellant to deposit the Termination Payment in the Escrow Account. The said petition was disposed of vide an Order dated 22.12.2021 with a direction to the respondent no.1 to agitate the same before the Tribunal.

33. On 03.09.2019, the appellant issued a letter to the respondent No.1 clarifying the issues with respect to the termination of the CA. As per the provisions of the Article 37 of the CA, on account of the occurrence of an Event of Financial Default, to release of the Termination Payment amounting to ₹ 278,93,30,890/- to the Escrow Account.

34. On 28.01.2020, the respondent No. 1 issued notice to the appellant & respondent No. 2 invoking the arbitration under Clause 10 of the EA and Clause 8 of the SA. On 05.02.2020, the respondent No.2 issued notice invoking arbitration under Article 44.3 of CA to the appellant.

35. On 02.09.2021, the respondent No. 1 preferred an application under Section 11 of the Act seeking appointment of 3rd Arbitrator in terms of the provisions of the EA/SA, since the respondent No. 2 had not appointed its Nominee Arbitrator. This Court vide order dated 22.12.2021 in ***Arb. (P) No. 867 of 2021***, appointed 3rd arbitrator and referred the disputes to the learned Tribunal.

36. The learned Tribunal framed the issues based on, in the following manner: -

> *"76. The final issues based on these amended pleadings were finalized on 9.8.2023 by the Tribunal, as follows:*
>
> > *"1. Whether the present arbitral proceedings are liable to be terminated on the ground that the claims of the Claimant are beyond the scope of Escrow Agreement and/or the Substitution Agreement?*
> > *2. Whether the Claimant is entitled to seek Termination Payment or 90% Debt Due and interest thereon from the Respondent No. 2 having invoked the arbitration under the Escrow Agreement and/or the Substitution Agreement?*
> > *3. Whether the issue of "Debt Due" can be termed as a "dispute" under the arbitration clause of the Escrow Agreement or the Substitution Agreement?*
> > *4. Whether the issue of "Debt Due" was referred to arbitration in accordance with notice under Section 21 of the Arbitration and Conciliation Act, 1996?*
> > *5. Whether the Claimant is entitled to a declaration that "Respondent No. 2 is liable to deposit in the Escrow account, the Termination Payment and the Claimant is entitled to release thereof in its favour to the extent of 90% of Debt Due"?*
> > *6. Whether Respondent No. 2 is liable to deposit a total Termination Payment of Rs. 278.93 crore on account of termination of the Concession Agreement?*
> > *7. Whether Respondent No. 2 is liable to pay 90% of Debt Due of Rs. 193,62,27,188/- or any other amount to the*

Claimant as damages for non-deposit of Termination Payment in the Escrow Account?
8. Whether the Claimant can claim damages on account of default of Respondent if the contract provides for interest?
9. Whether the Claimant is entitled to a sum of Rs.62,44,73,053/- from Respondent No. 2 towards the pre-reference interest on 90% Debt Due at the rate of 12% p.a. for the period from 16.04.2019 to 22.12.2021 as damages for non-deposit of Termination Payment in the Escrow Account?
10. Whether the Claimant is entitled to pendente lite interest on 90% Debt Due as damages for non-deposit of Termination Payment in the Escrow Account? If so, from which date and at what rate?
11. Whether the Claimant is entitled to future interest? If so, at what rate?
12. Costs?""

37. It is the case of the appellant that the Tribunal passed Arbitral Award on 13.11.2024, in the following manner: -

"264. The Tribunal answers the issues as follows:
i. The claims with regard to the Termination Payment are not beyond the scope of Escrow Agreement and/or the Substitution Agreement but the claims with regard to Debt Due are beyond the scope of the present arbitration.
ii. The Claimant is entitled to seek deposit of the Termination Payment with interest thereon by NHAI in the Escrow Account. The Claimant is not entitled to its claim of 90% Debt Due and interest thereon from the Respondent No. 2 being (a) beyond the scope of the present arbitration and (b) premature.
iii. The issue of "Debt Due" can be termed as a "dispute" under the arbitration clause of the Escrow Agreement or the Substitution Agreement but the same does not arise in the present arbitration.
iv. The issue of "Debt Due" was not referred to arbitration in accordance with notice under Section 21 of the Arbitration and Conciliation Act, 1996.

v. The Claimant is entitled to a declaration that "Respondent No. 2 is liable to deposit in the Escrow account, the Termination Payment" but the Claimant is not entitled in this arbitration to a declaration that it is entitled to the release thereof in its favour to the extent of 90% of Debt Due.

vi. Respondent No. 2 is liable to deposit in the Escrow Account, i.e., Account number 0246073000005524, with the Secunderabad branch of SIB, the Termination Payment of Rs. 181.81 crore on account of termination of the Concession Agreement.

vii. Respondent No. 2 is not liable to pay 90% of the alleged Debt Due of Rs. 193,62,27,188/- or any other amount to the Claimant as damages for nondeposit of Termination Payment in the Escrow Account.

viii. The Claimant cannot claim damages on account of default of Respondent No. 2 in not depositing the Termination Payment. There was no such obligation of NHAI towards the Lenders (i.e., the Claimant). The obligation was to pay the Concessionaire the Termination Payment by depositing the same in the Escrow Account. The remedy for delay in making such deposit was provided in Article 37.3.3 of the Concession Agreement by payment of interest on the Termination Payment at the rate of 3% above the Bank Rate into the Escrow Account.

ix. The Claimant is not entitled to a sum of Rs.62,44,73,053/- from Respondent No. 2 towards alleged pre-reference interest on the alleged 90% Debt Due at the alleged rate of 12% p.a. for the period from 16.04.2019 to 22.12.2021 as purported damages for non-deposit of Termination Payment in the Escrow Account.

x. The Claimant is not entitled to any pendente lite interest as no principal amount is payable to the Claimant.

xi. Since the deposit of the Termination Payment along with interest is to be made by Respondent No. 2 into the Escrow Account and the Escrow Bank, under Clause 2.3.2 of the Escrow Agreement, is mandated to maintain the Escrow Account in accordance with the terms of the Escrow Agreement and its usual practices and applicable *regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time, the Claimant is not entitled to future interest.*

xii. The Claimant is entitled to costs. However, as the Claimant has only partially succeeded in respect of its claims, it would be reasonable to award about half of the costs claimed. The Claimant has claimed Rs. 1,14,71,235/-. Accordingly, the Claimant would be entitled to Rs. 57,35,617.50. However, the Claimant was also directed to deposit, in terms of the Arbitration and Conciliation Act, 1996, a sum of Rs. 34,50,000 for all the arbitrators, as Respondent No. 2 had failed to deposit its full share of fees. Thus, the Claimant is entitled to a payment of Rs. 57,35,617.50 plus Rs. 34,50,000, i.e., Rs. 91,85,617.50 rounded off to Rs. 91,85,618/- towards costs from Respondent No. 2. The Claimant is also entitled to simple interest at the rate of 9% per annum on the costs, to be calculated from the date of the award till realisation."

38. On 07.02.2025, the appellant filed a petition under Section 34 of the Act challenging the Award passed by the learned Tribunal.

39. After the impugned judgment, the appellant received a communication email dated 16.07.2025 whereby the appellant has been informed that Serious Fraud Investigation Office ("SFIO") is conducting an investigation into the affairs of the concessionaire and therefore, sought certain information/ documents.

SUBMISSIONS BEFORE THE LEARNED SINGLE JUDGE: -

40. The appellant/petitioner alleged that the respondent No. 2 violated the terms of the CAs and it issued "Suspension Notice" under Article 36.1 of CAs to the respondent No.2. The respondent No.1 also issued a Notice of

Financial Default dated 26.03.2019 to the respondent No.2 informing about the material breach of the terms of the Common Loan Agreement.

41. The appellant issued Termination Notice dated 22.05.2019 thereby terminating the CA w.e.f. 09.04.2019 and informed the respondent No. 2 that it had taken over the Project Highway. Consequently, respondent No. 1 wrote letters to the appellant/petitioner to release the Termination Payment amounting to ₹393,49,97,509/-. along with the applicable interest. The appellant denied depositing the Termination Payment into the Escrow Account vide its letter dated 24.06.2019 and stated that since the Commercial Operation Date ("COD") for the Project could not be achieved and the CA was terminated prior to the occurrence of COD, no Termination Payment for the Project was payable. In its letter dated 24.06.2019, the appellant also stated that the letter dated 17.12.2016 issued by the IE keeping the PCC in abeyance had been issued under the instructions of the appellant.

<u>FINDINGS OF THE LEARNED SINGLE JUDGE</u>

42. The learned Single Judge has noted that the Arbitral Award(s) can only be set aside on the ground, *inter alia*, being in conflict with the public policy of India, patent illegality and violation of principles of natural justice.

