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

Decided on: 20.12.2022

+ **ARB. A. (COMM.) 75/2022 & I.A. 17778/2022, I.A. 18288/2022, I.A. 20313/2022.**

SUPREME PANVEL INDAPUR

TOLLWAYS PRIVATE LIMITED

..... Appellant

Through: Mr. Jaideep Gupta, Senior Advocate
with Dr. Amit George, Mr. Avinash
Shukla, Mr. Akshay Khetan, Mr.
Rayadurgam Bharat, Mr. Amol,
Mr. Arkaneil, & Mr. S.P. Mukherjee,
Advocates.

versus

NATIONAL HIGHWAYS

AUTHORITY OF INDIA

..... Respondent

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

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CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

JUDGMENT

1. The present appeal under Section 37(2)(b) of the Arbitration and Conciliation Act, 1996 [hereinafter, "the Act"] is directed against an order dated 23.10.2022 by which a three-member Arbitral Tribunal

[hereinafter, “the Tribunal”] has rejected an application of the appellant for interim measures under Section 17 of the Act.

I. Factual Background:

2. The Tribunal is in seisin of disputes between the parties under a Concession Agreement dated 21.01.2011 [hereinafter, “CA”] with regard to “*Four Laning of Panvel-Indapur Section of NH-17 from KM 0.000 to KM 84.000 in the State of Maharashtra*”, on Build Operate Transfer [hereinafter, “BOT”] basis.¹ The original period for completion of the work was 910 days, the scheduled date of completion being 16.06.2014. The CA envisaged a concession period of 21 years from 19.12.2011 and payment of an additional concession fee by the appellant. The relevant clauses of the CA, cited in the course of arguments, are set out later in this judgment.

3. The project has admittedly not achieved completion within the time originally stipulated. The substantive dispute between the parties relates to the responsibility for the delay. There is considerable material on record in this connection, of which the relevant minutes of meetings and correspondence will be referred to at the appropriate juncture. The appellant alleges that deviation from the completion schedule occurred on account of the respondent not being able to ensure Right of Way, which was its responsibility under Article 10 of the CA. Moreover, certain delays occurred as the scope of work was increased by the respondent unilaterally. One of the principal contentions of the respondent on the other hand, is that the appellant

¹ Concession Agreement dated 21.01.2011 at document-3 of appellant’s list of documents.

was unable to infuse sufficient funds for timely completion of the project and that the respondent was compelled to invest a sum of ₹540 crores in the project under its One Time Fund Infusion Scheme [hereinafter, “OTFIS”].

4. The progress of the project was monitored from time to time by the OTFIS Review Committee and extensions of time for completion were also granted. The last of the extensions, granted on 11.08.2020, was until 31.03.2021.

5. The respondent issued a notice of intention to terminate dated 16.10.2020 [hereinafter, “NITT”], wherein it referred to the correspondence between the parties and contractual clauses to assert that the appellant had failed to achieve progress in the project as envisaged, that it had failed to infuse requisite funds and that the respondent was, therefore, entitled to terminate the CA under Clause 37.1.1 (c), (e) and (g) thereof. After considerable correspondence and meetings between the parties, the CA was ultimately terminated on 17.11.2021.

6. The appellant approached this Court, under Section 9 of the Act, for stay of termination of the CA in anticipation of arbitration proceedings [O.M.P.(I)(COMM) 382/2021]. Several orders were passed by this Court in the course of these proceedings, and an appeal arising therefrom [FAO(OS)(COMM) 52/2022]. It is not necessary for the purposes of the present appeal to enumerate those orders in detail. Suffice it to state that by virtue of an order of the learned Single Judge dated 08.02.2022, read with orders of the Division Bench dated

16.03.2022 and 21.03.2022, the appellant's application under Section 9 of the Act was directed to be treated as an application under Section 17 of the Act before the Tribunal, which had been constituted in the interregnum. However, as the respondent had called for fresh tenders pursuant to the impugned termination, the Division Bench directed that until the Tribunal takes a view on the application under Section 17 of the Act, bids may be invited but no work order should be issued to the successful bidder.

7. The Tribunal has thereafter heard the application under Section 17 of the Act and passed the impugned order dated 23.10.2022 rejecting the appellant's request for stay of termination.

II. Relevant Clauses of the Concession Agreement:

8. The following clauses of the CA have been cited by learned Senior Counsel for the parties in the course of arguments: -

"ARTICLE 14

COMPLETION CERTIFICATE

14.1 Tests

14.1.1 At least 30 (thirty) days prior to the likely completion of the Project Highway, the Concessionaire shall notify the Independent Engineer of its intent to subject the Project Highway to Tests. The date and time of each of the Tests shall be determined by the Independent Engineer in consultation with the Concessionaire, and notified to the Authority who may designate its representative to witness the Tests. The Concessionaire shall provide such assistance as the Independent Engineer may reasonably require for conducting the Tests. In the event of the Concessionaire and the Independent Engineer failing to mutually agree on the dates for conducting the Tests, the Concessionaire shall fix the dates by not less than 10 (ten) days notice to the Independent Engineer.

