

Via video conferencing

\$~

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

Date of Decision : 17.02.2021

+ O.M.P.(I) (COMM.) 312/2020 & IA No.8975/2020(impleadment), IA No.8981/2020(stay)

M/S MEP SANJOSE TALAJA MAHUVA ROAD PVT. LTD

..... Petitioner

Through: Dr. Abhishek Manu Singhvi, Sr. Adv,
with Mr. Rajiv Shankar Dwivedi, Mr.
Azeem Samuel, Mr. Sushant Kumar
Sarkar & Mr.Rishabh Jain, Adv.

versus

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through: Mr. Parag Tripathi, Sr. Adv. with Ms.
Padma Priya & Ms. Shreya Sethi,
Adv.

+ O.M.P.(I) (COMM.) 315/2020 & I.A. 8974/2020(impleadment), I.A. 8982/2020(stay)

M/S. MEP SANJOSE MAHUVA KAGAVADAR ROAD PVT. LTD

..... Petitioner

Through: Mr. Mukul Rohatgi, Mr. Atul Nanda,
Sr. Adv. with Mr. Rajiv Shankar
Dwivedi, Mr. Azeem Samuel, Mr.
Sushant Kumar Sarkar & Mr.Rishabh
Jain, Adv.

versus

M/S NATIONAL HIGHWAYS AUTHORITY OF INDIA

..... Respondent

Through: Mr. Parag Tripathi, Sr. Adv. with Ms.
Padma Priya & Ms. Shreya Sethi,
Adv.

+ O.M.P.(I) (COMM.) 328/2020
INDIA INFRASTRUCTURE FINANCE COMPANY LIMITED
..... Petitioner
Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.
Sanjay Gupta & Mr. Shivansh Singh
& Ms. Mehaak Jaggi, Advs.

versus

M/S NATIONAL HIGHWAY AUTHORITY OF INDIA & ANR.
..... Respondents
Through: Mr. Parag Tripathi, Sr. Adv. with Ms.
Padma Priya, Ms. Shreya Sethi and
Mr. Dhruv Nayar, Advs. for R-1.
Dr. Abhishek Manu Singhvi &
Mr. Atul Nanda, Sr. Advs, with Mr.
Rajiv Shankar Dwivedi, Mr. Azeem
Samuel, Mr. Sushant Kumar Sarkar &
Mr. Rishabh Jain, Advs for R-2.

+ O.M.P.(I) (COMM.) 329/2020
INDIA INFRASTRUCTURE FINANCE COMPANY LIMITED
..... Petitioner
Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.
Sanjay Gupta & Mr. Shivansh Singh
& Ms. Mehaak Jaggi, Advs.

versus

M/S NATIONAL HIGHWAY AUTHORITY OF INDIA & ANR.
..... Respondents
Through: Mr. Parag Tripathi, Sr. Adv. with Ms.
Padma Priya, Ms. Shreya Sethi and
Mr. Dhruv Nayar, Advs. for R-1.
Dr. Abhishek Manu Singhvi &
Mr. Atul Nanda, Sr. Advs, with Mr.
Rajiv Shankar Dwivedi, Mr. Azeem
Samuel, Mr. Sushant Kumar Sarkar &
Mr. Rishabh Jain, Advs for R-2.

**CORAM:
HON'BLE MS. JUSTICE REKHA PALLI**

REKHA PALLI, J

JUDGMENT

1. The present decision disposes of four petitions under section 9 of the Arbitration & Conciliation Act, 1996 raising disputes in relation to two separate but similar Concession Agreements dated 08.07.2016 and 09.08.2016, executed between MEP, the Concessionaire and the National Highways Authority of India (NHAI). The first two petitions, being O.M.P.(I) (COMM.) 312/2020 and O.M.P.(I) (COMM.) 315/2020, have been filed by the Concessionaire seeking stay of the two notices issued by the NHAI on 18.09.2019 expressing its intention of terminating (IOT notice) the two Concession Agreements in question, as also from initiating any coercive actions in that respect. Whereas, the remaining two petitions, being O.M.P.(I) (COMM.) 328/2020 and O.M.P.(I) (COMM.) 329/2020, have been filed by the senior lenders' representative, India Infrastructure Finance Company Limited (IIFCL), seeking certain specific injunctions against the NHAI for the purpose of ensuring that the rights of the senior lenders under the two Concession Agreements and the consequently executed two Substitution Agreements, are not frustrated by the actions of the NHAI stemming from these IOT notices.

2. Though no formal reply has been filed by the respondents in any of the four petitions, both sides have filed extensive written submissions and

documents, on which they sought to place reliance. Accordingly, with the consent of the parties, the petitions were taken up for final disposal.

3. The Concessionaires in the Concession Agreements dated 08.07.2016 and 09.08.2016 are M/s MEP Sanjose Talaja Mahuva Road Pvt. Ltd. and M/s. MEP Sanjose Mahuva Kagavadar Road Pvt. Ltd. respectively, which are special purpose vehicles formed out of a joint venture between M/s MEP Infrastructure Developers Ltd. and M/s Sanjose India Infrastructure & Construction Pvt. Ltd. - only for the purpose of carrying out the work set out in the two Concession Agreements. The respondent no.1 in all these petitions is the National Highways Authority of India (NHAI), an autonomous statutory body responsible for development, maintenance, management, operation and toll collection of the country's national highways.

4. The two Concession Agreements related to the conversion of a contiguous stretch of National Highway-8E (NH-8E) in the state of Gujarat, falling between design chainages 53.585-100.100 KM (Talaja-Mahuva section or Package II) and 100.100-139.915KM (Mahuva-Kagavadar section or Package III), into a four-lane highway. These two projects were being executed under the NHAI's Project Implementation Unit at Bhavnagar, which had four coastal road network construction projects under its jurisdiction, and Packages II and III formed a part thereof.

5. The projects were based on the Hybrid Annuity Mode (HAM) mode introduced by the Central Government under NHDP-IV, which meant that part of the funds required to carry out the work under the Concession Agreements would be provided by the Government, whereas the remaining had to be arranged by the Concessionaire. This is when, in the year 2017, the

senior lenders' consortium stepped in. They appointed IIFCL to represent their interests and extended credit facilities to the Concessionaires to enable it to meet its remaining financial needs for completing the project work. The senior lenders executed two Substitution Agreements; one with the NHAI and M/s MEP Sanjose Talaja Mahuva Road Pvt. Ltd., on 07.04.2017 (O.M.P.(I) (COMM.) 329/2020) and the other with the NHAI and M/s. MEP Sanjose Mahuva Kagavadar Road Pvt. Ltd. on 08.05.2017 (O.M.P.(I) (COMM.) 328/2020).

6. For the sake of convenience, only the facts relevant to the Talaja-Mahuva project, forming the basis of OMP(I)(COMM) 312/2020 and 329/2020 are being noted hereinbelow.

i. The NHAI issued a Request for Proposal in early 2016, in response where to the Concessionaire submitted its bid on 25.04.2016. Its bid was accepted by the NHAI by way of a letter of acceptance dated 26.05.2016. Thereafter, on 08.07.2016, the parties entered into a Concession Agreement which set down the appointed date as 24.04.2017 and required the project work to be completed within 910 days, i.e., by 21.10.2019. To that end, the Concession Agreement set down certain milestones in Schedule G titled Project Completion Schedule. However, the Concessionaire ran into difficulties in attaining these milestones in a timely manner which resulted in the NHAI issuing a cure period notice to it on 12.10.2018, stating that its work progress rate was slow and stood at a mere 11.08% completion, against the proposed target of 20% envisaged in Milestone-I. This cure period notice was vehemently opposed by the Concessionaire on 04.12.2018. However, since the Concessionaire had failed to achieve significant progress in the cure period or the months following its reply

dated 04.12.2018, the NHAI issued the 1st IOT notice to it on 03.04.2019. This notice, however, was subsequently kept in abeyance at the Concessionaire's request till 31.08.2019, after it had unconditionally committed to making up for lost time, improving its progress percentage and catching up with the work.

ii. Notwithstanding its unconditional assurances, the Concessionaire failed to achieve the targeted progress rate by 31.08.2019 and could only chalk up a progress of 0.21% of the targets set; the NHAI addressed a letter to it in this regard on 05.09.2019. A copy of this letter was also served upon the lenders, calling upon them to initiate the process of substitution in wake of the Concessionaire's decision to initiate the process for termination. This letter was followed by a second IOT notice issued by the NHAI on 18.09.2019, reviving the IOT notice dated 03.04.2019. This period granted by the NHAI between 03.04.2019 and 18.09.2019, which is being called an Extension of Time (EoT) by the Concessionaires and the Lenders, shall be referred to as the 'first adjustment period'

iii. On 01.10.2019, the lenders issued a letter to the NHAI setting out their intention to initiate the process of substituting the Concessionaire under the Concession Agreement, which held them entitled to a period of 180 days, extendable by a further period of 90 days at their request, for getting their affairs in order and effecting substitution. A few days later, on 07.09.2019, IIFCL, NHAI and the Concessionaire met to discuss the status of substitution, the details whereof have been recorded in the Minutes of Meeting of that date. At this meeting, the Concessionaire urged that since its failure to achieve the targets in the first extension period was merely a result of unprecedented weather conditions in the state of Gujarat during this

period, which included Cyclone Vayu and torrential rains, it ought to be granted a further extension of the Concession Agreement as an opportunity to redeem its past performance. The Minutes of that date also show that IIFCL also requested the NHAI to not make haste in substituting the Concessionaire at that point, since it needed some more time to find a suitable private entity to nominate for substitution. The Minutes further show that together with the IIFCL, the Concessionaire asked NHAI to give it a further extension, by way of a last opportunity, so that it could achieve an additional 20% physical progress in the project work till 20.01.2020, subject to which the NHAI would consider the extension of the Schedule Completion Period. This period between 21.08.2019 and 20.01.2020, which is also being called an EoT by the Concessionaires and the Lenders, shall be referred to as the 'second adjustment period'.

- iv. The Concessionaire, however, remained unsuccessful in achieving the targeted progress rate in the second adjustment period as well, which became clear by January 2020. Accordingly, on 07.02.2020, another meeting was convened between IIFCL, NHAI and the Concessionaire, to discuss the status of substitution. However, the Minutes of Meeting dated 07.02.2020 show that once again, IIFCL and the Concessionaire jointly requested the NHAI to grant some more time to the Concessionaire, as also for revision of Milestones for this period, which would extend till 30.06.2020. The NHAI proceeded accommodate the Concessionaire till 30.06.2020, by explicitly stating that this period was going to be adjusted against the cumulative 180 days' provided to the lenders for substitution under the Concession Agreement. The intervening duration between 07.02.2020 and 30.06.2020, which is again being referred to as an EoT by

the lenders and the Concessionaires, shall hereinafter be referred to as the ‘third adjustment period’).

- v. Shortly after the third adjustment period came into effect, the COVID-19 pandemic hit the world, which was declared as a Force Majeure event by the Central Government and subsequently led to a national lockdown on 24.03.2020. However, a few days before that on 18.03.2020, the Petitioner had already invoked the Force Majeure clause under Article 28 of the Concessionaire Agreement on the ground that the pandemic had decelerated its work progress and crippled its ability to meet milestones in a timely manner.
- vi. The Concessionaire, through its various representations, informed the NHAI that the delay in completion of the project was a result of the extenuating circumstances brought about by the national lockdown due to which, reverse migration of labourers was resulting in under-utilization of manpower and a failure to mobilize resources at site from other locations. It was, therefore, requested that the timelines under the Concession Agreement be extended. The Concessionaire also requested the NHAI to relieve it from its obligation of making direct payment to the subcontractors/ vendors against the works executed by them, in line with the Atmanirbhar Bharat – Relief to Contractors scheme.
- vii. Without responding to these representations, the NHAI wrote to the IIFCL on 27.04.2020 asking it to furnish a status report detailing its target and progress inasmuch as the substitution of the Concessionaire by 30.06.2020 was concerned. This letter also stated that any failure to carry out substitution by 30.06.2020 would lead to the NHAI proceeding with the termination of the agreement.

viii. A few days later, on 13.05.2020, the Ministry of Finance, Department of Expenditure issued a Policy Circular clarifying that the invocation of the Force Majeure Clause would be valid only in a situation where the parties to the contract were not in default of the contractual obligations as on 19th February 2020. In line with these directions, the Ministry of Road, Transport and Highways (MoRTH) also released a circular on 18.05.2020 stating that the NHAI undertook to allow extension of time to contractors under Force Majeure Clause due to COVID pandemic, subject to the instructions contained in the circular issued by the Department of Expenditure on 13.05.2020. The NHAI also released its own circular on 26.05.2020 reiterating this incentive.

ix. In view of these circulars and guidelines, IIFCL wrote to NHAI on 16.06.2020, requesting grant of further 90 days' time to the Concessionaire w.e.f. from 30.06.2020, to continue carrying out the work under the Concession Agreement. In reply, NHAI, while stating that the Concessionaire was not entitled to any such extension and that the lenders were also not entitled to be granted their request either since they had failed to exercise their right of substitution within the cumulative period of 270 days' granted to them for this purpose, chose to accommodate the lenders this time till 30.09.2020. This shall be referred to as the 'fourth adjustment period' hereinafter.

x. In the interregnum, the Respondent issued a Notice Inviting eTender on 28.08.2020, for construction of the left out work at the project site; the NIT estimated the cost of left-over work at the project site at INR 646.61 Crores. On seeing this NIT, the Concessionaire wrote to the NHAI on

29.08.2020 under Article 38.2 of the Concession Agreement for the purpose of notifying disputes and initiating conciliation talks.