43. The findings of the learned Single Judge on different issues are as under:-

a) ***<u>Concession Agreement form part of the EA and SA</u>*** :-

The EA and SA by clear phraseology incorporate the CA in both the EA as well as the SA. The recitals of EA and SA are clear and unambiguous, there is no need for any external aid. The CA was not merely a reference or a statement in the passing but the parties expressly agreed to it forming and becoming a part of the two Agreements i.e. EA and SA. The learned Single Judge referring to paragraphs 96,126 and 132 of the Arbitral Award held that the learned Tribunal has rightly held that the CAs forms part of the EA and SA and the conclusion of the learned Tribunal calls for no interference.

b) ***<u>PCC cannot be kept in abeyance</u>*** :-

Keeping the PCC in abeyance by the IE vide letter dated 17.12.2016, was beyond the terms of the said Article i.e. 14.5 of CAs. The CA nowhere provides that the PCC once issued can be kept in abeyance or withdrawn. The interpretation that IE after realizing its mistake, kept the PCC in abeyance as 75% of the total length of the Project Highway was not completed, is against the Article quoted above which gives IE the only right to withhold the PCC before it is issued but not once the PCC is issued. The PCC was issued after inspection by the IE and approval by the appellant/petitioner. If the interpretation propounded by the appellant/petitioner is accepted then said Article will lead to absurdity. The view taken by the Tribunal is the correct view and most definitely is a plausible view and does not shake the conscience of the Court.

c) ***Jurisdiction of the AT over the disputes*** :-

The respondent No. 1 invoked the Arbitration Clause of the EA which is Clause 10. On perusal of the same, it clearly indicates that "any dispute, difference or claim arising out of or in connection with this Agreement" shall be referred to arbitration. It includes the disputes arising in connection with the EA which also includes the CA.

It is the case of the respondent No.1 that the appellant/ petitioner refused to deposit the Termination Payment vide letter dated 24.06.2019 which clearly violated Clause 3.2 of the EA. Hence, the respondent No. 1 was constrained to invoke the arbitration clause of the EA. The learned Tribunal had the jurisdiction to entertain the disputes arising out of the EA and more particularly non deposit of Termination Payment by the petitioner in the Escrow Account. The learned Single Judge held that the above reasoning is sound, borne out of the correct interpretation of the contractual terms and there is no merit in the contention of the appellant/petitioner that the learned Tribunal lacked jurisdiction over the dispute of non deposit of Termination Payment in the Escrow Account.

d) ***Contentions qua Termination Payment*** :-

The learned Single Judge has held that the respondent No. 2 under the CAs has been described as "concessionaire" which includes its successors and permitted assigns and substitutes. It is clear that there is a conscious and deliberate intent on the part of the contracting parties to transfer and assign all rights, title, and interest held by the concessionaire to the Lenders Representative i.e. the respondent No. 1. After the execution of the SA, the respondent No. 1/ lender steps into the shoes of the concessionaire, acting in the capacity of the respondent No. 2 and is entitled to make such demands. The argument that the concessionaire can only demand the Termination Payment completely ignores the plain language and "*commercial purpose*" of the Agreements. This interpretation would disregard the intent of the parties, who clearly intended that the lender, upon substitution, would possess all the rights necessary to recover its dues including the Termination Payment. The Termination Payment can only be sought by respondent No. 2, is rejected.

If the CA is terminated due to the defaults committed by the respondent No. 2 before achieving COD, the Termination Payment shall not be due and payable. Article 37.3.1 states that, if the Agreement is terminated on account of the concessionaire default during the operation period then the Authority i.e. the appellant/petitioner would pay as per the Article quoted above. Articles 37.3.2 and 37.3.3 state the formula to be applied for Termination Payment along with the interest component.

Once the COD is achieved on the date of issuance of PCC, the demand made by the respondent No. 1 for Termination Payment was valid. The calculation of the Termination Payment is a question of fact not a question of jurisdiction. The answer to the said contention i.e. calculation of Termination Payment, clearly lies in Article 37 of the CA and more particularly in Article 37.3.2 and 37.3.3.

The learned Single Judge held that the appellant has not argued that the amount of ₹ 229.50 Crore suffer from any errors or that extra amounts have been added instead of this, only a mere averment has been made without any evidence. On perusing the Statement of Defence filed by the petitioner, the calculation of Termination Payment has not been disputed. The Tribunal has dealt with the said contention in paragraph 157 of the Arbitral Award. Therefore, the Tribunal has rightly dealt with the said contention and hence, no interference is required.

44. The learned Single Judge in view of its above findings has held that no interference is required with the Arbitral Awards and dismissed the petitions.

SUBMISSIONS ON BEHALF OF THE APPELLANT:-

45. Mr. Sudhir Nandrajog, learned Senior Counsel appearing for the appellant submitted that the CAs are not a part of the EA or the SA. The conclusion drawn by the learned Tribunal that CAs formed part of agreements is erroneous; it was merely annexed to EA and SA as annexures. The terms of the CAs were never made "*part and parcel*" of these agreements. He also submitted that the learned Single Judge failed to

consider that the learned Tribunal has erred by substituting the agreements in its own wisdom, which is impermissible in law.

46. According to him, intention of annexing the CAs in the agreements can be deduced from Clauses 2 & 3 in the SA and Clauses 2.5 & 2.6 of the EA. He submitted that CAs were annexed to the agreements so that the non-signatory to CAs, i.e., the respondent no. 1 is aware of the terms of the CAs to enable the respondent no. 1/lender to exercise its rights under Clauses 2 & 3 in the SA and Clauses 2.5 & 2.6 of the EA.

47. He submitted that the appellant could not have been directed to deposit Termination Payment in accordance with Clause 3.2 of the EA, as the same never became "*due and payable*". For Termination Payment to become due and payable, the concessionaire as well as the learned Tribunal was obligated to follow the procedure prescribed under Article 37.3 of the CAs. The mere factum of the recital annexing the CAs to EA(s) and SA(s) does not make the CA '*part and parcel*' of the said agreements in the absence of a clear or specific indication that the CAs in its entirety was intended to be made part of the EA(s) and SA(s). In support of his submission, he has relied on the judgment of the Supreme Court in ***M.R. Engineers & Contractors (P) Limited v. Som Datt Builders Limited (2009) 7 SCC 696***.

48. According to Mr. Nandrajog, the award is patently illegal as the Termination Payment under the CAs is not payable if termination happens due to concessionaire's default occurring prior to COD under Article 37.3.1

of the CAs. The COD is achieved upon issuance of Completion Certificate / PCC which is issued by IE.

49. He submitted that the CODs were not achieved as the PCC which was issued by IE was kept in abeyance, as 75% of the total length of the Project was not completed by the respondent No.2/concessionaire. In terms of Article 14.3.2 of CA, PCC could have only been issued upon completion of 75% of the total length of the Project, i.e., 100.350 KM out of the total length of 133.793 Km. The respondent No.2 had only completed 90.671 Km. Therefore, issuance of PCC/achieving COD, raising a demand by the concessionaire/ respondent No. 2 for the Termination Payment, and providing necessary particulars, all were a sine *qua non* to the claim of Termination Payment. He also submitted that the same was submitted by the appellant in its Statement of Defence which was not decided by the learned Tribunal on its merits in the Award and came to a conclusion that, act of keeping the PCC in abeyance could not have been done without considering Article 14.5 of the CA-I.

50. It is his submission that the learned Single Judge has failed to consider that the learned Tribunal has failed to note that, even if the appellant is obliged to pay the Termination Payment, it shall be upon the demand of the respondent no.2/concessionaire within 15 days of the termination, which was admittedly never did by the respondent No.2. He also submitted that the learned Tribunal erred in interpreting Article 37.3.3 of the CAs and held that there is no requirement for the concessionaire to demand Termination Payment from the Authority/appellant. The learned Tribunal has given complete go-by to the categorical and unambiguous

provisions of Article 37.3.3 which mandates "demand" by the concessionaire with "necessary particulars". Such an interpretation to Article 37.3.3 of CAs has the effect of altering the binding terms of the contract between the parties, which is impermissible in law and is patently illegal.

51. According to him, it is settled proposition of law that, only parties to a contract can enforce their rights and liabilities under such contract and no stranger is allowed/ permitted to agitate claim(s) or seek to enforce terms of such contract against the parties to such contract. The respondent no. 1 is precluded in law from seeking enforcement of terms of CAs to which it is not a party to. An arbitrator/Tribunal being a creature of a contract, cannot step out of the four corners of the contract. Hence, the Tribunal erred in travelling beyond SA and EA to adjudicate disputes which could only be agitated and adjudicated by a competent Arbitral tribunal constituted under the arbitration Article contained in CAs. The findings of the learned Tribunal that Clause 10 of EA & Clause 8 of SA are widely worded and indicate that, it would include disputes "arising out of or in connection with" including those under the Cas, is erroneous. He submitted that the CAs were beyond the scope of reference and the respondent no. 1 not being a party to the CAs, could not have sought to enforce the terms.

52. He submitted that the learned Tribunal erred in relying upon Clause 2 of the SA, that, once the assignment takes place SIB/Lender steps into the shoe of respondent no.2/concessionaire. It is his submission that the Clause 2 is subject to Clause 3.1 of the SA. The 'substitution/assignment' rights of the respondent no. 1 are only restricted to appointment of a 'Nominated Company' to perform the obligations under the CAs. Whereas, Clause 2.1

nowhere reads that the Lender would step into the shoe of the respondent no.2/concessionaire and shall be entitled to all rights under the CAs. If the same analogy is followed, then for the claims of the appellant against the concessionaire, the appellant can agitate and raise claims against the respondent No.1/Lender for the wrongs/defaults of the concessionaire/ respondent no.2. He also submitted that Clause 5.1 of the SA nowhere assigns any right to respondent No. 1 to call upon the appellant to deposit the Termination Payments, which have not become due and payable and is subject to Article 37.3.3 of CAs.

53. According to him, the learned Tribunal erred in holding that calculation of Termination Payment was a "mechanical exercise" whereas there are two preconditions for the Termination Payments to become "due and payable; Firstly, there must be demand by the respondent No. 2; Secondly, the respondent No. 2 must submit necessary particulars. Both the preconditions were missing and without complying with the preconditions under Article 37.3.3 of the CAs.