14.1.2 All Tests shall be conducted in accordance with Schedule-1. The Independent Engineer shall observe, monitor and review the results of the Tests to determine compliance of the Project Highway with Specifications and Standards and if it is reasonably anticipated or determined by the Independent Engineer during the course of any Test that the performance of the Project Highway or any part thereof does not meet the Specifications and Standards, it shall have the right to suspend or delay such Test and require the Concessionaire to remedy and rectify the defects or deficiencies. Upon completion of each Test, the Independent Engineer shall provide to the Concessionaire and the Authority copies of all Test data including detailed Test results. For the avoidance of doubt, it is expressly agreed that the Independent Engineer may require the Concessionaire to carry out or cause to be carried out additional Tests, in accordance with Good Industry Practice, for determining the compliance of the Project Highway with Specifications and Standards.

14.2 Completion Certificate

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

14.3 Provisional Certificate

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

14.3.2 The Parties hereto expressly agree that a Provisional Certificate under this Clause 14.3 may, upon request of the Concessionaire to this effect, be issued for operating part of the Project Highway, if at least 75% (seventy five per cent) of the

total length of the Project Highway has been completed. Upon issue of such Provisional Certificate, the provisions of Article 15 shall apply to such completed part.

14.4 Completion of Punch List items

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14.5 Withholding of Provisional Certificate

14.5.1 If the Independent Engineer determines that the Project Highway or any part thereof does not conform to the provisions of this Agreement and cannot be safely and reliably placed in commercial operation, it shall forthwith make a report in this behalf and send copies thereof to the Authority and the Concessionaire. Upon receipt of such a report from the Independent Engineer and after conducting its own inspection, if the Authority is of the opinion that the Project Highway is not fit and safe for commercial service, it shall, within 7 (seven) days of receiving the aforesaid report, notify the Concessionaire of the defects and deficiencies in the Project Highway and direct the Independent Engineer to withhold issuance of the Provisional Certificate. Upon receipt of such notice the concessionaire shall remedy and rectify such defects of deficiencies and thereupon Tests shall be undertaken in accordance with this Article 14. Such procedure shall be repeated as necessary until the defects or deficiencies are rectified.

14.5.2 Notwithstanding anything to the contrary contained in Clause 14.5.1, the Authority may, at any time after receiving a report from the Independent Engineer under that Clause, direct the Independent Engineer to issue a Provisional Certificate under Clause 14.3, and such direction shall be complied forthwith.

14.6 Rescheduling of Tests

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ARTICLE 15

ENTRY INTO COMMERCIAL SERVICE

15.1 Commercial Operation Date (COD)

Four-Laning shall be deemed to be complete when the Completion Certificate or the Provisional Certificate, as the case may be, is issued under the provisions of Article 14, and accordingly the commercial operation date of the Project shall be the date on which such Completion Certificate or the Provisional Certificate is issued (the “COD”). The Project Highway shall enter into

commercial service on COD whereupon the Concessionaire shall be entitled to demand and collect Fee in accordance with the provisions of Article 27.

15.2 Damages for delay

Subject to the provisions of Clause 12.4, if COD does not occur prior to the 91st (ninety first) day after the Scheduled Four-Laning Date, unless the delay is on account of reasons solely attributable to the Authority or due to Force Majeure, the Concessionaire shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until COD is achieved.

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ARTICLE 37

TERMINATION

37.1 Termination for Concessionaire Default

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

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

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

(e) Project Completion Date does not occur within the period specified in Clause 12.4.3;

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

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(k) a breach of any of the Project Agreements by the Concessionaire has caused a Material Adverse Effect;

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37.1.2 Without prejudice to any other rights or remedies which the Authority may have under this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall by a notice inform the Concessionaire of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) days, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of clause 37.1.3.”²

III. Relevant provisions of the Specific Relief Act, 1963:

9. The following provisions of the Specific Relief Act, 1963 [hereinafter, “SRA”], as amended by Act 18 of 2018, have been cited in the impugned order and referred to in the course of hearing:

“CHAPTER II: SPECIFIC PERFORMANCE OF CONTRACTS

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Section 10. Specific performance in respect of contracts: -

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

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

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

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

² Emphasis supplied.

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

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

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Section 20A. Special provisions for contract relating to infrastructure project: -

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

Explanation:- For the purposes of this section, section 20B and clause (ha) of section 41, the expression “infrastructure project” means the category of projects and infrastructure Sub-Sectors specified in the Schedule.

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CHAPTER VII: INJUNCTIONS GENERALLY

Section 36. Preventive relief how granted: -

Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

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CHAPTER VIII: PERPETUAL INJUNCTIONS

Section 38. Perpetual injunction when granted:

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(2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.

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Section 41. Injunction when refused: -

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(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project.”