7. In September 2020, in the light of the disputes looming between the parties and the NHAI's unwavering stand that no further extension would be granted to the Concessionaires, IIFCL wrote letters to the NHAI on 08.09.2020 and 10.09.2020 requesting it to revive the IOT notices dated 03.04.2019 and 18.09.2019 so that they could take steps in respect of substitution. In its response dated 10.09.2020, the NHAI stated that there was no question of revival since these notices were already in effect. The NHAI also stated that it had already extended significant accommodations to the Concessionaire at the behest of the IIFCL, not to mention the additional deferral of 90 days granted between 30.06.2020 and 30.09.2020, which fell within the 270 days' available with the lenders for substitution under Clause 3.3.2 of the Substitution Agreement. The NHAI, thus, emphasised that the lenders had only got time till 30.09.2020, i.e., 20 days from then, to effect substitution.

8. The two petitions filed by the Concessionaires came to be filed against this backdrop. They are aggrieved on the ground that the third adjustment period granted to them could not be utilised properly owing to the pandemic, and the circulars dated 18.05.2020 and 26.05.2020 issued by the MoRTH and NHAI respectively hold them unconditionally entitled to a further extension of time, yet the NHAI is denying them an EoT. They have sought for an annulment of the NIT issued by the NHAI on 28.09.2020 and for an injunction restraining NHAI from issuing the letter of termination in respect of the two Concession Agreements. This Court, when it took up the

matter for the first time on 29.09.2020, had directed the NHAI to not take any precipitative action against the Concessionaire until a final decision was rendered by the Court.

9. Learned senior counsel appearing on behalf of the Concessionaires, Dr. Singhvi, Mr. Rohatgi and Mr. Atul Nanda, have made the following submissions:

(i) Firstly, the NHAI has prematurely and arbitrarily terminated the contract by overlooking the fact that it is bound by the various circulars and guidelines released by the Central Government, particularly the office memorandum bearing no. F.18/4/2020-PPD dated 19.02.2020 issued by the Ministry of Finance, Department of Expenditure Procurement Policy Division, Government of India which declares that the COVID-19 pandemic is a force majeure event, in order to protect contractors who are engaged in construction of highways. This force majeure event was unexpected and triggered a nationwide lockdown, all of which adversely impacted the Concessionaires' abilities to perform their duties. Then, the second and third circulars issued by the Central Government on 18.05.2020 and 03.06.2020 respectively, clearly provided that on account of the COVID-19 pandemic, the government authorities shall (i) grant all contractors an extension of time to complete the concerned project, and (ii) release payments which are due to subcontractors for the work they had already discharged. These three circulars have to be considered in the light of Section 33 of the NHAI Act, which requires the NHAI to adhere to the rules and regulations/ policy declarations of the Central Government. This is a common provision in several acts wherever the Central Government owns a large share in the statutory corporation. Thus, it is irrelevant whether the conduct of the

Concessionaires was good or bad prior to these circulars, the NHAI is a statutory creation which is amenable to the directions of the Central Government and these six circulars qualify as policy declarations explicitly stating the Central Government's intent to permit contractors, such as the Concessionaires herein, to treat the COVID-19 pandemic as a force majeure period and extend some benefits to them on that count. Therefore, when the NHAI wields no discretionary power when it comes to the implementation of these circulars, the Concessionaires must be extended the benefit of these circulars as a matter of law, not charity. An additional but important point which also needs to be noted is that none of the circulars state that the Force Majeure event itself is qualified by any 'prior default', therefore, without prejudice to its contentions, even if NHAI insists and is able to prove any default on the part of the Concessionaires, they would still be entitled to invoke the Force Majeure Clause within the Concession Agreements.

(ii) Secondly, even though it is immaterial to the application of these circulars – absolutely no question of prior default arises since the Concessionaires were still under the cure period under the Concession Agreements, which was invoked by the NHAI on 12.10.2018. The provisions relating to termination of the Concessionaires, specifically Article 31.1.1, provide that even if the Concessionaires were in default, they were entitled to be granted some time to rectify the default, after which the NHAI could issue an IOT notice to the Concessionaires and send copies thereof to the lenders for the purpose of substitution. In line with these provisions, NHAI issued the Cure Period Notice and, subsequently, the first IOT notice on 03.04.2019, which was then kept in abeyance till August 2019. The period following this, i.e., between October 2019-January 2020 was

adequately addressed by the NHAI's letter dated 17.10.2019 wherein it had impliedly conceded that no default was attributable to the Concessionaires, since they had been granted further time till 20.01.2020 as a last opportunity to catch up with the work. Ultimately this Extension of Time (EoT) period ending on 20.01.2020 came to be extended till 30.06.2020, then till 30.09.2020 and it is during this period that the six circulars in question were issued. Therefore, the plea of NHAI that the Concessionaires are defaulters completely overlooks the fact that the term 'defaulter' cannot be construed literally, but has to be interpreted constructively as per the Concession Agreement to read that the Concessionaires can be said to be in default only if they fail to cure the defaults within the period during which the notice remained in abeyance, i.e., till 30.09.2020. Since the period between 12.10.2018 and 30.09.2020 were EoTs granted by the NHAI to the Concessionaires under the Concession Agreements, the cure period was still underway in a manner of speaking. Until the expiry of this period, the Concessionaires could not be deemed to be in default at all. Thus, when these petitions came to be filed, the Concessionaires were not in default, yet the NHAI was striding forward as if they were and using this misconception to deny them the benefit of the circulars – which, in any event, they had misinterpreted.

Be that as it may, any delay in executing the project prior to 19.02.2020 is entirely attributable to a combination of factors ranging from NHAI's failure to carry out many of its obligations under the Concession Agreement in a timely manner, to the occurrence of other natural events, including Cyclone Vayu in June 2019 in the areas where the project site is located. There were failures and delays on the part of NHAI in acquiring and

handing over the entire land on which the constructions were to be carried out. The other impediments to the timely construction of the project were either attributable to the NHAI or beyond the control of the Concessionaire and were duly called into attention, ranging from informal alterations to the scope of the project by the NHAI to its failure to approve revised estimates for electrical utility shifting works involved in the project, or its failure to heed price escalations in the cost of labour and materials dictated by the prevailing market scenario, and overlooking of exclusion of GST impact. Without addressing its own failures under the Concession Agreements, the NHAI sent the 1st IOT notice on 03.04.2019. To aggravate the issue further, the NHAI then declined to issue a fresh IOT notice to the Concessionaires in September 2020, as it was supposed to - by wrongfully claiming that the 1st IOT notice was still in operation since it was never explicitly withdrawn but only kept in abeyance. This, as already mentioned, was arbitrary and completely ignored the EoTs that the NHAI had itself chosen to grant the Concessionaires.

(iii) On law, any opposition to these petitions on account of the provisions of the Specific Relief Act, 1963 is evidently erroneous on a holistic consideration of all the provisions of the Specific Relief Act. To begin with, the embargo under Section 41 (ha) read with Section 14(d) would only apply in case the contract is, by nature, determinable and, thus, can be ended without notice, without fault of any party or without the need to assign any cause or reason for termination. The present case, arising out of Concession Agreements which expressly provide for a termination process involving expression of intent to terminate, issuance of notices, assignment of cause, cure periods, etc., is certainly not determinable. On this principle, reliance

has been placed on the decisions in *Jumbo World Holdings Ltd. & Ors. Vs. Embassy Property Developments Private Limited & Ors.* 2020 SCC Online Mad 61 and *Narendra Hirawat & Co/ Ltd. Vs. Sholay Media Entertainment Pvt. Ltd.* 2020 SCC Online Bom 391. Further, the opposition to these petitions under Section 20A of the Specific Relief Act has to be considered in the light of two grounds: (i) the provision explicitly refers to the term ‘suits’ to indicate that it is exclusionary and only applies to civil suits and not petitions of this nature under Section 9 of the Arbitration Act. Considering the principle that exclusionary clauses ought to be construed strictly, any application thereof to non-suit proceedings would be a grave error in law; (ii) since the provision has been drafted with an intent to avoid any further delays or impediments in executing the project, NHAI’s prayer to terminate the Concessionaires only violates this provision since the whole process of termination, substitution and subsequent execution is bound to be time consuming; (iii) Finally, the injunction sought by the Concessionaires is in order to enforce a negative covenant, that of ensuring that any alleged Concessionaire default is not used to deprive it of its contractual right to invoke force majeure, thereby squarely falling within the purview of Section 42 of the Specific Relief Act. In these circumstances, there is neither any merit in the NHAI’s opposition to these petitions, nor in its insistence that the Concessionaires are defaulters, nor in its refusal to extend the benefit of the six circulars mentioned above, to these Concessionaires. It is therefore prayed that the NHAI be directed to refrain from issuing any letter which terminates the Concession Agreements, without considering the aspect that the third extension period had been eclipsed by the pandemic and the

Concessionaires are entitled to a further extension for a period corresponding to the time lost.

10. Mr. Sandeep Sethi, learned senior counsel appearing on behalf of the IIFCL has made the following submissions in support of the petitions filed by the lenders, being OMP(I)(Comm) 328/2020 and 329/2020:

(i) All the rights granted to the lenders under the Substitution and Concession Agreements are exclusive and unconditional rights vested upon them for the purpose of securing their interests in respect of the financing provided by them for the project, thus any interpretation by the NHAI to wrongfully contend that the period of substitution granted to the lenders thereunder had exhausted, was not sustainable. Without the financial assistance rendered by the lenders, neither of these highway construction projects would have taken off. Thus, in case the NHAI wanted to terminate these agreements, these rights granted to the lenders under the Concession and Substitution Agreements had to be protected since they enabled the lenders to recover their investment, which would be compromised otherwise and cause them enormous losses. There was always a timeline within which the lenders could exercise their right of substitution since the process of substitution itself was a time-consuming process, it was cumbersome and involved multiple stages of pre-selection and selection procedures, all for the purpose of picking an appropriate entity to undertake the project. Clauses 3.1 and 3.3 of the Substitution Agreement dated 07.04.2017 show that once the Concessionaire had been found to be in default under the terms of the Concession Agreement, it was requisite for the NHAI to send an IOT notice to the IIFCL as also the Concessionaire, and then provide the IIFCL with a period of fifteen days to make a representation stating its intent as regards its

substitution rights. After the NHAI had sent the IOT notice on 03.04.2019, it had, in its own wisdom, decided to keep the same in abeyance until September 2019, at the request made by the Concessionaire on 30.04.2019. This is where the operation of the 1st IOT notice came to an end. Thus, the 2nd IOT notice issued on 18.09.2019 was a fresh notice issued in respect of an entirely new instance of default, that of failing to honour its unconditional commitments undertaken by way of the letter dated 30.04.2019. A copy of this notice was sent to the lenders as well, granting them an opportunity to make a representation stating their intention to substitute the Concessionaire in accordance Substitution Agreement. In response, the IIFCL initially sought some time on 27.09.2019 to revert on the aspect of substitution, but on 01.10.2019 it sent another letter expressing the senior lenders' intention to initiate substitution. It was then that the NHAI called a meeting on 09.10.2019 with IIFCL and the Concessionaire to discuss the procedure towards substitution. However, on that day as well, the NHAI once again decided to keep its own IOT notice in abeyance till 20.01.2020, which meant that the 2nd IOT notice also lost its effect at that point. When the NHAI next convened a meeting with the IIFCL and the Concessionaire on 07.02.2020 to discuss the Concessionaire's lack of progress in the second extension period, it again granted an 'interim extension of time' to the Concessionaire till June 2020 to achieve any notable progress in work. Now, the IOT notice issued on 18.09.2019 could not be regarded as an extension of the notice dated 03.04.2019 at all, both the IOT notices were separate from each other and had lapsed as soon as they had been kept in abeyance by the NHAI. Since Clause 3.3 of the Substitution Agreement stipulates that the lenders can exercise their right of substitution only when the IOT notice is in force, and

not otherwise – all conversations as regards substitution, which preceded these extensions, became meaningless. Ultimately, the intervening period between the first, second and third extensions, was supposed to serve as a grace period during which the Concessionaire could catch up on its work, and achieve progress on the fresh monthly milestones which had been set out – there was an implied waiver by the NHAI during this period, in respect of taking any coercive actions against the Concessionaire under the Concession Agreement. Once the three extensions granted by the NHAI to the Concessionaire came to an end on 30.09.2020, it was mandatory for the NHAI to issue a fresh IOT notice to the Concessionaire as well as the IIFCL. After all, for the entire period during which the extensions were in operation, the waiver was subsisting and the IOT notices had lapsed; there was absolutely no way for the lenders to pursue the substitution process, because any such action would have been contractually unsustainable. Yet, out of the blue, the NHAI began claiming that this entire waiver period was counted in the 270 day-period available to the lenders under Clause 31 of the Concession Agreement. It is prayed that when there is clearly no IOT notice issued by NHAI in operation today, the lenders ought not to be deprived of the 180+90 days' substitution period granted to them.