54. On the issue of calculation /computation of the Termination Payment, he submitted that the learned Tribunal could not have arrived at the figure of ₹ 229.50 Crore in CA-I and ₹ 181.81 Crore in CA-II, as the Termination Payment is beyond the scope of reference. There is no provision in the EA and SA which enables the learned Tribunal or the parties to these agreements to calculate Termination Payment. The Termination Payment can only be adjudicated and calculated arising out of the CAs, which are subject matter of arbitral proceedings between the respondent No.2 and the appellant. He also submitted that, it is perverse finding of the learned

Tribunal that the appellant did not dispute the calculation made by the respondent No.1.

55. In support of his submissions, he has relied upon the following judgments: -

a) ***Associated Engineering Co. v. Government of A.P., 1991 4 SCC 93.***

b) ***Rajasthan State Mine and Minerals Ltd. v. Eastern Engineering Enterprises, 1999 9 SCC 283.***

c) ***Food Corporation of India v. Chandu Construction, 2007 4 SCC 697.***

d) ***Indian Oil Corporation Limited v. Shree Ganesh Petroleum Rajgurunagar, 2022 4 SCC 463.***

56. He submitted that the appellant approached the learned Tribunal under Section 33 of the Act seeking modification/correction in the Arbitral Award dated 13.11.2024 on the issue with regards to the 'non-deposit of the Arbitral Fee' by the appellant. The appellant had pointed out to learned Tribunal that it had paid full share of its Arbitral Fee to respondent no. 1. A sum of Rs. 34.50 Lakhs towards the Arbitral Fee which was incorrectly noted to have not been paid by the appellant, the Tribunal offered to refund the excess amount paid by the respondent no. 1 on the condition that respondent no. 1 would not recover the said amount from the appellant.

57. Mr. Nandrajog submitted that the appellant has the authority to withhold PCC under the CAs and the learned Tribunal erred in holding that the act of the IE in keeping the PCC dated 08.12.2016 in abeyance was *non-est*, *void ab-initio* and beyond the scope and powers of the IE under Article 14.5 of CAs. He also submitted that the IE was well within its power to

correct its own error / mistake. When a party has an administrative duty to act and in exercise of such duty it commits an error, the same authority is duty bound and obligated to correct it as soon as it is brought to its knowledge and the IE rightly corrected its mistake by keeping the PCC in abeyance vide its letter dated 17.12.2016 until 75% of the total length of the Project Highway was completed. The learned Tribunal failed to consider that, in terms of Article 14.3.2 of the CAs, PCC can only be issued upon the completion of 75% of the total length of the Project Highway. Thus the learned Tribunal erred by overruling the contractual obligation of the IE.

58. He submitted that, as per Article 37.3.1 of CA, the concessionaire acknowledges that no Termination Payment shall be due or payable on account of a concessionaire Default occurring prior to COD. The issue of withholding PCC is *sub judice* before a Tribunal wherein the appellant and respondent No. 2 (concessionaire) are parties.

59. In support of his submission he has relied on the following judgments:-

> ***a) Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55;***
>
> ***b) Nandram Hanutram v. Raghunath and Sons, 1953 SCC OnLine Cal 219;***
>
> c) ***Transstroy Tirupati Tiruthani Chennai Tollways Pvt. Ltd. v. Allahabad Bank and Anr., 2019 SCC OnLine Del 9080.***

60. He seeks prayer as made in the appeal.

<u>SUBMISSION ON BEHALF OF THE RESPONDENT NO.1</u>

61. Mr. Sandeep Sethi, learned Senior Counsel appearing for the respondent no.1 would submit that the only issue in ***FAO (OS) (COMM) 137/2025*** is with regard to PCC which was kept in abeyance. No such issue arises in ***FAO (OS) (COMM) 152/2025*** regarding the achievement of Commercial Operation Date (COD).

62. On the submission of the appellant that the liability to make Termination Payment is exclusively under CAs, to which the lender/respondent no.1 is not a party, he submitted that, under Clause 3.2 of the EA, it is the obligation of the appellant to deposit the Termination Payment when it becomes due and payable as the CAs forms part of EA and SA. The dispute that was referred to arbitration arose from the appellant's failure to perform its obligation to deposit Termination Payment in the Escrow Account under the EA and the SA, both of which are tripartite agreements.

63. He submitted that, under the CAs, the Projects were awarded as a DBFOT on an annuity basis, the appellant did not make any investment in the Projects. The funds were independently sourced by the concessionaire through equity contribution and/or by taking loan(s), and the Lender Banks invested huge amounts to bring the Project to life. The Awards record this commercial backdrop. Upon termination, the contractual mechanism is not that the appellant unilaterally adjusts the amounts claimed by it from the concessionaire from the Termination Payment. Rather, the parties had agreed on a structured escrow waterfall.

64. Clause 4.2 of the EA read with Article 31.4.1 of the CA, stipulates the

priority in which monies to be credited to the Escrow Account are to be applied upon termination. These clauses make it clear that payment of 90% of the Debt Due excluding Subordinated Debt is the highest priority after payment of taxes due and payable by the concessionaire. All payments and damages claimed by the appellant from the concessionaire are to be paid only after the payment of taxes and 90% of Debt Due. If the appellant had deposited Termination Payment in the Escrow Account, respondent No.1 could have appropriated an amount of at least up to 90% of the Debt Due from the said account in terms of Clause 4.2 of the EA.

65. According to Mr. Sethi, the Clause 3.2 of the EA read with Article 37.3 of the CA, no discretion is granted to appellant in making the Termination Payment. It is his submission that CA forms part of the EA and SA, as both are tripartite agreement executed by the lender/respondent no.1 and as well as Escrow Bank, respondent no.2/the concessionaire and the appellant. Both the agreements are identically worded and *inter alia* states that, a copy of the CAs are annexed hereto and marked as '*Annex-A to form part of this agreement*' and therefore the CAs forms part of both agreements by express incorporation.

66. On the judgment relied upon by the appellant in ***M. R. Engineers and Contractors (P) Ltd. (supra)***, he submitted that, it is not the case that a document is merely referred in the contract, the arbitration clause was invoked under Clause 10.1 of the EA, the relevance of the Recital A is that, it incorporates the CA(s) into EA(s) & SA(s) as part of contractual framework.

67. On the appellant's plea that the learned Tribunal had decided the matter beyond its scope of reference, Mr. Sethi placing reliance upon the judgment in the case of ***State of Goa v. Parveen Enterprises (2012) 12 SCC 581*** and ***Ssangyong Engineering and Construction Company Limited v. National Highway Authority of India (2019) 15 SCC 131***, submitted that the dispute referred to the learned Tribunal was due to the refusal of the appellant to deposit the Termination Payment in the Escrow Account.

68. On the issue of whether the lender can invoke arbitration under EA and SA and to deposit the Termination Payment in Escrow Account upon termination, Mr. Sethi has relied upon the judgment of this Court in the case of ***National Highways Authority of India v. Punjab National Bank (2021) SCC OnLine Del 3413*** to submit that learned Single Judge of this Court has held that once the CAs stood terminated, the loaned amount is required to be returned. The lenders, had no concern with the *inter se* disputes between parties therein (NHAI and JST). It is for this reason that the CA, rightly, made deposit by NHAI, into the Escrow Account, as well as the withdrawal, thereby, by the lenders, the inevitable sequitur to termination of the CA, which has been upheld by a Coordinate Bench of this Court *vide* the above judgment. The SLP filed was also dismissed.

69. On the issue of Termination Payment, had become '*due and payable*', Mr. Sethi submitted that under the security assignment under Clause 2.1 of the SA, the concessionaire/respondent no.2 had assigned all its rights title, and interest in the concession to the lenders' representative by way of security. According to him, the lenders assignee is entitled to enforce the relevant Termination Payment mechanism for the purpose of ensuring that

the Termination Payment is demanded/deposited in accordance with the contractual scheme.

70. On the argument of the appellant that, Lenders cannot demand Termination Payment because they could not execute the project is misconceived because the said clause merely clarifies that the lenders cannot themselves execute the project work. He submitted that, it neither dilute the lenders security assignment nor does it curtail their contractual right to seek deposit of Termination Payment into Escrow Account upon termination. According to him, the respondent No.1 is only seeking to enforce the escrow deposit mechanism triggered by the termination.

71. Mr. Sethi, on the submission of the appellant that, if the lenders are treated as concessionaires then the concessionaires would go out of the picture and claims between the appellant and the concessionaire would be derailed. He submitted that the Clause 2.1 of the SA is a security interest meant to be exercised to the extent necessary to protect the lenders exposure upon the defined events. The respondent no.1's case is limited to deposit of Termination Payment into the Escrow Account and does not see the adjudication of *inter se* disputes between the appellant and the concessionaire/respondent no.2 under the CAs does not seek to supplant the concessionaire in the arbitration. The respondent no.1 invoked the arbitration only because of the appellant refusal / failure to deposit the Termination Payment.

72. He submitted that Clause 7.2(v) of the CLA provides that, in the event of default by the concessionaire under Clause 7.1 of the CLA, the

lender / respondent no.1 can instruct any person who is liable to make the payment to the borrower to pay directly to the secured parties for the purpose of crediting the same into Escrow Account.