10. Section 20A and Section 41 (ha) of SRA have *inter alia* been inserted by the 2018 amendment. Section 10 has also been substituted for the following pre-amendment provision: -

“Section 10: Cases in which specific performance of contract enforceable: -

Except as otherwise provided in this Chapter, the specific performance of any contract may, in the discretion of the court, be enforced-

a) *when there exists no standard for ascertaining actual damage caused by the non-performance of the act agreed to be done; or*

b) *when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.*

Explanation: - Unless and until the contrary is proved, the court shall presume-

(i) that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money; and

(ii) that the breach of a contract to transfer movable property can be so relieved except in the following cases: -

(a) where the property is not an ordinary article of commerce, or is of special value or interest to the plaintiff, or consists of goods which are not easily obtainable in the market;

(b) where the property is held by the defendant as the agent or trustee of the plaintiff.”

IV. Findings of the Tribunal:

11. The Tribunal has rendered the following *prima facie* findings :-

- a. It noted that, pursuant to the infusion of funds by the respondent under the OTFIS, Review Committee meetings were held which

reflect that the appellant was unable to achieve the committed targets.³

- b. The minutes of the 21st OTFIS meeting on 24.01.2020 concerned replacement of the Engineering, Procurement and Construction [hereinafter, “EPC”] contractor by the appellant for part of the project and revised estimate of balance works. The Tribunal noted the appellant’s failure to infuse further funds, leading to its request dated 30.04.2020 for infusion of further funds by the respondent.⁴
- c. Lack of sufficient funding led to repeated requests by the appellant to the respondent for additional funding and unsatisfactory performance of the project by the appellant. Noting the minutes of various meetings of the OTFIS Review Committee, the Tribunal found that the appellant has been unable to demonstrate that it has the necessary funds and wherewithal to complete the project.⁵
- d. Although the appellant has invested a large amount in the project, the respondent has also infused significant funding but the progress of the project remained dismal even thereafter. While reserving the question of responsibility for this situation for decision at the stage of final adjudication, the Tribunal noted that the appellant has accepted the slow progress of the work in

³ Paragraph 50 of the impugned order.

⁴ Paragraph 52 of the impugned order.

⁵ Paragraphs 53 and 54 of the impugned order.

OTFIS meetings and even requested for suspension of the project by a communication dated 10.08.2021.⁶

- e. The Tribunal also found *prima facie* against the appellant on the question of issuance of Provisional Commercial Operation Date [hereinafter, “PCOD”] under Clause 14.3.2 of the CA. It noted that the appellant had accepted that no street lighting had been provided and that unrefuted photographs show that the road was not in a workable condition.⁷
- f. Even if PCOD had been issued, the appellant could not have been in a position to achieve Commercial Operation Date [hereinafter, “COD”] within 90 days as required by Clause 14.4 of the CA, as it did not have sufficient funds to complete the project.⁸
- g. In the context of amendments to Sections 14, 20A and 41(ha) of the SRA, the Tribunal observed that the CA being determinable, is incapable of specific performance by virtue of Section 14(d) of the SRA. It is a commercial contract which can be determined and terminated, under Clause 37 of the CA, by either side on occurrence of conditions mentioned therein.⁹

⁶ Paragraphs 53 and 55 of the impugned order.

⁷ Paragraph 56 of the impugned order.

⁸ Paragraph 57 of the impugned order.

⁹ Paragraphs 61-64 of the impugned order.

- h. If the determination of the CA is ultimately found to be illegal, the aggrieved party would have to be compensated by payment of damages.¹⁰
 - i. The grant of stay of termination which has been in operation since 17.11.2021, at this stage, when the appellant has already been dispossessed from the project, would amount to final relief being granted at the interim stage.¹¹
 - j. On the basis of above discussion, the Tribunal came to a conclusion that the appellant may have an arguable case but it does not have a strong *prima facie* case warranting stay of termination. The loss and injury, if any, suffered by the appellant was also found to be compensable in money.¹²
 - k. Having regard to the requirement of expeditious conclusion of the project, the balance of convenience cannot be said to be on the side of the appellant.¹³
12. Recording the aforesaid *prima facie* findings, the Tribunal has made it clear that the final adjudication of the case will be dependent upon the material adduced at trial and the Tribunal would, if it finds in favour of the appellant, grant such reliefs as the appellant is entitled to in law.

¹⁰ Paragraphs 63 and 64 of the impugned order.

¹¹ Paragraphs 54 and 68 of the impugned order.

¹² Paragraph 72 of the impugned order.

¹³ Paragraph 73 of the impugned order.

13. Having rejected the appellant's application on the aforesaid reasoning, the Tribunal concluded by noting, nevertheless, that the appellant had invested a huge amount in project and achieved more than 88% physical progress. It, therefore, suggested that the parties may attempt to arrive at a mutually acceptable resolution having regard to the fact that even in the course of arbitration proceedings, the parties had made an attempt to settle the matter amongst themselves.¹⁴

14. The final observations of the Tribunal were, in fact, the starting point of the proceedings before this Court. As noted in the orders dated 02.11.2022 and 11.11.2022, learned Senior Counsel for both parties accepted the suggestion of the Tribunal and attempted to achieve a consensus. The appellant also expressed a desire to introduce a proposed investor. Regrettably, their attempts to resolve the matter mutually have been unsuccessful and I have, therefore, proceeded to hear the appeal on merits.