11. Mr. Parag Tripathi, learned senior counsel for the NHAI has made the following submissions:

(i) On facts, it is evident that the Concessionaires want to keep their termination in abeyance endlessly, and these petitions are another means to that end. Since the Concessionaires have relied extensively on the three circulars to make their case, it would be pertinent to examine them in the appropriate light, that is, in the background of the facts of the present case.

Despite being handed most of the unencumbered project site on 24.04.2017, the appointed date, and being required to complete the project work within a previously stipulated period, the Concessionaires began raising inaccurate claims in respect of the inadequacy of the land handed over to them in 2018. However, even as per its own reply dated 04.12.2018 to the cure period notice, MEP Sanjose Talaja had admitted that 80% of the land had been made available to it by the NHAI. Despite the aforesaid, on 30.09.2018, with only one year left in the project period, the aforesaid Concessionaires had only achieved 23.667% physical progress in project package II (Talaja-Mahuva) and 30% completion in project package III (Mahuva-Kagavadar). The defaults of these Concessionaires were not only limited to their failure to adhere to the timelines stipulated in Schedule G of the Concession Agreement, but also included their failure to maintain the highway and compromising the safety of the users. Naturally, this was a legitimate ground for the NHAI to entertain apprehensions about whether the project could be completed within a reasonable time at all, let alone the stipulated completion date, but one thing was certain – the Concessionaires were in default. This fact was admitted by Mr. Rohatgi learned senior counsel for the Concessionaire at the time of arguments.

When the cure period notice was issued by the NHAI on 12.10.2018, it listed out these facts as also the 12 contractual violations that the Concessionaires were guilty of, and granted them sixty days to cure these defaults, with a copy marked to the lenders. In its reply dated 04.12.2018, the Concessionaire stated, among other things, that it had completed 25.19% of the work by then which, without prejudice to any averment so far, is barely an improvement on the NHAI's allegations or a legitimate

achievement over a span of two years. However, since the Concessionaires had failed to cure any of the defects over the sixty day cure period and the achieved physical progress on the project work remained abysmal, the NHAI was compelled to issue the 1st IOT notice on 03.04.2019. In response thereto, the Concessionaire hurriedly sought a meeting with the NHAI to pray for an extension of time by 120 days and for the IOT notice to be kept in abeyance. NHAI, in an attempt to be reasonable, accommodated them till 31.08.2019 by way of the first adjustment period. Soon thereafter, on 28.04.2019, the Concessionaires informed NHAI of certain steps they had taken to finally remedy some of the provisions of the contract it had violated, which was a clear sign that they had been dragging their foot on these counts from the very beginning of the project. However, without any real progress in sight by August 2019, NHAI revived the IOT notice dated 03.04.2019, on 18.09.2019. While it is on record that the Concessionaires are using the occurrence of Cyclone Vayu in June 2019 as a Force Majeure event to explain away their tardiness, the fact remains that even in May 2019, before the said Cyclone, the Concessionaires had only achieved 2.29% progress against the 5.012% of work which had been committed. Consequently, on 25.09.2019, notwithstanding this nine months' period of grace granted to it, the Concessionaires again sought a withdrawal of the IOT notice. This culminated in a meeting between the parties and the IIFCL on 09.10.2019 and led to the Concessionaires being permitted to work at the project site till 20.01.2020, at the specific request of the lenders who had exercised their substitution right and had nominated the Concessionaires to continue carrying out the work. When that failed, the parties met again and decided to grant the Concessionaires a third and then a fourth adjustment

period - all at the request of the IIFCL and its exercise of substitution rights . Thus, ever since 12.10.2018 and with the four adjustment periods granted to them so far, it is evident that the Concessionaires have been accommodated and given ample time to achieve any significant progress at the project site. Yet, they have continued to remain in default under the Concession Agreements.

(ii) It is against this backdrop that the three circulars in question ought to be considered. The circular dated 19.02.2020 issued by the Ministry of Finance confirmed the stance adopted by the Central Government that COVID-19 would be considered a Force Majeure event, but the application thereof was qualified by the phrase “wherever considered appropriate following the due procedure.”. On 18.03.2020, even before the Central Government notified the national lockdown on account of the COVID-19 pandemic, the Concessionaires had issued a letter to the NHAI invoking the Force Majeure clause. The Concessionaires, in all subsequent correspondences in April and May 2020, maintained the position that an event of force majeure had occurred and excused them from executing the project work during this period. The circular dated 18.05.2020 clearly stated that extension of time to contractors under the Force Majeure Clause due to COVID pandemic had to be made as per the OM dated 13.05.2020 which, in turn, specified that force majeure invocation would be valid only in case the parties to the contract were not in ‘prior default’ of the contractual obligations as on 19.02.2020. This position was reiterated in the NHAI circular dated 26.05.2020 and the subsequent circular dated 03.06.2020. Thus, notwithstanding the attempt of the Concessionaires to misdirect this Court by conveying the impression that these circulars were binding and the

benefits therein extended to every contractor, irrespective of the progress of the work achieved on site, that is not so. These circulars provide that all beneficiaries thereof cannot be defaulters as on 19.02.2020, a stance clearly stipulated by the NHAI in its own circular dated 26.05.2020. Thus, NHAI is not denying the applicability of these circulars in general, but insofar as the facts of the present case is concerned, it would be inconsonant with the spirit and letter of these circulars to extend the benefits therein to the Concessionaires, who have been in default since 12.10.2018. Moreover, on the aspect of invocation of the force majeure clause, reliance has been placed on the decision of a Coordinate Bench of this Court in *M/s. Halliburton Offshore Services Inc. Vs. Vedanta Limited & Anr., O.M.P. (I.) (COMM.) No. 88/2020* decided on 29.05.2020 to contend that the Concessionaires, who specifically failed to meet their obligations under the Concession Agreements, even before COVID-19 lockdown was imposed, cannot use force majeure event now, as an excuse for non-performance of the contract, keeping in view the fact that multiple and repeated opportunities to make amends have already been provided to them by NHAI.

(iv) With every counsel, the Concessionaires have changed their course of arguments. The argument in the beginning was an admission that the Concessionaires were in default, and notwithstanding the same, they remained entitled to the benefits extended in the circulars. Subsequently, at the time of rejoinder, the Concessionaires adopted a new stand, that once it is an admitted position that they were operating after the cure period notice had been issued, they cannot be treated as defaulters at all until expiry of the notice period. The Concessionaires' opposition to being called a defaulter is

neither present in their pleadings, nor in their first round of arguments. Further, on law, these petitions are barred by the provisions of the Specific Relief Act, 1963 on two grounds: the first being that Section 20A and 41(ha) specifically preclude the grant of injunctions in the case of infrastructure projects, especially if the same would inevitably delay and impede completion of the project. Furthermore, Sections 14(b) and 14(d) of the statute also preclude any such injunctions in the case of determinable contracts involving projects that require continuous performance of a duty which the Courts cannot supervise. Since Article 31.1.1 of the Concession Agreement, laying down the procedure for termination thereof, renders the contract determinable, Sections 14(b) and 14(d) apply in this case. As a result, the reliefs sought in these petitions are expressly barred by law and they ought not to be entertained at all. In any event, since the lenders have already exercised their substitution rights through the Concessionaires, in the second, third and fourth adjustment periods, the next course of action is for the NHAI to nominate a company to take the place of the Concessionaires – there is absolutely no way that the Concessionaires can be permitted to return to work.

(v) Finally, in reply to the lenders' case advanced by Mr. Sethi, the IIFCL was completely wrong to deny the operation of the IOT notice w.e.f. 18.09.2019. While the lenders are right to contend that the cumulative period of 270 days' granted to them under the agreements are sacrosanct and a way to insure them against the investment made by them in the project, at the same time, their submissions have been made in complete ignorance of the fact that the second and third adjustment periods granted on 09.10.2019 and 07.02.2020 had been granted purely at the express request of the lenders

in exercise of their substitution right. As can be seen even from the communications dated 05.05.2020 sent by the IIFCL, all parties were ad idem that these two adjustment periods were included in the 180+90 day period available to the lenders for the purpose of substitution, which period ended on 30.06.2020. As per Clause 31.1.3 of the Concession Agreement, the lenders had two choices: (i) exercise their substitution right, or (ii) require the defaults specified in the IOT notice to be cured in the 180 days' period. On 09.10.2019, the lenders' request to the NHAI to permit the Concessionaire to continue till January 2020 had to be read in conjunction with their letter dated 01.10.2019 whereunder they had expressed their intention to begin the substitution process. Thus, on 01.10.2019, the 180-day period had begun and the lenders' decision to use this time by asking the Concessionaires to carry out the work till January 2020, rather than nominating another company, clearly indicated that they had already exercised their substitution right under Clause 31.1.3 of the Concession Agreement. On 01.07.2020, once the cumulative 270 days' period had ended, the NHAI could have easily asked the lenders to step down and taken over the reign and/or issued the NITs for the remaining project work, but it did not. Rather, as an act of goodwill, the NHAI granted a final accommodation to the lenders from August 2020 till 30.09.2020 for the purpose of substitution. In this manner, the Concessionaire and the lenders had gotten three months' time over and above what they were entitled to under the Concession and Substitution Agreements, when in fact that entire period could have been used to construct the highway immaculately. That being said, the NHAI could not endlessly adopt a charitable approach towards the Concessionaire who had been a defaulter

since 2018; the NHAI is answerable to the public and not only was the Concessionaires' low quality construction and delay in meeting project timelines hard to explain, it was also dangerous since the Concessionaire had been failing to maintain the roads entrusted to it - causing safety concerns for travelers on the route. All in all, the Concessionaire had 18 months since 03.04.2019 to do the work, during which time the lenders fully exhausted the 270 days' period granted to them under the agreements. In those circumstances, the NHAI was entitled to issue a fresh NIT in August 2020 to rope in a new entity to carry out the remaining work in these projects, and no rights of the lenders were encroached upon. It is prayed that these four petitions preferred by the lenders and the Concessionaires, seeking injunctions against the RFP dated 28.08.2020, termination of the Concession Agreements and deprivation of the substitution period, are completely misguided and ought to be dismissed.

12. I have heard learned senior counsel for the parties and perused the record. What emerges is that, by way of OMP(I)(Comm) 312/2020 and 315/2020, the Concessionaires are primarily seeking to continue working at the project site, by getting the NHAI to agree to an extension of the project completion date. To that end, the Concessionaires have placed reliance on certain circulars released by the Government of India between February 2020 and October 2020 to claim that they are entitled to such an extension, which has been disputed by the NHAI on the ground that these circulars do not apply in the case of the Concessionaires at all. Then, in OMP(I)(Comm) 328/2020 and 329/2020, the IIFCL has assailed the decision of the NHAI to deduct the period between October 2019 and September 2020 granted to the

Concessionaires to continue working on-site, from the substitution period available with them under the Concession Agreements.