73. According to him, the learned Tribunal has held that the Clause 5.2.2 of the CA requires concessionaire to submit drafts of all Project agreements for its review and comments. CLA is a "Financing Agreement" and forms part of the definition of "Project Agreements" under Article 48.1 of the CAs. He also submitted that, the Recitals C and D to the Supplementary CLA dated 15.04.2011 records that the appellant had reviewed the CLA and had stipulated certain modifications / deletions / insertions to the same on account of which the SA was executed. As evident from the said SA, no modifications were suggested by appellant to Clauses 7.2(v) and 10.2 B (ii) of the CLA. Thus, the appellant had acquiesced to the said Clause 10.2 B (ii) which recognises that the lenders can claim Termination Payment from the appellant. Thus, the learned Tribunal has rightly held that the appellant had acquiesced to the provisions of the CLA which provide that the lenders can claim Termination Payment.

74. With regard to the appellant's submission of 'necessary particulars', Mr. Sethi submitted that this argument was not raised as a defence during the arbitration and it was first raised in the petition under Section 34 of the Act. The appellant has neither specified what "necessary particulars" were allegedly missing, nor does it plead or demonstrate how any absence of particulars caused prejudice or prevented computation/verification of the Termination Payment.

75. On the issue of the concessionaire / respondent No. 2 raising / demanding Termination Payment, he submitted that the appellant has in its application under Section 16 of the Act stated that the concessionaire has invoked arbitration under the CAs; the concessionaire had raised claims similar to those raised by Lenders/SIB. Thus, there was clearly a demand for Termination Payment by the concessionaire as well.

76. He submitted that, as per Clauses 2.1.1 and 2.1.2 of the EA, the Escrow Account is a trust and declares respondent No.1, respondent No.2/concessionaire and the appellant as the beneficiaries of the said trust. Therefore, the appellant is required to deposit Termination Payment in the Escrow Account as beneficiaries of the trust under the EA and/or as beneficiaries under Article 31.4.1 of the CAs. He also submitted that the appellant had admitted its liability to make Termination Payment to lender banks in such projects in a draft shelf prospectus issued by it on 07.10.2015.

77. On the appellant's argument that the PCC could not have been issued because at least 75% of the Project Highway was not completed and that the issuance of the PCC was therefore a patent mistake, rectified by keeping the PCC in abeyance, Mr. Sethi submitted that, no such contention was taken in the arbitration proceedings, and the same is an attempt to reargue merits under Section 37 of the Act. The PCC was issued by the IE under the authorisation of the appellant and strictly as per the contractual provisions as well as the circulars issued by the appellant.

78. As per Article 10.3.5 of the CA, the issuance of the PCC shall not be delayed due to access not being granted to any part of the site. As per Article

14.3.1 of the CA, the IE shall not withhold the PCC for the reason of any work remaining incomplete if the delay in completion thereof is attributable to appellant. He submitted that the learned Single Judge held that, it was the sole responsibility of the appellant to provide access to vacant land as per the Appendix to the respondent No. 2/ concessionaire within the 90 days period from the Appointed Date and if there was any delay in providing the same, it was to attract damages payable to the respondent No.2 by the appellant.

79. He submitted that, the IE issued a recommendation for issuance of PCC on 07.11.2014 highlighting that, since the project began, there were problems in handing over ‘Right of Way’ and ‘Right to Access’ and NHAI Circular No. NHAI/CMC/2010/Misc./13873 dated 07.09.2010 permits issuance of PCC for completed stretches in such situations. The appellant issued a cure period notice dated 10.06.2015. After an additional portion of the works was completed, the IE expressed its intention to issue a PCC for the completed stretches vide its letter dated 30.09.2016. The appellant explicitly and clearly concurred with this recommendation in its letter dated 24.10.2016, wherein, it had inspected the completed length of the Project Highway along with the IE and found it to be safe and reliable for commercial operation and conveyed its authorisation for the issuance of the PCC to the IE. The IE issued the PCC through its letter dated 08.12.2016 while requiring the concessionaire to execute a SA before 25.12.2016 and completing the balance works by 31.10.2017.

80. He submitted that, nine days after the issuance of the PCC, the IE suddenly issued a letter dated 17.12.2016 stating that the PCC is kept in

abeyance. The learned Single Judge has held that the CAs nowhere provides that the PCC once issued can be kept in abeyance or withdrawn. The submission that, IE after realising its mistake, kept the PCC in abeyance, as 75% of the total length of the Project Highway was not completed is against the Article, which gives IE the only right to withhold the PCC 'before' it is issued but not once the PCC is issued. The PCC was issued after inspection by the IE and approval by the appellant.

81. He submitted that the learned Tribunal has held that, keeping the PCC in abeyance, was completely different from the letter dated 08.12.2016 in which it was stated that the concessionaire should complete either Periyakulam Bypass or Theni bypass before the first Annuity payment becomes due. The first annuity payment would have become due in terms of the said letter of the Engineer on 08.05.2017 (i.e. 6 months after the issuance of the PCC). He also submitted that the learned Tribunal has rightly held that, under Article 14.5 of the CAs relates to withholding of PCC but does not apply once the PCC has been issued. A series of conditions had to be met for the applicability of Article 14.5 which had not been met in the present case. He also submitted that the learned Tribunal has not altered any of the terms of the agreements entered into between the parties, as contended by the appellant.

82. He submitted that the contention of the appellant that Debt Due are beyond the scope, and it was not referred in the notice under Section 21 of the Act and damages could not be claimed directly by the lenders are procedurally untenable, having neither been specifically pleaded in the petition under Section 34 of the Act nor raised as a ground in the present

appeals. It was raised for the first time in oral arguments without pleadings or factual foundation, ought to be rejected.

83. He submitted that the Original Statement of Claim filed by respondent no.1 was limited to a prayer for specific performance of appellants contractual obligation to deposit the Termination Payment into the Escrow Account together with interest. Subsequently, by way of an amendment, respondent no.1 sought an alternative relief, namely damages quantified at 90% of the Debt Due, along with interest claimed as damages for delay in deposit. Since the concerned projects are annuity projects, the Termination Payment is the discounted value of future annuities, not 90% Debt Due. This alternative claim and it quantification at 90% Debt Due was premised on the escrow waterfall under Clause 4.2 of the EA, which accords priority to 90% Debt Due after taxes. It was expressly pleaded as an alternative to, and not in substitution of, the primary relief of escrow deposit.

84. He submitted that the learned Tribunal held that NHAI's contractual obligation was not to pay damages or interest directly to the lenders, but to deposit the Termination Payment into the Escrow Account; and that the contractual consequence for delay in such deposit was expressly provided under Article 37.3.3 of the CAs. The learned Tribunal declined the alternative reliefs sought by the Lenders' (direct payment of damages and interest), but simultaneously enforced the primary contractual obligation by directing the appellant to deposit the Termination Payment along with interest into the Escrow Account. The relief granted by the learned Tribunal is limited to a direction to deposit the Termination Payment (with interest) into the Escrow Account. There is no direction to discharge the lenders'

outstanding debt or to make any payment directly to the lenders.

85. On the submission of the appellant that the expression "*due and payable*" in Article 37.3.3 of the CAs permits the appellant to affect a unilateral set-off of its alleged claims against the Termination Payment, Mr. Sethi submitted that, Article 37.3.3 stipulates that the Termination Payment becomes due and payable upon a demand made after termination. The provision does not make the obligation to deposit the Termination Payment contingent upon: (i) adjudication or resolution of inter se disputes between appellant and the concessionaire, or (ii) adjustment of NHAI's alleged claims against the concessionaire. The contractual scheme clearly separates appellant's obligation to deposit the Termination Payment into escrow from its claims against the concessionaire, which are required to be pursued independently.

86. He submitted that the contractual structure precludes any unilateral pre-deposit set-off against the Termination Payment. The claims against the concessionaire are not extinguished, but they are deliberately subordinated in the agreed priority mechanism.

87. He submitted that the argument of the appellant that, Clause 3.2 of the EA entitles the appellant to appropriate Concession Fee due and payable from the concessionaire from the Termination Payment which means that there has to be an adjustment from the Termination Payment, is misconceived. The Concession Fee is only a nominal amount of Re. 1 per year during the term of the CAs. It has not been pleaded by the appellant in the arbitration, Section 34 petition or in the appeal that any Concession Fee

is outstanding to be paid by the concessionaire which should have been adjusted from the Termination Payment directed to be deposited by the appellant in the Escrow Account in terms of the Award. Therefore, the appellant is not entitled to raise any such argument.

88. Mr. Sethi submitted that the learned Tribunal had made it clear that it did not enter into any impermissible adjudication on jurisdictional facts, but merely noted that the quantification was never disputed, no alternative computation was provided by the appellant, and that the issue was one of merit, not jurisdiction. Once it is accepted that the CAs forms part of the EAs and SAs, the application of the pre-agreed contractual formula under Article 37 of the CA for computing the Termination Payment cannot be characterised as a jurisdictional overreach. It is, an exercise in arithmetical application of contractual terms, which falls squarely within the learned Tribunal's remit. As recorded both in the Awards and the impugned judgment, the appellant has neither disputed the computation or quantum of the Termination Payment before the learned Tribunal nor was any alternative calculation placed on record. The computation of Termination Payment for concessionaire's default under Article 37.3.1 of the CAs is based on an objective and mechanical formula.

89. He submitted that, it is well settled that interpretation of contractual provisions lies squarely within the domain of the learned Tribunal, and so long as the interpretation adopted is a possible and plausible view, it is immune from interference under Sections 34 and 37 of the Act. It is well settled that errors of fact or even of law committed by an Arbitral Tribunal are not grounds for setting aside an award unless they fall within the narrow

compass of Section 34(2) or Section 34(2A) of the Act.