V. Submissions:

15. Mr. Jaideep Gupta, learned Senior Counsel for the appellant, submitted that the Tribunal has erred in finding the *prima facie* case established by the appellant to be insufficient for grant of interim relief. He pointed out that the appellant had admittedly completed 88% of the physical progress of the work. He emphasised that, in a BOT contract, the concessionaire makes the investment in the project in consideration of the right to operate the highway and collect toll for the concession period. In a case such as the present one, where the

¹⁴ Paragraphs 77-79 of the impugned order.

agreement is terminated on the verge of project completion, the termination has the consequence of depriving the appellant of consideration altogether. The threshold for applying for PCOD being 75% of project completion, the petitioner in fact applied for PCOD on 10.11.2021. Mr. Gupta submitted that, instead of considering the petitioner's case for issuance of PCOD certificate, the respondent proceeded to terminate the CA altogether. He further submitted that the act of the respondent in terminating the CA without consideration of the appellant's request for issuance of the PCOD, in fact, deprives the appellant of its right to collect toll revenue and is a *mala fide* attempt by the respondent to appropriate the revenue which would otherwise be available to the appellant to recoup its investment.

16. Mr. Gupta pointed out that the respondent itself had extended the time for completion of the project from time to time, including lastly by an order dated 11.08.2020, upto 31.03.2021. He submitted that in these circumstances, the respondent also agreed to continue the project as is evident from the fact that the respondent did not act upon the NITT dated 16.10.2020 until the impugned termination letter, issued 13 months thereafter.

17. Learned Senior Counsel submitted that a Public Interest Litigation [PIL No. 19/2021] has been instituted before the Bombay High Court, in which the High Court is monitoring the status of the project. Mr. Gupta referred to an affidavit filed by the respondent before the Bombay High Court on 15.11.2021, which *inter alia* states as follows:-

“3. I further to say that the Four- Laning of Panvel- Indapur started in the year 2012 and was scheduled to complete during June 2014. The Project got delayed due to various issues i.e. Financial crisis being face by the Concessionaire, delayed handing over of encumbrance-free land including land belonging to Railways and Salt Pan Department, delay in shifting of various utilities, NBWL clearance for the eco-sensitive zone fo Karnala (20 Km length) received in October 2015.Diversion of forest land in December 2016, removal of encroachments. Majority of encroachments removed by March 2016, Long monsoon period, Public demand for various additional facilities and Poor performance by the Concessionaire. When aforesaid issues were mostly resolved and work is restarted in January 2017 with one time fund infusion (OTFIS) of Rs .540 Cr. by the NHAI. The Concessionaire has awarded the work from Km 0+000 to 38+000 (38 km in length) to EPC Contractor M/s JMM Infra Pvt Ltd. and From Km 38+000 to 84+600 (46 km in length) no EPC Contractor deployed by the Concessionaire up to October-2018. In November-2018 work from Km 38+000 to 64+300 (26 km in length) was awarded by the Concessionaire to M/s JMM Infra Pvt Ltd and in march-2019 work from Km 64+300 to 8.4+600 (20.60 km in length) to MD Infra / Rameshwar Construction. **The Concessionaire has already carried out the works amounting of Rs. 540 Cr. and further funding of about 67 Cr. is required to complete the work required for achieving Provisional Commercial Operational Date (PCOD).** I further say that with regards to other contentions raised referring to the Affidavit dated 25.08.2021 filed by this Respondent, it is necessary to mention here that Respondent by their affidavit has apprised this Hon'ble Court about the slow progress made in the their stretch along with difficulty faced with regard to finance and other financial constraints faced by the Concessioner. **Based on the assurances given by the lenders during the VC held on EPC on 20.04.2021, whereby an additional funding of Rs.40 Crores was to have finalized within 10 to 15 days from the date of the said meeting. However, the assured, fund has not been infused by the lender Bank till date. The provisional completion is likely to be achieved by December 2021 subject to availability of the working season and the Concessioner arranging the funds. Going by the assurances given and the availability of working season and funds, the completion date may be expected by 31.03.2022.** As far as the present status is concerned, the stretch is in motorable condition prior to the monsoon. However, due to damages occurred during the heavy rains and heavy vehicular traffic in certain sections, there were some patches, potholes and waterlogging which are being filled up with Paver blocks & Bituminous material.

In addition to this, two dedicated Ambulances and Patrol vehicles are made available at 0+000 (Kharpada) & Km. 66+000 (Sukheli) so as to take care of emergency situations and safeguarding of the road users.

4. *I say that repair and maintenance work on the Highway Project on the stretch from Panvel -Indapur section is being done regularly under the supervision of an independent Engineer and the Authority. I say that Respondent has issued intention to Termination Notice to the Concessionaire for slow progress of work, in October, 2020. However, thereafter, it was considered not to proceed for termination of the contract on assurance given by Lenders to infuse funds of Rs. 40 Cr. for achievement of PCOD. I say that till date physical progress is 88.08% of the work on the aforesaid section is complete.*¹⁵

Mr. Gupta submitted that the affidavit discloses that the respondent had decided not to act on the basis of the NITT dated 16.10.2020 and at the very least, was required to give a fresh notice in due compliance of the termination provisions. He submitted that the Tribunal has failed to consider the appellant's argument with regard to the staleness of the cure notices issued by the respondent in the year 2017 *vis-à-vis* the NITT dated 16.10.2020 and, in turn, of the long period between the issuance of the said notice and the actual termination. Mr. Gupta relied upon a judgment of a coordinate bench in *EFS Facilities Services (India) Pvt. Ltd. vs. Indeen Bio Power Limited*¹⁶, to contend that consideration of the said material would have led to a different conclusion which in itself is a ground for interference with the impugned order in appeal.