13. At the root of all these issues is the length of time available with the Concessionaires to finish building and maintaining the Talaja-Kagavadar stretch of NH-8E, under the two Concession Agreements. Insofar as the project schedule, contained in Schedule G of the Concession Agreement, is concerned, the Concessionaires were initially expected to complete the project work in accordance with the following timelines:

<i>Milestones</i>	<i>Target Progress</i>	<i>Total capital cost permitted to be spent out of the Financial package, in this period</i>	<i>Scheduled Date of completion</i>
<i>Milestone I</i>	<i>Petitioner ought to have achieved 20% physical progress</i>	<i>20%</i>	<i>07.02.2018 or the 290th day from 24.04.2017</i>
<i>Milestone II</i>	<i>Petitioner ought to have achieved 35% physical progress</i>	<i>35%, out of which 70% expenditure to be incurred purely on physical works</i>	<i>29.06.2018 or the 430th day from 24.04.2017</i>
<i>Milestone III</i>	<i>Petitioner ought to have achieved 75% physical progress</i>	<i>75%</i>	<i>16.03.2019 or the 690th day from 24.04.2017</i>

14. Now, Clause 5 of this very schedule made it mandatory for the Concessionaire to complete the project on or before the scheduled completion date which fell on the 910th day from 24.04.2017, which meant that time was of the essence of the Concession Agreement. At the same time, Clause 6 thereof provided that extension of any of the milestones or the completion date itself would tantamount to an amendment of Schedule

G. Pertinently, after the NHAI had issued the cure period notice on 12.10.2018, the Concessionaire had been granted periods of respite between 12.12.2018-03.04.2019, 10.05.2019-31.08.2019, 09.10.2019-20.01.2020, 07.02.2020-30.06.2020 and 30.06.2020-30.09.2020 during which it could carry on working at the project site and finish the work under the Concession Agreement. Without taking into account the interval between 12.12.2018 and 03.04.2019, the remaining periods were granted to the Concessionaire under the following correspondences:

- i. Extracts from the letter dated 10.05.2019 sent by the NHAI to the Concessionaires:

“2. Competent Authority has agreed to keep in abeyance the notice for intention to Termination for the next 4 months i.e. up to 31.08.2019 in the interest of project on the request and commitment of agency received vide letter no.MSTMRPL/OUT/2019-20/128 dated 30.04.2019. The Concessionaire has unconditionally committed to achieve following target during the abeyance period up to 31.08.2019:

<i>S. No.</i>	<i>Month</i>	<i>Planned % age physical progress</i>
<i>1.</i>	<i>May, 2019</i>	<i>4.5</i>
<i>2.</i>	<i>June, 2019</i>	<i>4.51</i>
<i>3.</i>	<i>July, 2019</i>	<i>4.79</i>
<i>4.</i>	<i>Aug-2019</i>	<i>5.65</i>

3. If Concessionaire fails to achieve the above target committed by them, the intention to Termination notice will come into effect, giving lenders a fresh opportunity for substitution as per Concession agreement.”

- ii. Extracts from the Minutes of the Meeting held between the NHAI, lenders and the Concessionaires on 09.10.2019:

“6. It was agreed that in case Concessionaire achieve the committed target up to January, 2020, the Authority would consider the extension of Schedule completion period and withdrawal of intention to termination notice as per provision of CA. However, in case the Concessionaire does not perform during this period, the lenders will get only 90 days to substitute the Concessionaire as per provision of CA.”

iii. Extracts from the Minutes of the Meeting held between the NHAI, lenders and the Concessionaires on 07.02.2020:

“5. Although not exactly entitled, it was agreed to grant the Concessionaire an interim Extension of Time upto 30.06.2020, purely to keep the Concession Agreement alive, with the Concessionaire committing to achieve the progress committed earlier. The Concessionaire will infuse necessary funds in ESCROW account to achieve the targets by the end of June, 2020.”

iv. Finally, the extracts from the letter dated 17.07.2020 sent by the NHAI to the lenders granting them, and by extension the Concessionaire as well who was still engaged to carry out the work at the project site, time till 30.09.2020 to achieve any progress in the construction work.

4. The maximum period allowed for the substation is over. However, based on the request of the Lenders' Representative and prevailing COVID-19 situation, the Authority, as a last chance, has decided to give additional 90 days from 30.06.2020 to the Senior Lenders, to bring in the substitution. No further time will be allowed, thereafter, and the Authority will be free to move ahead with the Termination of the Concession Agreement

15. For now, without discussing these adjustments made to the project schedule, it is safe to say that the parties were ad idem that, as per the

arrangement revealed from the afore-produced extracts, that the Concessionaire finally had time till 30.09.2020 to work at the project site.

The issue of the circulars and their application

16. Now, the Concessionaire is seeking to be granted an Extension of Time (EoT) after 30.09.2020 on the ground that it was unable to fully utilize the period between 07.02.2020 and 30.06.2020 to carry out any work, on account of the COVID-19 pandemic. The entire plea for being granted the EoT arises out of the various circulars issued by the Central Government, in the context of contracts involving infrastructure projects, which qualify COVID-19 pandemic as a force majeure event and contain directions to government authorities to *inter alia* extend existing deadlines for the benefit of private contractors who failed to meet project milestones on account of the COVID-19 pandemic. It is evident that both sides are ad idem on the factum of existence of each of these circulars, their applicability to infrastructure projects and that they are binding upon government authorities, which includes the NHAI.

17. The NHAI has vehemently opposed extending the benefits of these circulars to the Concessionaires on the ground that they were already defaulting under the Concession Agreements, on 19.02.2020 and, these circulars do not accrue in favour of private contractors who are defaulters. On the other hand, the Concessionaires have contended that (i) they were working at the project site till 30.09.2020 under various extensions granted by the NHAI, and till such time these extensions were in operation, it could neither be said that there was any default under the Concession Agreements

nor that the Concessionaires were defaulters, and that (ii) even otherwise, these circulars did not discriminate between a defaulting and a non-defaulting Concessionaires, which meant that regardless of its status – the Concessionaires were entitled to the benefits of these circulars. Since the application of these circulars is a point of heated contest between the parties, it is imperative to begin by noting their contents in extenso and considering their overall effect.

18. This discussion begins with the first circular issued by the Central Government on 19.02.2020, declaring COVID-19 pandemic as a natural calamity and Force Majeure Event, and acknowledging its adverse economic implications, especially the disruptions it had wrecked on global supply chains. The circular stated that any disruptions in supply chains due to the spread of COVID-19 in China or any other country had to be deemed as a Force Majeure Event, thereby warranting invocation of the Force Majeure Clause in contractual relationships, whenever appropriate. As far as the Concessionaires and the NHAI are concerned, this circular was relevant since Article 28 of both the Concession Agreements contained a provision for Force Majeure, which, as per the Concessionaires,

19. The next circular which is relevant, was issued on 18.05.2020 by the Ministry of Road & Transport and Highways (MoRTH) bearing No. COVID-19/RoadMap/JS(H). It extended certain reliefs to the contractors and developers of the road infrastructure sector. From this circular, the Concessionaires have sought to be granted the reliefs avowed by the MoRTH and NHAI, for allowing extension of time to HAM contractors under Force Majeure Clause due to COVID pandemic as also for directing payments to approved subcontractors for the work done by them, wherever

the NHA I was satisfied that such payment was required for early completion of work in accordance with the Concession Agreement. Since both of these reliefs could be granted subject to the contents of the circular released by the Department of Expenditure on 13.05.2020, it may be useful to reproduce the same:

***“Attention is invited to Department of Expenditure’s OM No.18/4/2020-PPD dated 19th February, 2020 on the invocation of Force Majeure Clause (FMC). Vide the OM, it was clarified that disruption of supply chains due to spread of Coronavirus will be covered under FMC which could be invoked, wherever considered appropriate, following the due procedure as stated in para 9.7.7. of the Manual on Procurement of Goods.*”**

2. Subsequent to issuance of the above referred OM, further disruptions have affected transportation, manufacturing and distribution of goods and services in the country. Limitations placed on the movement of men and material as per the guidelines issued by the Ministry of Home Affairs (MHA) under the Disaster Management Act, 2005 (DM Act, 2005) and the respective State and UT governments from time to time have severely impaired the fulfillment of contractual obligations for supply of goods, works and consultancy services (including other services), and affected the volume of vehicular traffic.

3. Attention in this regard is invited to para 9.7.7 of the Manual for Procurement of Goods 2017, para 6.4.2 of the “Manual for Procurement of Works 2019” and para 8.14.1 of the “Manual for Procurement of Consultancy and other Services 2017” issued by the Department of Expenditure. The above referred three Manuals recognize extraordinary events or circumstances beyond human control leading to delays in or after following due procedure, parties to the contract are

allowed flexibility to invoke FMC following prescribed due procedure.

4. *It is recognized that in view of the restrictions placed on the movement of goods, services and manpower on account of the lockdown situation prevailing overseas and in the country in terms of the guidelines issued by the MHA under the DM Act, 2005 and the respective State and UT Governments, it may not be possible for the parties to the contract to fulfill contractual obligations. In respect of Public private Partnership (PPP) concession contracts, a period of the contract may have become un-remunerative. Therefore, after fulfilling due procedure and wherever applicable, parties to the contract may invoke FMC for all construction/works contracts, goods and services contracts and PPP contracts with Government Agencies and in such event, date for completion of contractual obligations which had to be completed on or after 20th February, 2020 shall stand extended for a period not less than three months and contractor/concessionaire. Concession period in PPP contracts ending on or after 20th February, 2020 shall be extended by not less than three and not more than six months. The period of extension (between three and six months) may be decided based on the specific circumstances of the case and the period for which performance was affected by the force majeure events.*

5. *It is clarified that invocation of FMC would be held valid only in a situation where the parties to the contract were not in default of the contractual obligations as on 19th February, 2020. It is further clarified that invocation of FMC does not absolve all non-performances of a party to the contract, but only in respect of such non-performance as is attributable to a lockdown situation or restrictions imposed under any Act or executive order of the Government/s on account of COVID 19 global pandemic. It may be noted that, subject to above stated,*

all contractual obligations shall revive on completion of the period.(emphasis supplied)

20. In the wake of the guidelines contained in these circulars dated 13.05.2020 and 18.05.2020, the NHAI also released a circular on 26.05.2020 setting out the reliefs that it was proposing for its contractual partners, under the force majeure provisions, which *inter alia* provided that extensions of time would be granted for 3-6 months, depending on the facts and circumstances of each case and how much time did the contractor lose on account of the pandemic. However, the circular ended with the following caveat as regards its applicability:

“V. Applicability of Circular: The Circular is applicable to all BOT (Toll) projects where the Concessionaire and Authority have entered into a Concession Agreement based on the model Concession Agreement. If provisions in the Concession Agreement are different, the provisions in the Concession Agreement shall prevail. Further all the requirements of the Concession Agreement and Policy Circular NHAI/Policy Guidelines/Concession Fee during subsistence of Force Majeure /2017 No 8.4.16/2017 dated, the 10th August, 2017 shall be complied with.

It may be further be noted that invocation of Force Majeure Clause would be held only in a situation where the parties to the contract were not in default of the contractual obligations as on 19th February, 2020. Further, the Concessionaire should comply with the conditions/provisions of Model Concession Agreement for claiming Force Majeure Event.”
(emphasis supplied)

21. Subsequently, MoRTH released another circular on 03.06.2020, which added to its earlier circular dated 18.05.2020, insofar as it also specified that extensions of time could be granted for 3-6 months, and that amounts due to the approved sub-contractors could be paid through the

Escrow Account. However, this circular specifically stipulated that once any particular Concessionaire invoked force majeure provisions, the Independent Engineer or the Engineer appointed by the NHAI was to examine and recommend the grant of relief, subject to the approval of the PD/Executive Engineer of the NHAI.

22. In the light of the circulars dated 18.05.2020 and 03.06.2020, the Concessionaire wrote to the NHAI seeking grant of extension of time for completion of the project and for approval of its subcontractors so that payments could be released to them. Pertinently, while the Central Government had released another circular in October 2020, its essence remains similar to that of the previous circulars.

23. To begin with, each of these circulars, with every ensuing circular released, cumulatively sets down the Government's policy – they have to be read together, especially since they all bear a reference to the preceding circular either in the subject line or in the contents. A cumulative reading of the circulars dated 13.05.2020, 18.05.2020, 26.05.2020, 03.06.2020, shows that they were passed in order to accommodate the logistical exigencies triggered by the COVID-19 pandemic, by announcing relief measures for contractors and developers in the road sector. Although all contractors were entitled to claim the reliefs set out in these circulars, there were certain conditions which determined the success of their claim. Thus, contrary to the claim of the Concessionaires, the circulars were not unconditional in the reliefs they offered. In this case, the Concessionaires have sought to be granted the benefits set out in paragraphs 2A(i) and (ii) of the circular dated 18.05.2020, i.e., for grant of further time to complete the project work and for release of payments to approved subcontractors – which were qualified

by the contents of the circular issued by the Department of Expenditure on 13.05.2020. That circular, in turn, clarified that in case any private contractor were to be granted any reliefs on the grounds of force majeure stemming from the COVID-19 pandemic, the same would be entertained only if the contractor was not in default under the applicable Concession Agreement, on 19.02.2020. The circular further stipulated that its benefits only accrued in those cases where the non-performance of the contractor was directly attributable to the loss of function or abilities triggered by the lockdown or the pandemic. In short, any private contractor raising claims under these circulars, including the Concessionaires herein, is required to prove that (i) it was not in default under the Concession Agreement as on 19.02.2020 and that (ii) its inability or the impossibility of performing the contract had a direct nexus with the unexpected event which it claimed had rendered the performance of the contract impossible. Thus, evidently, the Concessionaires are not correct to say that the circulars did not discriminate between a defaulting and a non-defaulting private contractor. Ultimately, to succeed in these petitions, the Concessionaires have to show that they were not in prior default, as on 19.02.2020, and that the lockdown imposed on account of COVID-19 is what made it impossible for them to complete any work in the period between 09.02.2020 and 30.09.2020.