90. Mr. Sethi submitted that, an appeal under Section 37 of the Act is extremely narrow and far more circumscribed than the already limited scope of interference under Section 34 of the Act. The appellate court does not sit in appeal over the arbitral award, nor does it undertake a re-appreciation of facts or a re-interpretation of contractual provisions. In support of his submission, he has relied upon the judgment of the Supreme Court in ***Jan De Nul Dredging India Pvt. Ltd. v. Tuticorin Port Trust, 2026 SCC OnLine SCC33***,

91. He seeks dismissal of these appeals.

ANALYSIS AND CONCLUSION

92. Having heard the learned counsel for the parties and perused the record, the first and the foremost issue that needs to be decided is whether the CA(s) formed part of the EA(s) & the SA(s).

93. According to Mr. Nandrajog, the CA(s) was only annexed to the EA(s) and SA(s) and as such the learned Tribunal could not have directed the appellant to deposit the Termination Payment in the Escrow Account. He submitted that, according to the learned Single Judge, the phraseology used in EA(s) and SA(s) is very clear in as much as the CA(s) is annexed and marked as Annex-A to form part of the agreement(s) i.e., EA and SA, is erroneous.

94. He submitted that the CA(s) was annexed to the agreements so that the non-signatory to the CA(s) is aware of the terms of the CA(s) so as to

enable the respondent no.1 exercise its rights. To support his submission, Mr. Nandrajog has placed reliance on Articles 2 and 3 of the SA and Articles 2.5 & 2.6 of the EA, which we reproduce as under:

"2 ASSIGNMENT
2.1 Assignment of rights and title
The Concessionaire hereby assigns the rights, title and interest in the Concession to, and in favour of, the Lenders' Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Senior Lenders under the Financing Agreements.
3 SUBSTITUTION OF THE CONCESSIONAIRE
3.1 Rights of substitution
3.1.1 Pursuant to the rights, title and interest assigned under Clause 2.1, the Lenders' Representative shall be entitled to substitute the Concessionaire by a Nominated Company under and in accordance with the provisions of this Agreement and the Concession Agreement.
3.1.2 The Authority hereby agrees to substitute the Concessionaire by endorsement on the Concession Agreement in favour of the Nominated Company selected by the Lenders' Representative in accordance with this Agreement. (For the avoidance of doubt, the Senior Lenders or the Lenders' Representative shall not be entitled to operate and maintain the Project Highway as Concessionaire either individually or collectively)..

2.5 Rights of the parties
The rights of the Authority, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the Authority, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.
2.6 Substitution of the Concessionaire
The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Nominated Company, pursuant to the Substitution Agreement, it shall be

deemed for the purposes of this Agreement that the Nominated Company is a Party hereto and the Nominated Company shall accordingly be deemed to have succeeded to the rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Nominated Company."

95. Suffice to state that there is nothing in Clauses 2 and 3 of the SA and Clauses 2.5 and 2.6 of the EA to show that the CA was only annexed for information of the respondent no.1 to enable respondent no.1 to exercise its rights. If the intention of the parties was only to annex the CA(s) in the agreements for the knowledge of the non-signatory/respondent no.1 herein, the wordings would have been *"a copy of the CA(s) is annexed hereto"* but the express wording in the EAs & SAs, '*to form part of this agreement'*, would surely mean that the intention of the parties was to make CA(s) to form part of the said agreement(s).

96. As per Clause 3.2 of the EA, the appellant being signatory to the said agreement had agreed to make deposit in the Escrow Account the Termination Payment. Even the interpretation under Clause 1.2.2 and 1.2.4 of the EA, gives a clear indication that the CA is not merely annexed for the knowledge of the respondent no.1 but to form part of the agreements. In this regard, we shall reproduce Clauses 1.2.2, 1.2.4 and 3.2 of EA, as under:

"1.2.2 The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein but defined in the Concession Agreement shall, unless repugnant to the context, have the meaning ascribed thereto in the Concession Agreement.

1.2.4 The rules of interpretation stated in Clauses 1.2, 1.3 and

1.4 of the Concession Agreement shall apply, mutatis mutandis, to this Agreement.

3.2 : Deposits by the Authority
The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:
(a) Annuity and any other monies disbursed by the Authority to the Concessionaire;
(b) Deleted;
(c) Deleted and
(d) Termination Payments:
Provided that Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account."

97. The learned Single Judge by referring to paragraphs 96, 126, 132 and 184 of the award has drawn his conclusion in paragraphs 46, 47 and 49 of the impugned judgment, which we reproduce as under:

"46. On perusal of the above, the parties to the Agreements i.e. EA and SA have clearly mentioned that the Concession Agreement "forms part of this Agreement" which leaves no manner of doubt that the Concession Agreement was an integral part of these Agreements. Both EA and SA are tripartite agreements wherein all the parties herein were parties to the EA and the SA. Also, EA and SA are subsequent agreements to the Concession Agreement meaning thereby both these agreements were executed mainly for the purpose of the smooth functioning of the Project Highway.
47. The argument of the learned senior counsel for the petitioner that mere annexing does not make the Concession Agreement part and parcel of the EA and SA in the absence of a clear and unambiguous/declaration is devoid of merit as the wordings of the Recital quoted above clearly indicates that the Concession Agreement has been made part of EA and SA which is a clear indication in itself.
xxxx xxxx xxxx xxxx

49. Reliance on the said judgment is misplaced as the same deals with the incorporation of an arbitral clause when a document is merely referred to in a Contract whereas the present case does not deal with the incorporation of an arbitration clause. The EA and SA by clear phraseology incorporates the Concession Agreement in both the EA as well as the SA. When the recitals of EA and SA are clear and unambiguous, there is no need for any external aid. A perusal of the Recitals quoted above show that the Concession Agreement was not merely a reference or a statement in the passing but the parties expressly agreed to it forming and becoming a part of the two Agreements i.e. EA and SA. Reading anything else would be counter productive to the clear terms agreed upon between the parties and would in effect be rewriting the terms of the Contract."

98. We may at this stage reproduce paragraphs 96, 126, 132 and 184 of the Award, as under:-

"96. There are as many as four agreements that are relevant to the present matter. The first is a Concession Agreement entered into between the Concessionaire (Respondent No. 1) and NHAI (Respondent No. 2). Next, there is a Common Loan Agreement between the lenders and the Concessionaire, whereby the lenders (the Claimant) advanced loans to the Concessionaire for the execution of the Project. Importantly, this Common Loan Agreement was vetted / approved by NHAI. There are also Supplementary Loan Agreements. There are also two agreements between the Claimant, Respondent No.1 and Respondent No.2, i.e., an Escrow Agreement and a Substitution Agreement. The present arbitration is invoked under these two agreements. It is important to note that, as per the recitals of both these agreements, the parties have agreed that the Concession Agreement form part and parcel of these agreements as well. All these agreements are interlinked and define the rights and obligations of the parties, and relevant provisions from these are discussed in more detail in the following paragraphs.

xxxx xxxx xxxx xxxx
126. It may be noted that as per Recital (A) of the Escrow Agreement, the Concession Agreement now forms a part of the Escrow Agreement.
xxxx xxxx xxxx xxxx
132. It is noted that, as per Recital (A), it is clear that the Concession Agreement, which is annexed to this agreement, forms a part of the Substitution Agreement as well, in a manner similar to that which is provided in the Escrow Agreement.
xxxx xxxx xxxx xxxx
184. Recital A of both the Escrow Agreement and Substitution Agreement are identically worded and, among other things, states that a copy of the Concession Agreement is "annexed hereto and marked as Annex–A to form part of this Agreement." Thus, the Concession Agreement forms a part of both the Escrow Agreement and the Substitution Agreement as per the express words used in those agreements."

99. So, it follows, the conclusion drawn by the learned Tribunal and the learned Single Judge is justified. It is a settled law in terms of the judgments of the Supreme Court that, if a plausible view is taken by Arbitral Tribunal, the same need not be interfered with under Section 34 and Section 37 of the Act unless it shocks the conscious of the Court.

100. Insofar as the judgment in the case of ***M.R. Engineers & Contractors (P) Limited (supra)*** relied upon by Mr. Nandrajog is concerned, the same judgment was also relied upon by the appellant before the learned Single Judge. The learned Single Judge did not find the same to be applicable to the facts of these cases. In paragraph 49 of the impugned judgment which we have already reproduced above, the learned Single Judge holds that the recitals in EA and SA are clear in as much as the CA is not merely referred to, but the parties expressly agreed to form part of the agreement(s). Hence for parity of reasons, it need to be held that the said judgment is not

applicable to the facts of this case. Hence, first plea of Mr. Nandrajog is rejected.

101. Coming to the second submission of Mr. Nandrajog that the learned Tribunal erred in holding that the PCC could not have been kept in abeyance, suffice to state, the learned Single Judge agreed with the conclusion drawn by the learned Tribunal in paragraphs 257 to 263, wherein the learned Tribunal has held as under:

> *"257. The Tribunal has thoroughly examined the Concession Agreement, and is of the view that the said agreement does not contain any provision which provides that a PCC, once issued, can be either kept in abeyance or withdrawn.*
> *258. It is the Tribunal's considered view that once the I.E. issued the PCC, further to its letter of 08.12.2016, after being satisfied that the tests were successful, and the requisite portion of the highway was complete, the PCC remained validly issued, and it could not be withdrawn or kept in abeyance for any reason. The Tribunal also notes that the decision of the I.E. to keep the issuance of the PCC in abeyance on grounds mentioned in its letter of 17.12.2016 was invalid, as the PCC had already been issued. Additionally, the letter issuing the PCC of 08.12.2016 stated certain conditions that had to be met, but the Concessionaire was never given the opportunity to meet these requirements at all. In the circumstances, not only was the decision to keep the PCC in abeyance invalid, it was also contradictory to the position taken by the authority previously.*
> *259. A case was made out that the PCC was withheld under the terms of Article 14.5 of the Concession Agreement. The Tribunal has considered the provision, and finds that several conditions need to be met in order for Article 14.5 to operate. Pertinently, the provision specifically relates to withholding of PCC, but does not apply once the PCC has been issued. Therefore, in the present case, as the PCC was already issued, this provision would not come into operation.*
> *260. Even if one persists with examining the applicability of*

Article 14.5 further, it becomes clear that the facts of the case do not allow for such applicability. For Article 14.5 to apply, a series of conditions must be met. At the outset, the I.E. ought to have determined that the Project Highway or any part thereof did not conform to the provisions of the Concession Agreement and could not be safely placed in commercial operation, and made a report to such effect. The conditions in Article 14.5 further require that upon receipt of such a report, Respondent No. 2 would inspect the Project Highway, and notify Respondent No. 1 of such defects and deficiencies in the Project Highway and direct the I.E. to withhold issuance of the PCC.