18. With reference to the provisions of the SRA, as amended by the Amendment Act of 2018, Mr. Gupta submitted that the nature of

¹⁵ Emphasis supplied.

¹⁶ 2021 SCC OnLine Del 3414.

specific performance as a discretionary remedy, to be granted only when monetary compensation would not afford adequate relief, has been done away with by the substitution of erstwhile Section 10(b) of the SRA. This is also reflected in the amendment to Section 14 whereby the bar on specific performance in such situations has been removed. He argued that the Tribunal's analysis, to the extent that it considers whether damages would afford sufficient compensation to the appellant if it ultimately succeeds, is erroneous on this count.

19. Mr. Gupta further submitted that, in the context of a BOT contract, the finding of the Tribunal that damages would be adequate to compensate the appellant is also erroneous. He reiterated that such an approach condones a complete failure of consideration, as the only consideration available to a BOT contractor in return for its investment is the ability to operate the highway and collect toll revenue. He relied upon a decision of a coordinate bench in *West Haryana Highways Projects Pvt. Ltd. vs. National Highways Authority of India*¹⁷, wherein the Court granted an injunction against suspension of a BOT contract upon a detailed consideration of the questions of balance of convenience and irreparable injury.

20. With regard to Section 20A of the SRA, also inserted by the 2018 amendment, Mr. Gupta submitted that the injunction sought by the appellant does not fall foul of the prohibition contained therein as the appellant wishes to make a proposal which would not cause impediment or delay in the progress or completion of the contractual

¹⁷ Judgment dated 07.10.2020 in OMP(I)(COMM) 144/2020 and connected cases.

work. He contended that the proposal of the appellant, which includes an introduction of an investor willing to put in over ₹150 crores to complete the CA, would obviate any apprehension that the progress of the CA would suffer, if an injunction were to be granted. In this connection, he also stated that after the impugned termination, the respondent has appointed an EPC contractor whom the appellant is also willing to use for the purpose appointed to enable continuity, and that the appellant would be willing to perform such additional work, if any, for which the respondent has issued notice inviting tenders, pursuant to the impugned termination.

21. Mr. Parag P. Tripathi, learned Senior Counsel for the respondent-NHAI, submitted that the arguments advanced on behalf of the appellant are beyond the scope of scrutiny of this Court under Section 37 of the Act. He emphasised that the appellate jurisdiction under Section 37 is limited to a finding that the view taken by the Tribunal is capricious or perverse. In this connection, Mr. Tripathi cited the decisions of the Supreme Court in *Printers (Mysore) Private Ltd. vs. Pothan Joseph*¹⁸ and *Wander Ltd. and Anr. vs. Antox India (P) Ltd.*¹⁹, and the decisions of this Court in *Green Infra Wind Energy Ltd. vs. Regen Powertech Pvt. Ltd.*²⁰, *Sona Corporation India Pvt. Ltd. vs. Ingram Micro India Pvt. Ltd. & Anr.*²¹, *Sanjay Arora & Anr. vs. Rajan*

¹⁸ (1960) 3 SCR 713.

¹⁹ 1990 Supp SCC 727.

²⁰ 2018 SCC OnLine Del 8273.

²¹ 2020 SCC OnLine Del 300.

*Chadha & Ors.*²² and *Manish Aggarwal & Anr. vs. RCI Industries and Technologies Ltd.*²³

22. Without prejudice to this contention, Mr. Tripathi supported the decision of the Tribunal on all three facets relevant to grant of interim injunction i.e. *prima facie* case, balance of convenience and irreparable loss.

23. With regard to *prima facie* case, Mr. Tripathi submitted that although 88% of the physical progress of the project had been completed, the appellant was repeatedly in breach of the timelines for project milestones. He submitted additionally that the appellant's failure to infuse the requisite funds for project completion had correctly been noticed by the Tribunal, and that the appellant was also in violation of its obligations with regard to operation and maintenance of the highway. He referred to the OTFIS progress reports and the independent engineer's [hereinafter, "IE"] reports placed on record, to submit that the project was at a virtual standstill since July, 2021 which led to the decision to terminate. With regard to the appellant's contention regarding the issuance of the PCOD, Mr. Tripathi referred to Clauses 14.3.1 and 14.3.2 of the CA to emphasise that PCOD issuance is not an automatic consequence of 75% completion of the project but dependent upon the fulfilment of various conditions, including requirement for testing in terms of Clause 14.1.

²² 2021 SCC OnLine Del 4619.

²³ 2022 SCC OnLine Del 1285.