24. At this instant, before going any further, it is important to note that the nature of these petitions, having been filed under Section 9 of the Act, ultimately makes the disputes contained herein the concern of the arbitral tribunal; the responsibility of this Court is to simply ensure that its powers to grant interim measures under Section 9 are effectively put to use, so that the amounts in dispute and the property concerned is preserved till a final

decision is rendered in arbitration. Have the Concessionaires been able to demonstrate their entitlement to these interim reliefs? In the alternative, is there any merit in their claim that they were not in prior default of the Concession Agreement on 19.02.2020?

Status of the Concessionaires as on 19.02.2020

25. On 12.10.2018, the NHAI sent a cure period notice to the Concessionaires under Article 31.1.1 of the Concession Agreement, expressing its dismay with the manner in which work was progressing at the project site. Notwithstanding the multiple notices and letters issued by the NHAI and the Independent Engineer, requiring the Concessionaire to remedy the breaches of the Concession Agreement, the total deficiency percentage in the work carried out, as per the estimations of the Independent Engineer, stood at a staggering 88.92%. This implied that, as per independent assessment, the Concessionaire had been able to successfully execute a measly 11.08% of the work under the Concession Agreement, within a span of 524 days. The primary grievance of the NHAI was that despite being granted access and right of way to over 80% of the land on the appointed date, i.e., 24.04.2017, as on July 2018, none of the structures set out in the Concession Agreement had been completed; the work on half of the major bridges and 10 of the 16 minor bridges, or any of the railway over-bridge, 7 ramps/overpasses, 14 retaining structures had even begun being constructed. The status of roadwork was stated to be miserably dissatisfactory and the Concessionaire appeared to display a complete lack of interest in settling the work quality complaints raised in the 13 Non-

Conformance Reports (NCR) issued to it. Although the Concessionaire was required to achieve Milestone-I by 07.02.2018, it did so only by 16.08.2018 - which well encroached into the period of carrying out works under Milestone-II, originally set to begin by 22.06.2018. The physical progress achieved at the project site, as on 30.09.2018, stood at 20.04% while the maintenance obligations fixed on the Concessionaire under Clause 12.4 of the Concession Agreement had also been compromised. The NHAI also stated its displeasure with the manner in which the highway was being maintained; the road was marred with massive potholes, heavy damages, accident-causing black spots, deficiency in sign boards – all of which jeopardized the safety of the structure. A further failure of the Concessionaire to submit video recordings of the project highway or the design and drawing of the project highway in totality, was also noted. In fact, it was also observed that despite repeated reminders, the Concessionaire had absolutely failed to carry out its obligation to shift utilities under Clause 11.2 of the Concession Agreement. The NHAI proceeded to note that the Concessionaire had shown 48% of the project cost as expenditure, against 24.5% of physical work it had carried out, which displayed a complete failure to employ good practices while utilising the monies in the Escrow Account. The cure period notice ended with the NHAI seeking damages amounting to INR 76,57,125/- from the Concessionaire for the delay in Financial Close, being in violation of Clause 31.1.1 (h) of the Concession Agreement, and gave the Concessionaire a period of sixty days ('cure period') to respond and/or cure the defaults set out in the notice.

26. In reply, on 04.12.2018, the Concessionaire objected to all the claims of the NHAI and the primary basis of its rival claim was – Clauses 4.1.2 (a),

10.3.1, 10.3.2 and 10.3.5 of the Concession Agreement required the NHAI to provide right of way over the project site, to the Concessionaire, in order for the work to progress unhindered – but it stated that the NHAI had violated this requirement on the appointed date. The Concessionaire then went on to posit that the NHAI only had 38% and 86.69% of the unencumbered project site in December 2016 and March 2017 respectively. The Concessionaire claimed that the right of way to the project site was obstructed by resistance from local villagers, which implied that the land handed over to it on the appointed date was not unencumbered at all and that, resultantly, in September 2018, only 68.99% of the land available with the Concessionaire was unhindered; thus, all calculations made by the NHAI in respect of the work done or percentage of deficiencies, had to be made as per the stretch of unencumbered land available with it, and not against the total length of the project highway, as the NHAI had done. Accordingly, the Concessionaire submitted its revised estimates of the physical progress achieved, deficiency percentage and the work done. The Concessionaire further stated that the delayed responses of the Independent Engineer in approving revised project schedules and/or designs and drawings, as regards the construction of overpass and road over bridges, had also caused a lag in the construction process. To the NHAI's claims of delayed achievement of project milestones, the Concessionaire admitted having completed Milestone-I and communicating the factum thereof to the NHAI by 27.09.2018. It was also pointed out that the NHAI had undervalued the estimates for shifting of utilities, by calculating it based on the SOR for the year 2015-16 for works which had to be executed in 2017-18; since none of the sub-contractors were willing to carry out this work at such deliberately

contracted prices, that work remained untouched. While the Concessionaire had raised several representations on the matter, the same had gone unaddressed by the NHAI. As far as the maintenance of the highway was concerned, the Concessionaire did not dispute its deficiencies in carrying out its duties in that regard. However, since the NHAI had already, at the recommendation of the Independent Engineer, taken over the duties of maintaining the highway at the Concessionaire's cost under Clause 17.9.1 of the Concession Agreement, all that the Concessionaire really protested was the NHAI's deduction of the maintenance costs it had incurred under Clause 17.9.2, out of the Milestone-I payments accruing to the Concessionaire. The Concessionaire concluded by requesting the NHAI to remove the hindrances, grant it an extension of time to complete the project work, waive the damages levied against it and withdraw the cure period notice.

27. It appears that the NHAI remained somewhat lenient towards the Concessionaires since, notwithstanding the notice period of sixty days granted on 12.10.2018 which expired by 12.12.2018, it issued the IOT notice under Article 31.1.2 only on 03.04.2019 which was, in essence, issued on the same grounds as its cure period notice. However, an additional charge came to be added against the Concessionaire, for being in violation of Clause 3.1.1(h) of the Concession Agreement and failing to give its share of the remuneration owed to the Independent Engineer, damages against default in financial close, damages against maintenance work which had been carried out by the NHAI on its behalf, within the period specified in this Agreement. With this IOT notice, the Concessionaire was granted fifteen days to make a representation opposing the proposed termination.

28. In reply, the Concessionaires addressed a letter to the NHAI on 08.05.2019 asking it to keep the IOT Notice on hold for the time being and committing to achieve 5% monthly physical progress at certain agreed upon timelines on the work. As noted hereinabove, the NHAI duly took the Concessionaire's representation into consideration and kept the IOT notice in abeyance till 31.08.2019, in order to grant the Concessionaires a chance at redemption.

29. Notwithstanding the Concessionaires' unconditional commitment to work at the project site during this period, they could not, owing to the onset of Cyclone Vayu in June 2019 in parts of Gujarat where the project work was taking place. As per the Concessionaires, this hindered any significant progress in work for that month. At the end of August 2019, the NHAI noted that there was a 19.24% difference in the physical progress achieved by the Concessionaires viz. the commitments they made. The NHAI displayed this deficiency in the following tabular form:

<i>Sr. No.</i>	<i>Month</i>	<i>Concessionaire's Commitment of Physical Progress</i>	<i>Physical Progress achieved</i>	<i>Difference</i>
1.	May-2019	4.5	0.21	4.29
2.	June-2019	4.51	0.0	4.51
3.	July-2019	4.79	0.0	4.79
4.	August-2019	5.65	0.0	5.65
<i>Total</i>		<i>19.45</i>	<i>0.21</i>	<i>19.24</i>

30. With this, the NHAI signaled that its next intended course of action was to proceed with termination. In reply, on 16.09.2019, the Concessionaires sought to explain their inability to meet the targeted schedule, despite having mobilized workforce and materials on site, and chalked it to the following grounds: (i) Cyclone Vayu had rendered it impossible to carry out any work for seven days, (ii) there were heavy rains in July 2019 on account of monsoons, (iii) it was facing financial crunches and that, (iv) it had managed to meet half of the committed progress percentage in the month of May 2019 which was evidence of its *bona fide*. It appears that the NHAI remained unconvinced and finally issued the second IOT Notice on 18.09.2019, which was issued on the same grounds as the first IOT notice.

31. As is practice, a copy of this 2nd IOT notice was sent to the lenders as well, granting them an opportunity to make representations as regards their intention to initiate the process of substitution, within a period of 15 days. While the Concessionaires responded to this IOT notice on 25.09.2019 by way of a letter, the contents therein primarily reiterated their earlier stance, as reflected in the letter dated 16.09.2019. The lenders replied by initially seeking time to respond on 27.09.2019 and subsequently, on 01.10.2019, stating their intention to initiate the process of substitution and intimate the name of the nominated company, in accordance with the terms of the Substitution Agreement.

32. However, when the parties convened with the lenders on 09.10.2019 to discuss the latter's preparedness to initiate the process of substitution as promised, the lenders requested the NHAI to grant the Concessionaires further time to improve their performance and demonstrate 15% to 18%

material physical progress in work, since they had requisite resources available on site to execute the balance works. The lenders, after stating that they also needed this time to find a suitable agency for substitution, agreed to have this period deducted from the initial 180 days of substitution period available with them under Clause 3.2.2 of the Substitution Agreement. Ultimately, at the request of the lenders, the NHAI chose to grant continuity to the Concessionaire until 20.01.2020 to report 20% additional work progress in both the projects, which meant that the total progress in the Talaja-Mahuva and Mahuva-Kagavadar stretches had to reach 40% and 50% respectively by 20.01.2020.

33. Thereafter, the lenders, the NHAI and the Concessionaires met on 07.02.2020, when it was recorded that the Concessionaires had achieved negligible progress in physical work and failed to mobilise manpower and resources, at the project site between October 2019 and January 2020. However, once again, the lenders' requested for grant of further time to the Concessionaires to achieve the committed progress target. On the other hand, the Concessionaires requested that the amounts deducted by the NHAI on the ground of various defaults, from the working capital advance accruing in their favour from the lenders, be released to them so that they could carry on with the work. While the NHAI granted the lenders' request to let the Concessionaires continue at the project site till 30.06.2020, it rejected the Concessionaires' prayer for release of the monies; they were, instead, directed to arrange the funds on their own which was to show interim proof of their bonafide commitment to the project, notwithstanding their tardy progress.

34. Shortly thereafter, on 19.02.2020, the Central Government released the first circular with respect to the applicability of Force Majeure clauses in government contracts on account of COVID-19, which has already been discussed in detail above. In the weeks following the issuance of this circular, the COVID-19 virus threat had erupted into a full-scale global pandemic, so the Concessionaires, on 18.03.2020, propelled by the contents of the circular dated 19.02.2020, invoked the Force Majeure Clause under Article 28.2(a) of the Concession Agreement.

35. When the Central Government imposed a national lockdown on 24.03.2020, the Concessionaires wrote to the NHAI stating that the lockdown had to be regarded as a continuation of the Force Majeure Event that they had invoked on 18.03.2020. In this manner, the Concessionaires sought continuation of the Force Majeure Event with every successive extension of the national lockdown, but by now it had added the national lockdown as a political situation qualifying as a Force Majeure Event under Article 28.4 of the Concession Agreement and sent letters to that effect to the NHAI on 14.04.2020, 04.05.2020, 19.05.2020, all the way till 31.05.2020. Thus, from 18.03.2020 till 31.05.2020, all progress at the project site remained at a standstill.

36. In the intervening period, the NHAI had addressed a letter to the lenders on 27.04.2020 requesting them to send an update about their progress in respect of the substitution, and to urge the Concessionaires to present their on-site progress during the third adjustment. Since the response of the Concessionaires sent on 05.05.2020 failed to clearly set out the progress achieved, the NHAI against sent a letter to the lenders on

26.05.2020 reiterating the contents of its letter dated 27.04.2020, and the relevant extracts of this letter read as under:

“5. No progress has been made ever since. The Concessionaire, in the meantime notified Force Majeure to the Authority on 18.03.2020 in the wake of COVID -19, much before the actual lockdown was announced. It is clarified that the Substitution Rights have already been exercised by the Senior Lenders who have opted for this arrangement to get the work done through the existing Concessionaire during the 180+90 days allowed to them for substitution/curing of the default. The arrangement is purely between the Lenders and the Concessionaire is not supposed to enter into such correspondence with the authority.

6. In view of the above, it is requested to impress upon the Concessionaire to demonstrate the committed target. Please also let us know, the status of your progress on the front of substitution. Needless to say, if no progress is made on these counts till 30.06.2020, NHAI will be left with no option but to go ahead with termination of the Concession Agreement under Clause 37.1.”