261. On the contrary, what transpired was in fact quite different. The Tribunal notes that the I.E. initially recommended issuance of PCC, stating that delays were caused due to Respondent No. 2. After a series of communications, Respondent No. 2, the I.E., the Project Director and Respondent No. 1, jointly conducted an inspection, in which it was concluded that the portion of the highway that had been completed was indeed fit for commercial operation. No report suggesting that it was not fit was made, and none of the subsequent requirements (as under Article 14.5) were met. I.E.'s letter dated 17.12.2016 which stated that the PCC was being kept in abeyance, said that this decision was to stand until completion of the Theni Bypass which was supposedly agreed by Respondent No. 1 in terms of a "draft supplementary agreement". The Tribunal notes that the earlier letter issued by the I.E., dated 08.12.2016, in which it had issued the PCC, had clearly stated that the Theni bypass was to be completed before the first annuity payment date, i.e., 6 months after PCC date (para 24 of the letter dated 08.12.2016). The decision to keep the PCC in abeyance for reason of not completing the Theni bypass, went against the earlier decision granting the Concessionaire time to do so till 6 months thereafter. This was a clearly contradictory exercise of authority, and cannot be held to be valid.

262. In the Tribunal's view, therefore, the PCC has remained validly issued by the I.E. It follows that, after the Concession Agreement was terminated, the Claimant's request for Termination Payment is also valid, and ought to be fulfilled.

263. Accordingly, Issue No. 5 is answered as follows: Answer to Issue No. 5. The letter dated 17.12.2016 issued by I.E. purportedly keeping the PCC dated 08.12.2016 in abeyance was non est, void ab-initio and beyond the scope and powers of I.E and Respondent No. 2"

(emphasis supplied)

102. The submission of Mr. Nandrajog is that the IE has corrected its error/mistake by keeping the PCC in abeyance. According to him, if the contrary is held to be correct, every mistake of IE will necessarily have to be litigated in the Courts and Arbitral Tribunal for it to be set aside and this will entail unnecessary litigation as such when a party has an administrative duty to act in execution of its duty, the same authority is duty bound and obligated to correct it as soon as it is brought to its knowledge.

103. His other submission is that the learned Tribunal had failed to consider Article 14.3.2 of CA(s) i.e., PCC could have only been issued after 75% of the total length of Project Highway has been completed. Whereas, it has only completed 90.61 km, which is less than 75% and the IE has rightly corrected its mistake and kept the PCC in abeyance till 75% of the total length of the project Highway is completed. In other words, it is his submission that, IE was obligated under the contractual provision to ensure compliance thereto.

104. Suffice to state, the reasons for the learned Tribunal to answer the issue relatable to PCC in the context of the facts has been noted by the learned Tribunal under Issue no.5, which can be seen from paragraphs 248 to 256, of the award, in the following manner:

"248. It is clear that the terms of the Concession Agreement[579] provided that it was the responsibility of Respondent No. 2 to

provide the vacant land and access to the project site (Article 10.3.2[580]), and any delays in such provision of land and right of way would invite a daily sum of damages proportional to the area, payable by Respondent No. 2 to the Concessionaire (Article 10.3.4[581]). The Concession Agreement[582] also specifically provides that once the Concessionaire receives such right of way, it shall complete the works within a reasonable period of time, and also that the issuance of the PCC shall not be delayed due to access not being granted to any part of the site (Article 10.3.5[583]). The Tribunal notes, in pertinent part, that Article 14.3.1[584] clearly provides that the I.E. shall not withhold the PCC for reason of any work remaining incomplete if the delay in completion thereof is attributable to Respondent No. 2.

249. Critically, the Tribunal notes that the Concessionaire's obligation to complete the affected works subsists only if Respondent No. 2 has paid the damages as specified (Article 10.3.5[585]), and if Respondent No. 2 stops paying such damages, the Concessionaire is no longer obliged to complete such works on such part of the Site.

250. In the present case, it is recorded (Respondent No. 1's letter dated 22.09.2014[586]) that Respondent No. 1 had completed all works in the land handed over by Respondent No. 2 within 90 days from the Appointed Date, following which, as per due process, it requested the I.E. to issue the PCC. This was in accordance with Article 14.3[587] of the Concession Agreement.5[88] The I.E. recommended onwards that the PCC be issued for a length of 80.561 km vide its letter No. ICT 654 TPV:2911 dated 13.03.2014 had recommended the issuance of PCC to the Project Director of Respondent No. 2 for a length of 80.561 km. However, in a subsequent letter no. ICT:654 TPV: 4302 dated 17.04.2014, the I.E. informed the Concessionaire that its recommendation for issuance of PCC was rejected by Respondent No. 2 as the completed stretches of the Project Highway (i.e., 80.561 km) was less than 75% of the Project Highway. Upon a request for reconsideration by the Concessionaire, it was invited by the NHAI vide letter dated 01.09.2014 to submit a proposal for issuance of PCC to the I.E. for further action, which it duly did by letter dated 22.09.2014.

251. Thereafter, the I.E., in its letter dated 07.11.2014[589] to the Project Director of Respondent No. 2, categorically recommending the issue of PCC for the completed stretches of 80.561 kms, highlighting that:

i. since the project began, there were problems in handing over 'Right of Way' and 'Right to Access' for highway construction;

ii. Respondent No. 1 had substantially completed the works in the length of the hindrance free highway available to it;

iii. As per Article 14.2[590] of the Concession Agreement,[591] on completion of the construction works and the I.E. determining the Tests to be successful, the I.E. must issue a PCC. These required tests had already been carried out in March 2014;

iv. Once a PCC is issued, it cannot be withheld, if reasons for delay in completion of the whole Highway is attributable to Respondent No. 2 for delay in handing over of land and State Government Authorities for delay in shifting of utilities as per Articles 10.3.5,[592] 14.3.1[593] and 11.2[594] of the Concession Agreement;[595]

v. NHAI Circular No. NHAI/CMC/2010/Misc./13873 dated 07.09.2010[596] permits issuance of PCC for completed stretches in such situations; vi. Respondent No. 1 is entitled to receive full Annuity Payment of Rs. 20.5 crore on completion of the first six months after the date of issue of PCC since the delay in completion of the Project within the Scheduled Two-Laning Completion Date of 31.08.2013 was due to the delay in handing over of encumbrance free and vacant access to the Concessionaire.

252. The Tribunal notes that the response of Respondent No. 2, to issue a cure period notice dated 10.06.2015 instead, in which it blamed Respondent No. 1 for the delays, according to the Claimant, was contradictory to the position taken by the I.E.

253. The Tribunal also notes that in the intervening period, Respondent No. 1 had had to resort to seeking additional loans and raising additional funds. However, according to the <u>Claimant, if Respondent No. 2 had approved the PCC upon the recommendation of the I.E., the annuity payments would have started flowing to Respondent No. 1, and it would not have had to resort to any loans or additional funding, and would have been able to continue its works without any financial</u>

impediments.

254. The Tribunal notes that after an additional portion of the works was completed, the I.E. wrote, in a letter of 30.09.2016,[597] to the Chief General Manger cum RO of Respondent No. 2, expressing its intention to issue a PCC for the completed stretches. Respondent No. 2, in its letter dated 24.10.2016,[598] also explicitly and clearly concurred with this recommendation, stating as much in the said letter, after recording that it had inspected the completed length of 90.671 km of the Project Highway, along with the I.E., the Project Director and Respondent No. 1, and found it to be safe and reliable for commercial operation. Respondent No. 2, besides confirming its concurrence with I.E.'s recommendation to issue the PCC, conveyed its authorization for the issuance as well, as is clear from the language of the letter, which states that "Undersigned therefore concurs with your recommendation for issuance of PCC…. and accordingly authorization is hereby conveyed for issue of Provisional Completion Certificate for the completed length of 90.671 km."

255. The Tribunal notes that thereafter, the I.E. issued the PCC for the completed stretch of 90.671 Km by its letter 08.12.2016,[599] but also required the Concessionaire to execute a Supplementary Agreement before 25.12.2016, and completion of balance works by 31.10.2017. However, before either of these requirements could be fulfilled, the I.E. issued another letter, on 17.12.2016,[600] that the PCC is kept in abeyance until "completion of Theni Bypass as agreed by the Concessionaire in the draft Supplementary Agreement and signing of the Supplementary Agreement as mentioned in paras 24 and 26 respectively of our aforesaid letter dated 08.12.2016."