24. Mr. Tripathi referred to the orders dated 07.03.2022 and 10.10.2022 passed by the Bombay High Court in PIL No. 19/2021 to point out that the Division Bench found the pace of progress of the project disappointing and also had occasion to comment upon the stand of the respondent before this Court in the proceedings under Section 9 of the Act.

25. With regard to the apparent inconsistency between the stand taken in the affidavit dated 15.11.2021 filed by the respondent before the Bombay High Court, as opposed to the termination two days later, Mr. Tripathi submitted that the assurances given to the Bombay High Court with regard to provisional completion by December, 2021 and final completion by 31.03.2022 were expressly conditional upon availability of working season and funds being arranged by the appellant. He further submitted that the affidavit itself makes it clear that the respondent's decision not to proceed with termination on the basis of the NITT issued in October, 2020 was based on an assurance by the appellant's lenders that they would infuse funds of ₹40 crores for achievement of PCOD. According to Mr. Tripathi, these funds were not infused. Upon a query of the Court with regard to the failure of the respondent to inform the Bombay High Court in the said affidavit of any decision having been taken to terminate the CA with the appellant, Mr. Tripathi submitted, on examining the records of the respondent, that the decision had been taken earlier in October, 2021 but was somehow not communicated to the deponent of the affidavit so as to be placed before the Bombay High Court.

26. On the question of balance of convenience, Mr. Tripathi distinguished the decision of this Court in *West Haryana Highways*²⁴ on facts. He submitted that the said decision was based on the PCOD already having occurred and the highway being operational, on the finding that the NHAI was responsible for delay and on the fact that the impugned order in that case was one of suspension rather than final termination of the CA. He also submitted that in the facts of the present case, the perspective on the question of the balance of convenience would be different as the respondent had also invested a significant amount in the project.

27. Mr. Tripathi refuted the appellant's submission with regard to the staleness of the cure notices and/or of the NITT on the ground that these are ultimately issues which will fall for final adjudication before the Tribunal, and cannot form the basis of appellate interference with the Tribunal's assessment of *prima facie* case. He submitted that the cure notices and NITT were sent strictly in terms of the CA and the respondent's failure to act immediately would not disentitle it to terminate the CA in the face of the appellant's continued non-compliance with contractual provisions. The position of the appellant having become untenable, it was submitted that the respondent was well within its contractual right to terminate.

²⁴ Supra (note 17).

VI. Analysis:

A. Scope of jurisdiction under Section 37(2)(b) of the Act

28. The first question to be considered in the light of these submissions is with regard to the scope of this Court's jurisdiction under Section 37(2)(b) of the Act. Mr. Tripathi submitted that the appellate power under Section 37(2)(b) of the Act is to be exercised in limited circumstances, relying upon four decisions of this Court.²⁵ Although the aforesaid judgments have been rendered upon a consideration of the limitations on judicial interference in arbitration proceedings, reliance has been placed upon the judgment of the Supreme Court in *Wander*²⁶, which is not a decision emanating from arbitration proceedings, but qualifies the extent of the general appellate power available under the Civil Procedure Code, 1908. The Supreme Court held, relying upon its earlier decision in *Printers (Mysore) Pvt. Ltd.*²⁷, as follows:

“13. On a consideration of the matter, we are afraid, the appellate bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the appellate court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocination as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.

²⁵ *Sona Corporation* (Supra note 21), *Green Infra Wind* (Supra note 20), *Sanjay Arora* (Supra note 22) and *Manish Aggarwal* (Supra note 23).

²⁶ Supra (note 19).

²⁷ Supra (note 18).

14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph*: (SCR 721)

“... These principles are well established, but as has been observed by Viscount Simon in *Charles Osenton & Co. v. Jhanaton* ‘...the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case’.”

The appellate judgment does not seem to defer to this principle.”²⁸

29. The first of the judgments of this Court, cited by Mr. Tripathi, dealing with the power under Section 37(2)(b) of the Act is *Green Infra Wind Energy Ltd.*²⁹ wherein a coordinate bench of this Court relied upon *Wander*³⁰ to hold that appellate power cannot be exercised in the absence of a finding that the discretionary order of the tribunal was perverse or contrary to law. The Court also noticed the decisions

²⁸ Emphasis supplied.

²⁹ Supra (note 20).

³⁰ Supra (note 19).

of this Court in *Ascot Hotels and Resorts Pvt. Ltd. vs. Connaught Plaza Restaurants Pvt. Ltd.*³¹ and *Bakshi Speedways vs. Hindustan Petroleum Corporation.*³² The aforesaid decision was followed by another coordinate bench in *Sona Corporation India Pvt. Ltd.*³³

30. In *Dinesh Gupta and Ors. vs. Anand Gupta and Ors.*³⁴, this Court considered the matter with reference to Section 5 of the Act and the generally limited nature of the Court's power in arbitration proceedings, to conclude as follows:

"60. In the opinion of this Court, another important, and peculiar, feature of the 1996 Act, which must necessarily inform the approach of the High Court, is that the 1996 Act provides for an appeal against interlocutory orders, whereas the final award is not amenable to any appeal, but only to objections under Section 34. If the submission of Mr. Nayar, as advanced, were to be accepted, it would imply that the jurisdiction of the Court, over the interlocutory decision of the arbitrator, would be much wider than the jurisdiction against the final award. Though, jurisprudentially, perhaps, such a position may not be objectionable, it does appear incongruous, and opposed to the well settled principle that the scope of interference with interim orders, is, ordinarily, much more restricted than the scope of interference with the final judgment.