37. By this time, which brings us to June 2020, since the circulars proposing relief measures had already been released, the Concessionaires had shot off letters to the NHAI seeking the benefits of these circulars. On 16.06.2020, the lenders, expressing their support for the Concessionaires and their claims under the circulars, also sent a letter to the NHAI requesting for an additional period of 90 days w.e.f. 30.06.2020, ending on 30.09.2020, to enable the lenders to complete the substitution process. Accordingly, on 17.07.2020, the NHAI did accede to the lenders request, only to the limited extent of granting it some more time to conclude the substitution process.

38. This is how these two Concession Agreements, which originally required the projects to be completed in October 2019 and were sought to be

terminated by the NHAI in 2018 itself, survived all the way till 30.09.2020. Now, in support of their contention that they could not have been deemed 'a defaulter' as on 19.02.2020 under the Concession Agreement, the Concessionaires have urged that since the NHAI has granted them four extensions so far on various grounds, the NHAI cannot claim that the IOT notice issued on 03.04.2019 continues to be in operation or that it has any effect. Consequently, the Concessionaires have urged that in the aftermath of these four extensions, they ought to be sent a fresh IOT notice if the NHAI wishes to terminate the Concession Agreements. It has further been claimed that the issuance of the circulars by the Central Government in favour of all private contractors such as the Concessionaires during the subsistence of the third adjustment period necessarily meant that the NHAI was bound to grant the benefit of these circulars to them. On the other hand, the NHAI has relied on these correspondences to show that these four extensions were not exactly extensions, as sought to be contended by the Concessionaires. It has been contended that a part of the entire period during which the IOT notice had been kept in abeyance, arose out of NHAI's generosity and fell between 12.10.2018 and 18.10.2019; the remaining part of this period was granted in response to the lenders exercising their substitution rights. Thus, the NHAI has contended that the Concessionaires' attempts, by way of these petitions, to deliberately misconstrue this period and suggest that they were indemnified from being called defaulters until the period drew to a close, is simply *mala fide* and unsustainable in law. To truly understand this contention, it is important to examine – what was the nature of the period falling between 12.10.2018 and 30.09.2020, when the Concessionaire was carrying out work at the project site?

The period between 12.10.2018 and 30.09.2020

39. In response to the 2nd IOT notice, the IIFCL, had sent a letter to the NHAI on 01.10.2019 stating that it had decided to substitute the Concessionaire with a 'nominated company' as per the provisions of the Substitution and Concession Agreements, and that it was initiating the substitution process. There is absolutely no ambiguity in this reply, it was clear – the lenders were beginning the substitution process. Thereafter, the NHAI convened a meeting with the Concessionaires and IIFCL on 09.10.2019, the relevant extracts of the Minutes recorded on that date read as under:

“5. The Lenders M/s. IIFCL requested Authority that the present Concessionaire be given last opportunity to demonstrate committed physical progress since it would be in the interest of project and lender as they also require time to find suitable agency for substitution. After detailed discussion and Pros & Cons of available option, Authority agreed to the request of lender on continuity of the existing Concessionaire for time being. Member (P) informed that lenders that authority has no objection to give one last opportunity to the Concessionaire to perform 20% progress of the work till 20.01.2020 for both the packages (up to 40% in Pkg-2 & 50% in pkg-3). CGM (T) suggested that the progress of work of Concessionaire during this period be closely monitored by PD/IE/Lenders.

6. It was agreed that in case Concessionaire achieve the committed target up to January 2020, the Authority would consider the extension of Schedule completion period and withdrawal of intention to termination notice as per provision of CA. However, in case the Concessionaire does not perform during this period, the lenders will get only 90 days to substitute the Concessionaire as per provision of CA.” (emphasis supplied)

40. Thus, in the Minutes of the Meeting dated 07.02.2020, the NHAI had already stated that the third adjustment period was going to be taken out from the entire period of 270 days' granted to the lenders for substitution. Apart from this accommodation extended to the Concessionaire, even the third adjustment period between 07.02.2020 and 30.06.2020 was granted to the Concessionaires at the behest of IIFCL. Just like the second adjustment period, even in the third adjustment period the IIFCL had agreed that in case the Concessionaire failed to perform at that time, the lenders would only be granted 90 days for substitution, thus reducing their total substitution period from 270 days, to 90 days. This meant that the lenders had agreed to carve out the period during which the Concessionaires were allowed to continue working at the project site, out of the initial 180 days' substitution period available with them.

41. On 27.04.2020, two months after the aforesaid resolution, NHAI sent a letter to the IIFCL, after the Concessionaires had invoked the force majeure clause and requested for grant of EoT. This letter was phrased clearly, with an intent to avoid all confusion or ambiguity that may arise in respect of the arrangement made between them. The NHAI began by clarifying that all Force Majeure invocation and extension requests sent to it by the Concessionaires in March-April 2020 were addressed incorrectly because the third adjustment period was purely an arrangement between the lenders and the Concessionaires, and did not involve the NHAI at all. The NHAI had also explicitly stated that once the IOT notice came into operation on 03.04.2019 and then on 18.09.2019, the lenders had two choices available with them as a substitution right under Clause 31.1.3 of the Concession Agreements – they could either substitute the Concessionaires

with a nominated company or employ the Concessionaires as their representatives for achieving progress in the project work, during the 180+90 days' curing/substitution period granted to them under the Substitution Agreement. The NHAI claimed that the accommodations granted to the Concessionaires on 18.09.2019 and 07.02.2020 permitting them to continue working on-site, extended at the behest of the lenders, had to be regarded as an exercise of the lenders' choice to have the work carried out by the Concessionaires only. Thus, the NHAI stated that the senior lenders were, in effect, already in exercise of their substitution rights which implied that the Concessionaires were working at the project site only at the lenders' sanction. Since this arrangement was purely between the lenders and the Concessionaires, the latter did not have any reason to communicate directly with the NHAI. Now, to this letter, IIFCL replied on 05.05.2020 wherein it completely failed to challenge this position put forth by the NHAI. Instead, IIFCL wrote:

““As regards the Authority's opinion under the same point no. 5 of the letter that “the Substitution Rights have been exercised by the Senior Lenders who have opted for this arrangement to get the work done through the existing Concessionaire during the 180+90 days allowed to them for substitution/curing of the default. The arrangement is purely between the Lenders and the Concessionaire and the Concessionaire is not supposed to enter into such correspondence with the Authority”, we, the Concessionaire humbly beg to differ and would like to expound that since the Authority has granted the provisional time period up to 30th June 2020 for showing the progress and achieving the targeted 50% progress to the Concessionaire and moreover Authority being the “Owner” of the Project, any problem being

faced by the Concessionaire (in present case the Force majeure Event of Corona pandemic), the Concessionaire was/is contractually bound to communicate and notify to the Authority about any such event as per Article 28.2 (a) of the Concession Agreement. (emphasis supplied)

42. Thus, as can be seen, there was absolutely no reference to or denial of the NHAI's position that the lenders were in exercise of their substitution rights. In response, on 26.05.2020, the NHAI, while reiterating the substance of its letter dated 27.04.2020, again pointed out that now that the lenders had exercised their substitution right, the Concessionaire had no reason to communicate with the NHAI directly. To this, IIFCL had replied on 16.06.2020 stating that it was the NHAI that had decided to grant an EoT to the Concessionaire till 30.06.2020 purely to keep the Concession Agreement alive, which is why IIFCL had also granted the Concessionaire an approval for interim EoT till 30.06.2020. It was then stated that as a result, the process for appointing the transaction advisor, who was to then undertake the process of substitution on the lenders' behalf, could be initiated only post expiry of the EoT, i.e., after 30.06.2020. Nevertheless, the IIFCL stated that after receiving the letter dated 26.05.2020, it had begun publishing advertisement for inviting bids for appointment of transaction advisor. Significantly, at the end of this letter dated 16.06.2020, IIFCL told NHAI:

Further, considering the outbreak of Covid-19 outbreak, and in terms of Clause 31.1.3 of the Concession Agreement upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate.

IIFCL, on behalf of consortium requests Authority to grant extension to the aforesaid period of 90 days from 30.06.2020 to additional 90 days in addition to Covid-19 relief in order for IIFCL/lenders to complete the process of substitution in line with the Concession Agreement. (emphasis supplied)

43. The reason why this statement assumes precedence is because it proves that, on 16.06.2020, the lenders had been operating under the belief that they would exhaust the initial 180 days of the substitution period by 30.06.2020, whereafter the next 90 day-interval which was also contractually vested upon them, would begin. It is further evident from this letter, that even IIFCL was always aware that the entire 270 days for substitution available with the lenders would end on 30.09.2020. Furthermore, citing COVID-19, IIFCL requested the NHAI to grant them some more time, apart from the 90-days left in the substitution period vesting in them.

44. The NHAI responded to this request on 17.07.2020 by stating that the lenders had already exercised their substitution right w.e.f. 01.10.2019, implying that the 270 days' substitution period had to be counted from then and had expired on 30.06.2020. Yet, the NHAI acceded to the lenders' request contained in the letter dated 16.06.2020, inasmuch as the period between 30.06.2020 and 30.09.2020 were to be treated as the extra time granted to the lenders for substitution on account of COVID-19. It was clarified that no further time would be granted to the lenders thereafter for substitution.

45. In response to this letter, on 08.09.2020, for the very first time since October 2019, IIFCL denied the assertions of the NHAI that the substitution

period had already come into effect or that the extensions granted to the Concessionaires could be deducted from the 270 days' period granted to them for substitution. In fact, I find that the submissions advanced by Mr. Sethi initially found mention in the letter sent by the IIFCL on 08.09.2020. The multifold streams of arguments emerging therefrom, is best summed up in the following manner: (i) the notices had been kept in abeyance, which implied that they stopped operating as soon as they were retained in that condition and that any subsequent conversation about termination could follow only once a fresh, separate IOT notice had been issued; (ii) the decision to keep these notices in abeyance was one made by the NHAI, irrespective of the entreaties made in that respect by the lenders; (iii) the act of keeping them in abeyance had been made under the Concession Agreement, to which the lenders were not a direct party and that the right of substitution was one which primarily flowed out of the Substitution Agreement. The decision made under one agreement, could not possibly prejudice the rights flowing from another. In response, the NHAI reiterated that the lenders were already in exercise of their substitution rights.

46. These substitution rights, lying at the heart of this dispute are enshrined in Clause 31.1.3 of the Concession Agreement read with Clauses 3.1 and 3.3 of the Substitution Agreement which read as under:

Clause 31.1.3 of the Concession Agreement

“The Authority shall, if there is Senior Lenders, send a copy of its notice of intention to issue a Termination Notice referred to in Clause 31.12 to inform the Lenders’ Representative and grant 15 (fifteen) days to the Lenders’ Representative, for making a representation on behalf of the Senior Lenders stating the intention to substitute the Concessionaire in accordance with the Substitution Agreement. In the

event the Authority receives such representation on behalf of Senior Lenders, it shall, in its discretion, either withhold Termination for a period not exceeding 180 (one hundred and eighty) days from the date of such representation or exercise its right of Suspension, as the case may be, for enabling the Lenders' Representative to exercise the Senior Lenders' right of substitution in accordance with the Substitution Agreement;

Provided that the Lenders' Representative may, instead of exercising the Senior Lenders' right of substitution, procure that the default specified in the notice is cured within the aforesaid period of 180 (one hundred and eighty) days, and upon such curing thereof, the Authority shall withdraw its notice referred to above and restore all the rights of Concessionaire.

Provided further the upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by such further period not exceeding 90 (ninety) days, as the Authority may deem appropriate." (emphasis supplied)

Clauses 3.1 and 3.3 of the Substitution Agreement

3 SUBSTITUTION OF THE CONCESSIONAIRE

3.1 Rights of substitution

3.1.1 Pursuant to the right s, 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 favor 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 as Concessionaire either individually or collectively.

x x x

3.3 Substitution upon occurrence of Concessionaire Default

3.3.1 Upon occurrence of a Concessionaire Default, the Authority shall by a notice inform the Lenders' Representative of its intention to issue a Termination Notice and grant 15 (fifteen) days' time to the Lenders' Representative to make a representation, stating the intention to substitute the Concessionaire by a Nominated Company.