256. The Tribunal notes the Claimant's position that this was completely different from the I.E.'s previous letter dated 08.12.2016,[601] in which it was stated that the Concessionaire should complete either Periyakulam Bypass or Theni bypass before the first Annuity payment becomes due. Had the terms of the 08.12.2016 been followed, the first annuity payment would have become on 08.05.2017 (i.e., 6 months after the issuance of the PCC)."

(emphasis supplied)

105. If the aforesaid paragraphs are read along with paragraphs 257 to 263 of the Award, it is clear that the PCC was issued, pursuant to a letter written by the IE dated 30.09.2016 to the Chief General Manager (of the appellant) expressing his intention to issue a PCC for the completed stretches. The appellant in its letter dated 24.10.2016 concurred with the recommendation in as much as the appellant in the said letter has stated that, it had inspected the completed length of 90.671 KM of the project Highway along with the IE, the project director and respondent no.1, wherein it is found to be safe and feasible for commercial operation. The appellant confirming its concurrence, authorised the IE to issue the PCC. So, it follows that the conclusion drawn by the learned Tribunal as upheld by the learned Single Judge is justified and needs no interference under section 37 of the Act.

106. The plea of Mr. Nandrajog that, it was a mistake on the part of the IE to issue the PCC cannot be accepted in the facts which have been noted by the learned Tribunal. The learned Single Judge has in paragraphs 54, 55, 56, 57, 59, 60,61 and 62 of the impugned judgment has held as under:

> *"54. On conjoint reading of Clauses 10.3.2, 10.3.4 and 10.3.5, it was the sole responsibility of the Authority (in the present case, the petitioner) to provide access and vacant land as per the Appendix to the respondent No. 2 within the 90 days period from the date of Appointed Date and if there was any delay in providing the same, it was to attract damages payable to the respondent No. 2 by the petitioner. Further, the construction work on the land provided was to be completed within 90 days and the issuance of PCC was not be delayed due to access being not granted to any part of the site. It is necessary to highlight the said clauses as in the present case as it is a case where the project site was not fully handed over by the petitioner to the respondent No. 2.*
>
> *55. As per Clause 14.3.1 and 14.3.2, upon the request of the*

Concessionaire (in the present case, the respondent No. 2), the IE may issue PCC subject to tests being successful and if the Project Highway could be safely and reliably placed in commercial operation. Further, the IE was not to withhold the PCC if the work was incomplete due to delay attributable to the petitioner. Also, PCC was only to be issued if the 75% of the total length of the project highway was completed. Clause 14.5 states that if the IE determined that Project Highway was not in conformity with the provisions of the Concession Agreement and could not be safely placed in commercial operation, IE should forthwith send a report to the petitioner and respondent No. 2. If the petitioner was also of the same opinion, then the petitioner could direct the IE to withhold the PCC.

56. The respondent No. 2, after completion of the construction work within 90 days from the appointed date, issued a letter dated 22.09.2014 to IE requesting grant of PCC. IE responded to the said letter of the petitioner, vide letter dated 07.11.2014 by stating that respondent No. 2 had completed the work in the length available and there were major problems at the petitioner's end in handing over the "Right of Way" and "Right to access" for construction meaning thereby that the respondent No. 2 was entitled to Annuity Payment as there was delay in handing over of encumbrance free and vacant access to the respondent No. 2 by the petitioner. Vide letter dated 17.04.2014, IE informed the respondent No. 2 that PCC request has been rejected by the petitioner on the ground that 75% of the Project Highway was not completed.

57. IE again wrote a letter dated 07.11.2014 to the petitioner by reiterating the above grounds. In the meanwhile, the petitioner issued Cure Period Notice on 10.06.2015. Again, after the additional work was completed, IE vide letter dated 30.09.2016 expressed its intention to issue PCC. <u>The petitioner vide letter dated 24.10.2016 confirmed the request of the IE after inspecting the 90.671 km of the Project Highway. Thereafter, the IE vide letter dated 08.12.2016 issued PCC for the completed stretch of 90.671 KM of the Project Highway and further stated that the respondent No. 2 shall complete the Periyakulam Bypass or Theni Bypass before the first annuity payment falls due i.e. 08.05.2017 (6 months after issuance of</u>

PCC) and the remaining bypasses before 31.10.2017 and to execute SA.

xxxx xxxx xxxx xxxx

59. IE again issued a letter dated 17.12.2016 informing the respondent No. 2 that PCC had been kept in abeyance by stating that "until completion of the Theni Bypass as agreed by the Concessionaire in the draft Supplementary Agreement and signing of the Supplementary Agreement as mentioned in paras 24 and 26 respectively of our aforesaid letter dated 08.12.2016".The operative part of letter dated 17.12.2016 is extracted below:-

> *"Ref: ICT letter no.ICT:654:TPV:10532 dt. 08.12.2016 Dear Sir, In continuation to our letter no.10532 dated 08.12.2016, it is hereby notified that Provisional Certificate dated 08.12.2016 enclosed herewith for the above mentioned project is kept in abeyance, until completion of the Theni Bypass as agreed by the Concessionaire in the draft Supplementary Agreement and signing of the Supplementary Agreement as mentioned in paras 24 and 26 respectively of our aforesaid letter dated 08.12.2016."*

60. To my mind, the letter dated 17.12.2016 is contrary to the letter dated 08.12.2016 as the former is against the deadlines/instructions provided in the latter.

61. A perusal of the letter dated 17.12.2016 show that the PCC was kept in abeyance till Theni bypass is completed and the SA is signed. However, the letter dated 08.12.2016, while issuing PCC, the IE himself had granted time to complete the bypasses and signing of the SA. Respondent No. 2 was not given time to complete the requirements as mentioned in the letter of 08.12.2016. Further, clause 14.5 of Concession Agreement only gives the liberty to withhold the PCC before it is issued by the IE but does not give any liberty to withhold the PCC once it is issued.

62. Keeping the PCC in abeyance by the IE vide letter dated 17.12.2016 was beyond the terms of the said clause i.e. 14.5. The fact that the PCC was granted after the petitioner confirmed its concurrence and recommended its authorization then its issuance cannot be ignored. The Concession Agreement *nowhere provides that the PCC once issued can be kept in abeyance or withdrawn. The interpretation given by the learned senior counsel for the petitioner that IE after realizing its mistake, kept the PCC in abeyance as 75% of the total length of the Project Highway was not completed is against the clause quoted above which gives IE the only right to withhold the PCC „before" it is issued but not once the PCC is issued. Additionally, the PCC was issued after inspection by the IE and approval by the petitioner. If the interpretation propounded by the petitioner is accepted then the said clause will lead to absurdity."*

(emphasis supplied)

107. At this stage, we may refer to the finding of the learned Tribunal in paragraph 259 of the Award on the interpretation of Article 14.5 of the CA. The paragraph 259 is already reproduced in paragraph 101 above.

108. The aforesaid conclusion of the learned Tribunal and the learned Single Judge is justified and cannot be said to be perverse in law. It is a plausible interpretation, which cannot be interfered with. Hence, this submission of Mr. Nandrajog is liable to be rejected.

109. Insofar as the submission of Mr. Nandrajog that the learned Tribunal has directed the deposit of Termination Payment is erroneous as according to him, the Termination Payment under the CAs is not payable if termination happens due to concessionaire's default. He has heavily relied upon the Article 37.3.1 of the CA(s) which stipulates that, concessionaire acknowledges that no Termination Payment shall be due or payable on account of a concessionaire default occurred prior to COD. He also submitted that the COD is achieved upon issuance of Completion Certificate / PCC which is issued by the IE. Since the COD was not achieved as the

PCC issued by IE was kept in abeyance, the Termination Payment is not payable. He has also submitted that the Termination Payment becomes only payable when the concessionaire raises the demand for the same. According to him, only the parties to the contract can enforce their rights and liabilities under such contract, as such, respondent no.1 is precluded from seeking enforcement of CA(s)/ Termination Payment

110. According to the learned Tribunal, the PCC was validly issued on 08.12.2016. Therefore, COD was achieved on the date of issuance of PCC as per Article 15 of the CA. In this regard, the learned Single Judge has in paragraphs 73 to 84 of the impugned judgment has held as under:

> *"73. Clause 40 of the Concession Agreement reads as under:-*
>
> > *"40.3 Substitution Agreement*
> >
> > *40.3.1 The Lenders' Representative, on behalf of Senior Lenders, may exercise the right to substitute the Concessionaire pursuant to the agreement for substitution of the Concessionaire(the "Substitution Agreement") to be entered into amongst the Concessionaire, the Authority and the Lenders' Representative, on behalf of Senior Lenders, substantially in the form set forth in Schedule – V."*
>
> *74. A perusal of the said clause makes it evident that the parties herein were obligated to enter into SA. Pursuant to the said clause, the parties herein entered into the SA on 31.05.2013.*
>
> *75. Clause 2 of the SA reads as under:-*
>
> > *"2. ASSIGNMENT*
> >
> > *2.1 Assignment of rights and title The Concessionaire hereby assigns the rights, title and interest in the Concession to, and in favour of, the Lenders'*

> *Representative pursuant to and in accordance with the provisions of this Agreement and the Concession Agreement by way of security in respect of financing by the Senior Lenders under the Financing Agreements."*

76. On perusal, it is clear that the Concessionaire has assigned its rights, title and interest in favour of the Lenders Representative, pursuant to execution of the SA, i.e. the respondent No. 1. Furthermore, the respondent No. 2 under the Concession Agreement has been described as "Concessionaire" which includes its successors and permitted assigns and substitutes. On conjoint reading, it is clear that there is a conscious and deliberate intent on the part of the contracting parties to transfer and assign all rights, title, and interest held by the Concessionaire to the Lenders Representative i.e. the respondent No. 1. Consequently, the respondent No. 1 after execution of the SA, steps into the shoes of the Concessionaire. Hence, the respondent No. 1 acting in the capacity of the respondent No. 2 is entitled to make such demands.