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64. There can be no gainsaying the proposition, therefore, that, while exercising any kind of jurisdiction, over arbitral orders, or arbitral awards, whether interim or final, or with the arbitral process itself, the Court is required to maintain an extremely circumspect approach. It is always required to be borne, in mind, that arbitration is intended to be an avenue for "alternative dispute resolution", and not a means to multiply, or foster, further disputes. Where, therefore, the

³¹ 2018 SCC OnLine Del 7940.

³² 2009 SCC OnLine Del 2476.

³³ Supra (note 21).

³⁴ 2020 SCC OnLine Del 2099.

arbitrator resolves the dispute, that resolution is entitled to due respect and, save and except for the reasons explicitly set out in the body of the 1996 Act, is, ordinarily, immune from judicial interference.

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66. *In my opinion, this principle has to guide, strongly, the approach of this Court, while dealing with a challenge such as the present, which is directed against an order which, at an interlocutory stage, merely directing furnishing of security, by one of the parties to the dispute. The power, of the learned Sole Arbitrator, to direct furnishing of security, is not under question; indeed, in view of sub-clause (b) of Section 17(1)(ii) of the 1996 Act, it cannot. The arbitrator is, under the said sub-clause, entirely within his jurisdiction in securing the amount in dispute in the arbitration. Whether, in exercising such jurisdiction, the arbitrator has acted in accordance with law, or not, can, of course, always be questioned. While examining such a challenge, however, the Court has to be mindful of its limitations, in interfering with the decision of the arbitrator, especially a decision taken at the discretionary level, and at an interlocutory stage.*³⁵

31. The aforesaid approach has also been taken in *Augmont Gold Pvt. Ltd. vs. One97 Communication Ltd.*³⁶ and in *Sanjay Arora*³⁷. In the latter case, the Court went on to hold as follows:

*“19. This Court has already opined, in *Dinesh Gupta v. Anand Gupta and Augmont Gold (P) Ltd. v. One97 Communication Ltd.* that the considerations guiding exercise of appellate jurisdiction under Section 37(2)(b) are, fundamentally, not really different from those which govern exercise of jurisdiction under Section 34 of the 1996 Act.*

20. It is only, therefore, where the order suffers from patent illegality or perversity that the court would interfere with the order of the learned Arbitral Tribunal, under Section 37(2)(b). This is because, unlike appeals under other statutes or under the CPC, appeals against orders of Arbitral Tribunal are subject to the overarching limitations contained in Section 5 of the 1996 Act, read with the Preamble thereto, which proscribes interference, by

³⁵ Emphasis supplied.

³⁶ 2021 SCC OnLine Del 4484.

³⁷ *Supra* (note 22).

courts, with the arbitral process, or with orders passed by learned Arbitral Tribunal, save and except on the limited grounds envisaged in the 1996 Act itself.”³⁸

32. In *Manish*³⁹, the Court relied upon Section 5 of the Act and the decision in *Dinesh Gupta*⁴⁰ to hold as follows:

“13. Viewed from the settled perspective of guarded and sparing use of the powers under Section 37(2)(b) of the A & C Act in only exceptional circumstances; and even more so when the exercise of discretion by the arbitrator is not seen to be arbitrary, capricious, irrational or perverse, this Court finds no reason to interfere in the order made by the learned sole arbitrator in this case.”⁴¹

33. Mr. Gupta suggested that the observations of this Court in the aforesaid judgments, particularly those equating jurisdiction under Section 37 with jurisdiction under Section 34 of the Act, may be somewhat overstated. He relied upon the judgment of the Supreme Court in *Government of Maharashtra vs. Borse Brothers Engineers and Contractors Pvt Ltd.*⁴² to submit that there is, in fact, significant difference between Section 34 and Section 37 of the Act. *Borse Bros.*⁴³, however, does not really concern the scope of appellate power but the question of limitation. That the provisions are not identical in all respects is also clear from judgments of this Court. For instance, *Augmont*⁴⁴ makes it clear that the Court can under Section 37 of the

³⁸ Emphasis supplied.

³⁹ Supra (note 23).

⁴⁰ Supra (note 34).

⁴¹ Emphasis supplied.

⁴² (2021) 6 SCC 460.

⁴³ Ibid.

⁴⁴ Supra (note 36).