*3.3.2 In the event that the Lenders' Representative makes a representation to the Authority within the period of 15 (fifteen) days specified in Clause 3.3.1 stating that it intends to substitute the Concessionaire by a Nominated Company, the **Lenders' Representative shall be entitled to undertake and complete the substitution of the Concessionaire by a Nominated Company in accordance with the provisions of this Agreement within a period of 180 (one hundred and eighty) days from the date of such representation, and the Authority shall either withhold Termination or undertake Suspension for the aforesaid period of 180 (one hundred and eighty) days; provided that upon written request from the Lenders' Representative and the Concessionaire, the Authority shall extend the aforesaid period of 180 (one hundred and eighty) days by a period not exceeding 90 (ninety) days; provided further that the Lenders' Representative may at any time withdraw its representation hereunder and upon such withdrawal, the Authority may terminate this Agreement in accordance with the provisions hereof. (emphasis supplied)***

47. Evidently, once the NHAI had sent an IOT notice to the Concessionaires and a copy thereof to the lenders, the latter was granted 15 days to make a representation on their behalf as to whether they intended to substitute the Concessionaires at all. This immediately triggered a sequence

of events leading up to the termination of the Concession Agreements and the substitution of these Concessionaires. A holistic reading of Clause 31.1.3 of the Concession Agreement reveals that the NHAI is right inasmuch as there were two choices carved out for the lenders to conduct themselves once they had signified their decision to proceed with the substitution; they could either substitute the Concessionaires or require curing of the defaults set out in the IOT notice. Against this backdrop, it is time to consider the grievances raised by the lenders, within the narrow parameters of the Court's broad powers under Section 9 of the Act which, in turn, has been succinctly dealt with by Justice Indu Malhotra, in her 'Commentary on the Law of Arbitration'¹ as below:

“An interlocutory injunction is an injunction that is limited so as to apply only until the final hearing or final determination by the court of the rights of the parties; and accordingly it issues in a form that requires that, in the absence of a subsequent order to the contrary, it should continue up to but not beyond the final hearing of the proceedings. The two matters with which the court is concerned in granting an injunction of this kind are, first the maintenance of a position that will most easily enable justice to be done when its final order is made, and secondly, an interim regulation of the acts of the parties that is, in other respects, the most just and convenient in all the circumstances.” The purpose of an interim injunction is to regulate the position of the parties pending trial, whilst avoiding a decision on issues which could only be resolved at trial. The interim measures are either prohibitory (not to perform certain specified acts) or occasionally mandatory (directed to performance of specified acts so as to restore an antecedent position).”

¹Justice Indu Malhotra, Commentary on the Law of Arbitration, (4th Edition, Vol. I), Pages 394-397

48. Thus, while the questions which arise from the rival contentions of the parties deserve a deeper scrutiny by an arbitral Tribunal, the sole adjudicatory duty of this Court for now is to adopt a *prima facie*, balanced view from the documents placed on record and ensure that necessary protective orders are passed to preserve the interest of the project and safeguard the rights of the parties, pending arbitration. Inasmuch as the lenders' case is concerned, admittedly, the choice of word employed by the NHAI in respect of the 1st IOT notice was, 'abeyance', which has been explained as 'a condition of being undetermined or in a state of suspension or inactivity' by the Black's Law Dictionary. This implies that any IOT notice kept in abeyance had to be understood to mean as, essentially, having been temporarily suspended or made inactive. That being said, the remaining documents which grant the Concessionaires permission to continue working on-site do not make use of the word 'abeyance' at all.

49. The contentions of the IIFCL that each instance of issuance of IOT notice had to be regarded as a fresh notice, implies in a way that the initial 'abeyance' and the subsequent deferrals of these notices were in the nature of 'recall', which is absolutely incompatible with the plain meaning of the term 'abeyance' and contrary to the contents of the Minutes dated 09.10.2019 and 07.02.2020. An ancillary consideration is that the subject line and the contents of all the IOT notices made a reference to the previous IOT notices and correspondences, thereby showing continuity between all of these exchanges. Not to mention, the Minutes dated 09.10.2019 clearly stated that in case the Concessionaires were able to deliver on the targets set in the second adjustment period, the Authority would consider withdrawing the IOT notice as per the terms of the Concession Agreement. That, in itself,

directly implies that the arrangement between the parties was such that the IOT notices were to continue being in operation, albeit inactive, even during the abeyance and/or adjustment period. Thus, any plea of the IIFCL that all instances when the notices were kept in abeyance necessarily spelt their end, or that a fresh IOT notice had to necessarily be issued by the NHAI under Clause 31.1.3 if it wanted to re-initiate the discussion on termination on 30.06.2020 is just not sustainable.

50. I now move on to a primary question arising out of this argument, was the NHAI justified in including the total adjustment period granted to the Concessionaires between 09.10.2019 and 30.09.2019 within the 180+90 day substitution period accruing to the lenders? Conversely, is the NHAI justified in claiming that the lenders had already exercised their substitution rights in October 2019, by selecting the Concessionaire to continue working at the project site, rather than nominating another company for substitution. This is where it becomes necessary to refer to the correspondences exchanged between the parties, to understand what was the true intention of their arrangement when the Concessionaires were granted the adjustment periods, which is reflected from the Minutes dated 09.10.2019 and 07.02.2020 as well as the letters dated 27.04.2020 and 05.05.2020.

51. In this context, it is necessary to examine the circumstances prevailing at the time the parties had convened on 09.10.2019. It is a matter of record that eight days earlier, on 01.10.2019, IIFCL had indicated the intent of the senior lenders to exercise their right of substitution, which letter was never formally withdrawn by it. It is under those circumstances that the NHAI, in paragraph 6 of the Minutes dated 09.10.2019, resolved that in case the Concessionaires failed to deliver on the promised work progress by the end

of the second adjustment period ending in January 2020, the lenders would have only 90 days to exercise their substitution rights. However, it turns out that the NHAI did not act upon this resolution when the second adjustment period drew to a close and, in my view, rightly so since the period between October 2019 and January 2020 only worked out to three months or 90 days. Had the NHAI acted on this resolution at that time, any such move would tantamount to depriving the lenders of half of the initial 180-day period which accrued in their favour, thereby becoming manifestly contrary to the terms of the Concession and Substitution Agreements.

52. However, the subsequently recorded Minutes dated 07.02.2020 contained the same statement of resolution, inasmuch as the lenders were explicitly informed that at the end of the third adjustment period, they would be left with 90 days to take any steps in exercise of their contractually vested substitution right. Needless to say, this implied that the NHAI had clearly stated its decision to deduct the adjustment period granted between 07.02.2020 and 30.06.2020, out of the initial 180 days' period granted to the lenders for substitution under Clause 31.1.3 of the Concession Agreement read with Clause 3.1.1 of the Substitution Agreement. That being said, unlike 09.10.2019, it is evident that on 07.02.2020, the NHAI felt the need to impress upon IIFCL its seriousness in respect of this resolve by going one step ahead and advising the lenders to get all their affairs in order. It is this seriousness in resolve which is reflected in the letter sent by the NHAI on 27.04.2020 to IIFCL whereby it clarified, in no uncertain terms, that by insisting on continuing with the Concessionaires a third time, the arrangement between the parties as recorded in the Minutes dated

07.02.2020 was that the lenders were exercising their substitution rights by engaging the Concessionaires to cure the defaults set out in the IOT notices.

53. Reverting to the question set out hereinabove, whether the NHAI was correct to contend that the adjustment periods, when the notices were inactive, could be inferred as the lenders' exercise of their substitution rights, I find that the express language of the Minutes dated 09.10.2019 and 07.02.2020, as well as the letter dated 27.04.2020, stated as much. In fact, the lenders accepted that they were in the substitution period on 16.06.2020, by stating that the initial 180-day period was drawing to a close on 30.06.2020. In fact, they differed from the NHAI, insofar as the latter regarded the entire 270 day-period to be coming to an end by 30.06.2020.

54. Now, for the sake of argument, if IIFCL truly disagreed with this position and was of the opinion that the adjustment periods could not be factored into the 180 days granted to the lenders under the Concession and Substitution Agreements, it had all reason to specifically challenge the Minutes dated 09.10.2019 and 07.02.2020 or the letter dated 27.04.2020, on this ground. Notwithstanding the ample opportunities it had to controvert the position that the lenders had chosen to have the defaults cured by the Concessionaires, no such opposition was ever raised by the IIFCL until 08.09.2020. Rather, I find that the sole objection ever sent by the IIFCL in respect of the Minutes dated 07.02.2020 by then, was vaguely worded and stated that it had also made a representation at the meeting to have the *lenders' concerns addressed in respect of restoration of their substitution rights*. This certainly cannot be regarded as a valid rebuttal by IIFCL. Even the reply sent by IIFCL on 05.05.2020 did not specifically oppose the part of NHAI's letter dated 27.04.2020 which stated that the lenders were in

exercise of their substitution rights at that time, instead it (i) eluded in directly addressing the point and then, (ii) evasively recalled its own letter dated 19.02.2020, which, as already noted above, cannot be considered a specific denial in any manner. Thus, until 08.09.2020, the prevailing view between all parties appeared to be that the resolution contained in paragraph 6 of the Minutes dated 07.02.2020 was going to be acted upon and that the lenders were in their substitution period. Any ambiguity which may arise in the arrangement between the parties is dissipated from a consonant reading of Minutes dated 09.10.2019 and 07.02.2020 which contain the resolutions permitting the Concessionaires to continue working at the project site during the lenders' substitution period, as also IIFCL's acceptance till September 2020 that the lenders were in exercise of their substitution rights or, rather, its failure to rebut this position.

55. While IIFCL is correct to say that it was at the express accord of the NHAI that the four adjustment periods were formalized, it can neither shrug off the role it had played in these adjustments, being that the same were granted at its request, nor can it state that the adjustments were granted only under the Concession Agreement, to which it was not a party. The latter line of thought arises out of a misguided and visibly hypertechnical approach; these adjustments were a result of meetings which were conducted between the parties to the Concession Agreements as well as the Substitution Agreement and taken after arriving upon a mutual consensus. In the light of the aforesaid as also the fact that neither of these agreements specifically envisage or provide for the act of keeping IOT notices in abeyance, by necessary inference, the abeyance was a decision which affected the parties to both the Concession and Substitution Agreements and, by extension, the

Agreements themselves. Certainly, there is cause for some ambiguity which has arisen owing to the fact that the Minutes dated 09.10.2019 did not, in so many words, declare that the substitution period was in effect. It is this ambiguity which has kindled and inflamed the contention of the senior lenders' today that the substitution period cannot be considered to be in effect at all. That being said, I find that the Minutes dated 09.10.2019 did state that the substitution period had begun, perhaps not in as many words but, at the same time, rather sensibly by informing the lenders that the entire duration of the second adjustment period was going to be deducted from the initial substitution period of 180 days available with the lenders. This was accepted by the senior lenders as well, on 16.06.2020. In these circumstances, there is absolutely no reason to disbelieve the position of the NHAI that the second and third adjustment periods were, in fact, the substitution period granted to the senior lenders, especially not when the IIFCL appeared to operate under the same belief until 08.09.2020.

56. In any event, it is not as if the lenders did not have ample notice of the fact that it would need to exercise its substitution rights, they were forewarned of this possibility ever since the issuance of the first IOT notice on 03.04.2019. Despite being sufficiently cautioned, the lenders took the risk of choosing to exercise their substitution rights through the Concessionaires only. At the same time, having regard to the principles governing the grant of interim reliefs under Section 9 of the Act, the losses, if any, suffered by the lenders are entirely recoverable in the form of damages through appropriate proceedings, including arbitration. In these circumstances, I see no reason, at this stage, to reject the NHAI's stand that the period between 09.10.2019 and 30.09.2020, when the Concessionaires

were working at the project site was, as a matter of fact, the lenders' exercise of the substitution rights.

57. With the aforesaid finding, the Concessionaires' opposition that there could be no question of prior default since the NHAI had 'granted EoTs' to it till 30.06.2020, no longer survives. That being said, it is now time to return to the question – were the Concessionaires in prior default at all? It is a settled position of law that a party seeking interim protection orders under Section 9 needs to show that the reliefs sought by him are such that, in their absence, he is bound to incur an injury by way of a violation of his right, which cannot be compensated by way of damages. The principles which guide the way forward from there have been set out by the Bombay High Court in *Newage Fincorp (India) Ltd. v Asia Corp. Securities Ltd.* (2000) 3 Arb LR 687 as under:

"It is not enough for the petitioner to show that he has a prima facie case, but he has to further show:

- (i) that in the event of withholding the relief of interim measures, he will suffer an irreparable injury;*
- (ii) that in the event of his success in the arbitration proceedings, he will not get the proper remedy, by being awarded damages;*
- (iii) that while taking into consideration the comparative mischief of inconvenience to the parties, the balance of convenience in his favour or in other words;*
- (iv) that the inconvenience in the event of withholding the relief of interim measures will in all events exceed that of the respondents in case he is not granted relief;*
- (v) the applicant must show a clear necessity for affording immediate protection of the alleged right or interest, which would otherwise be seriously injured or impaired."*

58. It is against this backdrop that I begin considering whether the Concessionaires have established a prima facie case in their favour, shown that the balance of convenience rests with them and adduced enough material to show that they meet all the aforesaid requirements for being granted interim reliefs under Section 9 of the Act.