77. Assuming for the sake of argument that the Concessionaire can only demand the Termination Payment, such a contention completely ignores the plain language and "commercial purpose" of the Agreements and if it is implemented, it will render effective the carefully crafted substitution mechanism. This interpretation would disregard the intent of the parties, who clearly intended that the lender, upon substitution, would possess all the rights necessary to recover its dues including the Termination Payment.

78. In somewhat similar circumstances, a coordinate bench of this Court in PNB II observed as under:-

> *"36. Besides, the debt had been extended, by the lenders, led by PNB, to JST, for the project forming subject matter of the Concession Agreement. Once the Concession Agreement itself stood terminated, the loaned amount was required to be returned. The lenders, led by PNB, had no concern with the inter se*

<u>disputes between NHAI and JST. It is for this reason that the Concession Agreement, rightly, made deposit by NHAI, into the Escrow Account, as well as the withdrawal, thereby, by the lenders, the inevitable sequitur to termination of the Concession Agreement.</u> The amounts claimed by NHAI from JST were subject matter of the inter se dispute between NHAI and JST. <u>The right of NHAI to claim these amounts from JST cannot be gainsaid. That, however, was rightly made subject matter of a separate arbitral proceeding, which is presently pending. Whatever be the outcome of the arbitral proceeding, the fact that the Concession Agreement stands terminated and that, thereby, NHAI became liable to deposit, into the Escrow Account, at least 90 of the Debt Due, is an undeniable, even if uncomfortable (to NHAI), contractual reality.</u> The attempt of NHAI to "adjust", from the said figure, the amounts which, according to it, are liable to be paid by JST, amounts to taking, from Peter, what is due from Paul. NHAI and Paul may be at loggerheads in the first arbitral proceeding; that cannot delegate from the right of Peter, to the return of the debt extended by it."

(Emphasis added)

79. The AT in paragraph 275 of the Arbitral Award in this regard has observed as under:-

"275. Respondent No. 2 maintains that the demand for Termination Payment should and could have been made only by the Concessionaire in order for the Termination Payment to become due and payable. However, this argument, as discussed earlier, has no merits. The Tribunal is of the view that the Concessionaire need not request for the Termination Payment at all; making such a request mandatory would nullify and effectively defeat the entire purpose of the scheme laid out in Article 37.3 of the Concession Agreement read with the Escrow Agreement and the Substitution Agreement"

80. Hence, the contention of the petitioner that the demand of the Termination Payment can only be made by respondent No. 2 is rejected.

81. It is also argued that if the Concession Agreement is terminated due to the defaults committed by the respondent No. 2 before achieving COD, the Termination Payment shall not be due and payable.

82. Clause 37.3 of the Concession Agreement reads as under:-

> *"37.3 Termination Payment*
>
> *37.3.1 Upon Termination on account of a Concessionaire Default during the Operation Period, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to the discounted value of future Annuity payments, the discounting factor applied being the then SBI PLR + (plus) 3% less Insurance Cover; provided that if any insurance claims forming part of the Insurance Cover are not admitted and paid, then 80%(eight per cent) of such unpaid claims shall be deducted from the Termination Payment so assessed. For the avoidance of doubt, the Concessionaire hereby acknowledges that no Termination Payment shall be due or payable on account of a Concessionaire Default occurring prior to COD.*
>
> *37.3.2 Upon Termination on account of any Authority Default, the Authority shall pay to the Concessionaire, by way of Termination Payment, an amount equal to the discounted value of future Annuity payments, the discounting factor applied being the then SBI PLR – (minus) 3%.*
>
> *37.3.3 Termination Payment shall become due and payable to the Concessionaire within 15 (fifteen) days of a demand being made by the Concessionaire to the Authority with the necessary particulars, and in the*

event of any delay, the Authority shall pay interest at a rate equal to 3% (three per cent) above the Bank Rate on the amount of Termination Payment remaining unpaid; provided that such delay shall not exceed 90 (ninety) days. For the avoidance of doubt, it is expressly agreed that Termination Payment shall constitute full discharge by the Authority of its payment obligations in respect thereof hereunder.

37.3.4 The Concessionaire expressly agrees that Termination Payment under this Article 37 shall constitute a full and final settlement of all claims of the Concessionaire on account of Termination of this Agreement for any reason whatsoever and that the Concessionaire or any shareholder thereof shall not have any further right or claim under any law, treaty, convention, contract or otherwise."

83. On perusal, Clause 37.3.1 states that the if the Agreement is terminated on account of the Concessionaire default during the operation period then the Authority i.e. the petitioner would pay as per the clause quoted above. Further, if the Agreement terminated prior to COD on the Concessionaire default, no amount shall be due or payable. Clause 37.3.2 and 37.3.3 states the formula to be applied for Termination Payment alongwith the interest component.

84. I have already observed that the letter dated 17.12.2016 is contrary to the letter dated 08.12.20216 and once PCC is issued in terms of the Concession Agreement, the same cannot be kept in abeyance and/or withdrawn. PCC was validly issued on 08.12.2016. Therefore, COD was achieved on the date of issuance of PCC as per Article 15 of the Concession Agreement and the demand made by the respondent No. 1 for Termination Payment was valid. Further the Concession Agreement was terminated vide Termination Notice dated 22.05.2019 w.e.f. 09.04.2019. The argument of the petitioner that the Agreement was terminated prior to COD is devoid of merit as PCC (08.12.2016) was issued before the Termination Notice dated

22.05.2019 w.e.f. 09.04.2019.”

(emphasis supplied)

111. Suffice to state that this plea of Mr. Nandrajog is also unmerited in view of our conclusion on his previous submission, based on the interpretation of Article 14.5 of the CA and the same has been rightly dealt with by the learned Single Judge in paragraph 84 of the impugned judgment. So, we find no reason to interfere with the conclusion drawn by the learned Single Judge. Hence, the plea of Termination Payment not becoming due and payable is not sustainable.

112. One of the pleas of Mr. Nandrajog is that the learned Tribunal has erred in arriving at figures of Rs.229.50 and Rs.181.81 Crores as Termination Payment is erroneous, as according to him, adjudication of quantum of Termination Payment is beyond the scope of reference as there is no provision in the EA or SA that enables the learned Tribunal to calculate Termination Payment. To put it straight, he stated that Termination Payment can only be calculated while entertaining disputes/claims arising out of CA(s) which are/shall be subject matter of Arbitral proceedings between the concessionaire and the appellant. We note the learned Single Judge has decided identical plea by stating in paragraph 87 of the impugned judgment, in the following manner: -

> *“87. I have already observed above that the Concession Agreement forms part of the EA and SA. Hence, there is no question that the AT exceeded its jurisdiction. Also, the calculation of the Termination Payment is a question of fact not a question of jurisdiction. The answer to the said contention i.e. calculation of Termination Payment, clearly lies in Clause 37 of the Concession Agreement and more particularly in Clause*

> *37.3.2 and 37.3.3. Further, the petitioner has not argued that the amount of Rs. 229.50 crores suffer from any errors or that extra amounts have been added instead of this, only a mere averment has been made without any evidence. On perusing the SOD filed by the petitioner, the calculation of Termination Payment has not been disputed."*
>
> *(emphasis supplied)*

113. We agree that the said conclusion drawn by the Learned Single Judge, which is a factual finding. Hence, this plea of Mr. Nandrajog is also liable to be rejected. We order so.

114. In so far as judgments relied upon by Mr. Nandrajog in the cases of ***Associated Engineering Co. (supra), Rajasthan State Mine and Minerals Ltd. (supra), Food Corporation of India (supra) & Indian Oil Corporation Limited (supra)*** are concerned, they have no applicability to the facts of the case, as the aspect of calculation of Termination Payment was never disputed before the learned Tribunal. The learned Single Judge has reiterated the finding of the learned Tribunal in paragraph 87 of the impugned judgment, which we have reproduced above. Hence, the contention of the appellant that the learned Tribunal exercised jurisdiction beyond the provisions of the contract, is devoid of any merit.

115. In so far as judgments in the case of ***Visa International Ltd. (supra) & Nandram Hanutram (supra)*** are concerned, Mr. Nandrajog submitted that the application for arbitration can be made only when a dispute arises between the parties to the arbitration agreement. It is the finding of the learned Tribunal on facts that the arbitration has been invoked by the respondent no.1 under EA & SA for the Termination Payment to be

deposited in the Escrow Account. The submission that the dispute is between the appellant and the concessionaire, and whether the lender/respondent no.1 can step into the shoes of the concessionaire is settled by the learned Single Judge in paragraph 76 of the impugned judgment as reproduced by us in paragraph 110 and no interference is called for. This answers the submission made by Mr. Nandrajog, as noted by us in paragraph 52 above.

116. In so far as judgment in the case of ***Transstroy Tirupati Tiruthani Chennai Tollways Pvt. Ltd. (supra)*** is concerned, the issue before the Court was with regard to the Bank's right to substitution upon the occurrence of concessionaire's default. The said judgment has no applicability to the facts of this case and in view of our findings above.

117. In view of our above discussion, these appeals being devoid of merits are dismissed. Pending applications are dismissed as infructuous.

V. KAMESWAR RAO, J

VINOD KUMAR, J

JULY 09, 2026
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