59. It is a matter of fact that the project began in 2016 and even after the passage of four years, the project has barely gone beyond Milestone-I mark. A perusal of the cure period notice dated 12.10.2018 and the reply thereto sent on 04.12.2018, show that the NHAI claimed that Milestone-I had not been achieved until September 2018, per contra, the Concessionaires claimed that against a deadline of 07.02.2018, the Concessionaires had attained Milestone-I by 16.08.2018. Thus, even if the Concessionaires were to be believed for now, they were already running behind schedule within the first year of the project, and had delayed attainment of Milestone-I by six months. Today, the cumulative percentage of physical progress in work done by the Concessionaires stands at 20.34% and 30.66%. In complete contrast, the adjoining road construction packages falling under the jurisdiction of NHAI's Bhavnagar Unit between Bhavnagar-Talaja and Kagavadar-Una, have reported a cumulative work completion of 77.62% and 80.03% respectively. The Concessionaires have explained that the reason for the delayed work is that, they had not been handed over the project site on the appointed date of 24.04.2017, as per the explicit obligations cast on the NHAI under the Concession Agreement. However, a mere glance at the reply sent by the Concessionaire on 04.12.2018, especially at paragraph (i)(b) of its response to Paragraph 3 of the cure period notice, shows its admission to what the NHAI had been claiming all

along - the NHAI had access to 86.69% of the encumbrance-free project site as on 24.03.2017, a whole month prior to the appointed date. There is absolutely no subsequent claim that any part of this land was withheld from the Concessionaire. On a purely interim analysis of the case which was established before me, and the documents brought on record, I find that the Concessionaire may not be justified in claiming that they had not been provided access to adequate project site on the appointed date. Though the Concessionaire did bring up the issue of the local villagers protesting the construction of the Bhadrod Bypass, but even then, it admitted that these protests only hindered construction between 87.040 and 90.090 chainage. This, in my prima facie view, cannot excuse the complete inability to show sufficient progress in work on the remaining portions of the project site.

60. Notwithstanding this position, on its part, the NHAI appeared to be desperately negotiating with the Concessionaires to even secure 20% progress in physical work at the project site all the way until September 2019. In fact, in the periods between 12.10.2018 and 03.04.2019, and then 03.04.2019 till 31.08.2019, NHAI's accommodating attitude is reflected in its decision to grant extensions of time to the Concessionaires, all in the interest of salvaging the project in some manner and affording the Concessionaires an opportunity to catch up. The NHAI accommodated the Concessionaires' reasons for the delays, including the disruptions brought on by Cyclone Vayu, the July 2019 monsoons and financial disruptions. It even permitted the Concessionaires to continue working at the project site till 30.09.2020, albeit at the express request of the lenders, not to mention the gracious accommodation which had been extended to them in the sixty-day cure period in 2018. In fact, these repeated instances of generosity did

not escape unnoticed and was acknowledged in the letter sent by the senior lenders themselves on 08.09.2020 and the relevant extract thereof reads as under:

“ A perusal of the correspondences exchanged between NHAI and the Senior Lenders (through the Lenders’ Representative, being IIFCL) as also the minutes of the meetings held, from time to time, shows that the NHAI has been highly considerate in keeping its intention to terminate in abeyance, from time to time, so that the Concessionaire gets time to meet its commitments under the Concession Agreement”

61. At this stage, the Concessionaires cannot claim that they have not been given enough time to cure their defaults or been denied an opportunity to state their case, since even between April and June 2020, the NHAI kept requesting the Concessionaires, through the lenders, to produce data relating to the on-site work progress achieved by them. In any event, it is not as if the Concessionaires have claimed to have achieved any great strides or significant progress in the extra time granted to them between 12.10.2018 and 30.09.2020, rather, I find that they have continued to take shelter and seek extensions by producing marginal progress percentages. Moreover, their reliance on Article 31.1.1 of the Concession Agreement to state that they were not in default until the extensions of time granted to them came to an end, is without any basis - since the contract itself does not contain any such stipulation and, as already noted above, all parties were aware that the Concessionaires had already stepped into the substitution period of the lenders by October 2019.

62. For the very same reason, I am unable to find any merit in the plea that the notice dated 03.04.2018 stands extinguished or ended in any manner, just because the Concessionaires had been permitted to continue working at the project site till 30.09.2020. Every single adjustment period had been granted in favour of the Concessionaires after making a reference to the preceding one. Therefore, the cure period notice issued on 12.10.2018, the first, second and third IOT notices as also the letters and Minutes of the meeting granting further time to the Concessionaires to work on-site have to be read together, in entirety and in continuity. Thus, when the Concessionaires have been unable to submit any substantive progress in their work since 12.10.2018 and have largely remained unable to meet project milestones, or any other milestone after Milestone-I, if their own position was to be believed, it is evident that the Concessionaires have been in default of the Concession Agreement, and have failed to cure the same since 12.10.2018 despite the deferrals granted to them to continue working at the project site.

63. Ultimately, the language of the correspondences show that the period pursuant to the issuance of the cure period notice and carrying on all the way to the first adjustment period had been granted to the Concessionaires, purely in public interest. Additionally, the subsequent adjustments granted in the project timeline, which fell in the substitution period, were also sufficient opportunities for the Concessionaires to compensate for the delays caused and to ensure that the work at the project site gained momentum.

64. In the light of the discussion thus far and my conclusion that the Concessionaires are, and have been, in default of the Concession Agreements, it would be safe to say that were in 'prior default' of the

Concession Agreements as on 19.02.2020. Even before the onset of the COVID-19 pandemic, the Concessionaires had failed to pull up their socks and achieve any significant progress at the project site despite the cure period, the periods during which the IOT notices had been deferred, as also the substitution period.

65. Although it is true that the circular dated 19.02.2020 was indiscriminate in its application, the reliefs sought by the Concessionaires stem out of the circulars released subsequently, especially the one released by the Finance ministry on 13.05.2020, which narrowed down the extension of these benefits. As discussed in paragraph 14 hereinabove, the Concessionaires were required to show that i) they were not in default under the Concession Agreements as on 19.02.2020 and that (ii) their inability or the impossibility of performing the contract had a direct nexus with the unexpected event which it claimed had rendered the performance of the contract impossible. However, in the facts of the present case, it is evident that the inability of the Concessionaires to carry out their obligations in respect of the project work, or the impossibility experienced by them in doing so, existed even without the pandemic. Clearly, when they had been defaulting on carrying out their work in terms of the Concession Agreements, even prior to the force majeure event, there is no question of a direct nexus between their failure to perform in the third adjustment period and the pandemic itself; rather the Concessionaires had become accustomed to such non-performance. In the light of this discussion, invariably, there is no question of unconditional extension of the benefits of the circulars dated 13.05.2020, 18.05.2020, 26.05.2020, 03.06.2020 and October 2020 in favour of the Concessionaires. Thus, it cannot be said that there was any infirmity

in the manner in which the NHAI applied these circulars in the Concessionaires' case, or, conversely, that the NHAI had arbitrarily eschewed extending the benefits thereof to the Concessionaires.

66. In view of the aforesaid discussion, when I consider the only other contention urged by the Concessionaires, that the NHAI was precluded from terminating the agreements at a time when the Force Majeure Clause was in operation, I find no merit therein. Without prejudice to all their other arguments, the Concessionaires had claimed that notwithstanding everything else, a combined reading of Clauses 28.2 and 31.1.1 of the Concession Agreement showed that they could not be deemed defaulters and were entitled to a period of respite as long as the COVID-19 pandemic continued to pose as a threat and was acknowledged as such by the Government of India. To deal with this point, it may be useful to refer to the relevant extracts of these provisions, which the Concessionaires have relied on:

“28.2 Non-Political Event

A Non-Political event shall mean one or more of the following acts or events:

(a) act of God, epidemic, extremely adverse conditions, lightning, earthquake, land slide, cyclone, flood volcanic eruption, chemical or radioactive contamination or ionizing radiation, fire or explosion (to the extent of contamination or radiation or fire or explosion originating from a source external to the Site);

31.1 Termination for Concessionaire's Default

31.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (sixty) days, the Concessionaire shall be deemed to be in default of this agreement (the “Concessionaire Default”),

unless the default has occurred as a result of any breach of this Agreement by the Authority or due to Force Majeure.”

67. Undoubtedly, the COVID-19 pandemic is a non-political force majeure event, it is far from over and the Central Government continues to monitor and pass directions in public health interest as on date. The purpose of Clause 31.1.1 is to define what would constitute a default on the part of the Concessionaire and the allusion to Force Majeure, in this context, is in order to save the Concessionaire from being deemed a defaulter when it cannot carry out the project work owing to a Force Majeure event which is taking place.

68. With this in mind, I have given due thought to the Concessionaires' contention that it could not be deemed to be in default between April-September 2020, when COVID-19 pandemic or the force majeure event was still underway, and could not bring myself to agree with this plea. In my view, whether the benefit under Clauses 28.2 and 31.1.1 of the Concession Agreement was accruing to the Concessionaires at all, was a question which could have been contemplated only if they had not been in prior default on 19.02.2020 or when the existing relationship between them and the NHAI was continuing to flow out of the Concession Agreements; that is clearly not the case owing to a transformation in the nature of their relationship since 01.10.2019, caused by the intercession of the senior lenders in exercise of their substitution right. In September 2020, when these petitions were filed, the Concessionaires' link with the Concession Agreement was surviving through the aid of the Substitution Agreement. After all, the schedule adjustments granted to them w.e.f. 09.10.2019 were not an *extension* in the

strictest sense of the term, rather they were pockets of time which were borrowed out of the substitution period available with the senior lenders. Thus, the continued presence of the Concessionaires at the project site between 01.10.2019 and 30.09.2020 was not in their capacity as signatories to the Concession Agreements dated 08.07.2016 and 09.08.2016, but rather as the parties nominated by IIFCL under the Substitution Agreements to carry out the remaining work under the Concession Agreement. Even otherwise, at the cost of repetition, the Concessionaires were in default even before the onset of COVID-19 pandemic, they remained grossly unable to finish the first milestone set out for them, or even the revised milestones later on. Even in September 2020, they continued being stuck doing work which was expected out of them, years ago. For these reasons, there is absolutely no merit to the contention that the Concessionaires could not be held to be in default of the Concession Agreements during the subsistence of the COVID-19 pandemic, or that any benefit inured to them on this ground.

69. All said and done, these are ultimately not some run of the mill activities, but expensive projects initiated to build, sustain and maintain the national transport corridors of the country, integral to the economy and the people, in public private partnership. Upon a combined assessment of all these factors, I see absolutely no justifiable *prime facie* reason to punish the NHAI by making it suffer any further contractual relationship with the Concessionaires, simply because it was indulgent towards them in the past by allowing it to continue working at the project site, especially since that decision stemmed out of a bonafide hope that the Concessionaires would be able to substantially improve on their performance. For this reason, the decision of the NHAI to issue the RFP on 28.08.2020 appears to be justified.

Not to mention, this RFP, having been issued after the lenders' substitution period had already ended, does not appear to be in violation of any contractual provisions. Even otherwise, no prejudice could be said to have been caused to the Concessionaires or the lenders on that count, since the work thereunder was only awarded after 30.09.2020, in October 2020, upon obtaining the leave of this Court.

70. Although an ancillary issue was raised by the NHAI that the contracts involved herein pertain to infrastructure projects, thereby implying that the bar under Sections 14(b) and (d), 20-A and 41(ha) of the Specific Relief Act, 1963 prevented any injunctions from being granted in these petitions. However, in the light of my aforesaid findings, I do not deem it necessary to deal with this issue. That being said, it is once again clarified that the findings hereinabove are prima facie in nature and would not bind the arbitral proceedings at all. It shall be open for each party to raise its respective claims and counterclaims, which shall invite a comprehensive adjudication by the arbitral Tribunal concerned, on its own merits, in accordance with law.

71. Before concluding, I must deal with one final concern. In October 2020, seeing that the Concessionaires' defaults had left the highway in a deficient state, the NHAI had invoked Clause 17.9.1 of the Concession Agreements to seek a third-party entity for carrying out emergency maintenance work upon the road, at the risk and cost of the Concessionaires. On 22.10.2020, the Court granted the NHAI permission to effect these works, with the consent of the Concessionaires who only had a limited prayer - the question whether the liability of these works could be fastened upon them be left open for determination in appropriate proceedings later

on. When these petitions were reserved, Mr. Tripathi had recalled the attention of this Court to the aforesaid events to plead that in case these petitions were to be rejected, the Concessionaires ought to be directed to forthwith reconstitute the NHAI for the expenditure it had incurred as a result of these emergency works. However, on this aspect, I am inclined to grant the Concessionaires' prayer since my views are interim in nature, and no such direction would be sustainable without having the disputes between the parties finally adjudicated. In my view, whether the Concessionaires are liable at all on this count, can be determined only once the parties have their differences examined in arbitration. The NHAI, therefore, will be at liberty to raise this claim in arbitration, which would then be decided as per law.

72. For the aforesaid reasons, these petitions, being bereft of merit, are dismissed along with the pending applications, with no order as to costs.

(REKHA PALLI)
JUDGE

FEBRUARY 17, 2021