Act modify an order while it is constrained under Section 34 of the Act either to uphold an award or set it aside.⁴⁵

34. In any event, the judgments of this Court, quoted above, are binding upon me. Be that as it may, I am of the view it is not necessary in the context of the present case to examine this issue in greater detail as Mr. Gupta also readily accepts that the power of the Court would be circumscribed by the general appellate power in cases arising out of discretionary interlocutory orders. For this purpose, the guidance available in judgments of the Supreme Court in *Printers (Mysore)*⁴⁶ and *Wander*⁴⁷ is sufficient. *Wander* itself enjoins considerable circumspection in the appellate court's interference with discretionary interlocutory orders, limited to the narrow category of cases enumerated in paragraph 14 of the judgment.⁴⁸ This is the basis of the reasoning in *Green Infra Wind*⁴⁹ and *Sona Corporation*⁵⁰ also. The latter judgments of this Court add an additional line of reasoning based on the provisions of the Act, and a purposive interpretation thereof. However, at least for the present purposes, there is, in my view, little difference in the conclusion, regardless of the perspective from which the matter is approached.

⁴⁵ Paragraph 74.

⁴⁶ Supra (note 18).

⁴⁷ Supra (note 19).

⁴⁸ Extracted in paragraph 28 above.

⁴⁹ Supra (note 20).

⁵⁰ Supra (note 21).

B. Application to the present case

35. In the light of the circumspect approach mandated by the aforesaid judgments, I do not find any reason to interfere with the decision of the Tribunal in the facts and circumstances of the present case. Although the Tribunal has recognized that the appellant has already completed more than 88% of the physical progress of the CA, it has recorded *prima facie* factual findings with regard to the appellant's inability to provide sufficient funding for the completion of the project, repeated requests for additional funding from the respondent and the unlikelihood of issuance of the PCOD and COD within the stipulated time. These findings are based upon a consideration of several minutes of OTFIS Review meetings, and the factual material placed before it. A perusal of the documents demonstrates that the Tribunal's *prima facie* findings are supported by the materials on record, which include the following: -

- a. In the 5th OTFIS meeting held on 16.10.2017⁵¹, the Committee noted that the appellant "*could not achieve the committed targets during the period from April 2017 to September 2017 and the progress of work is extremely poor in section-II.*" It was also pointed out that there was meagre deployment of resources and that since there was a failure to achieve the targeted progress, one month cure period notice should be issued by the IE.

⁵¹ 5th OTFIS meeting dated 16.10.2017 at document-5 of the respondent's list of documents.

- b. The IE wrote a letter dated 08.11.2017 to the appellant highlighting that no progress was being made in the project and the appellant had not replaced its EPC contractor, despite IE advising to do so earlier. It was also pointed out that there were maintenance and safety issues on the site that were not being attended by the EPC contractor deployed by the appellant.⁵²
- c. In the 8th OTFIS meeting dated 01.01.2018⁵³, the Committee noted that there was no progress in Section-II of the project since September 2017 and that there was no deployment of manpower and machinery in Section-II.
- d. In the 9th and 10th OTFIS meeting held on 06.02.2018 and 13.03.2018 respectively⁵⁴, the Committee noted that the appellant was not “*showing any interest in the project*” as none of the assurances given by it in the previous meetings were being fulfilled.
- e. In the 14th OTFIS meeting held on 25.08.2018⁵⁵, the Committee noted that the appellant had not been able to deploy adequate resources despite availability of sufficient cash flow. Therefore, it was decided in the meeting that the Committee will recommend issuing an NITT under the provisions of the CA.

⁵² Paragraph 50 of the impugned order.

⁵³ 8th OTFIS meeting dated 01.01.2018 at document-8 of the respondent’s list of documents.

⁵⁴ 9th OTFIS meeting dated 06.02.2018 and 10th OTFIS meeting dated 13.03.2018 at document-9 and 10 of the respondent’s list of documents respectively.

⁵⁵ 14th OTFIS meeting dated 25.08.2018 at document-14 of the respondent’s list of documents.

- f. The appellant wrote a letter to the IE on 10.08.2021 recommending invocation of Clause 36.1 (suspension) by the respondent *“with a view to get the balance work completed to achieve the Provisional Completion for the project for a maximum period of 180 days from the date of invocation of such clauses.”*⁵⁶
- g. In response to the appellant’s request for PCOD dated 11.11.2021, the IE wrote a letter on 16.11.2021 stating that it was unlikely that PCOD could be achieved by 30.11.2021 because there was insufficient deployment of machinery and manpower by the appellant to achieve PCOD, rectification of work at the PCOD location was moving at a slow pace, there was a lack of clarity on funding for the PCOD and there were outstanding dues of EPC contractors which had not been cleared by the appellant.⁵⁷

The Tribunal’s findings, in the light of these materials on record, cannot be said to be arbitrary or perverse.

36. Mr. Gupta’s submission that the termination of the CA without consideration of the appellant’s request for PCOD itself renders the termination illegal or *mala fide* also does not commend to me, at least at this stage. It may be noted that even according to the appellant, it applied for PCOD only on 10.11.2021, whereas according to the

⁵⁶ Letter dated 10.08.2021 from the appellant to the respondent at document-30 of the respondent’s list of documents.

⁵⁷ Letter dated 16.11.2021 from the IE to the appellant at document-9 of the appellant’s list of documents.

material placed on record, it had achieved 75% physical progress by May, 2019⁵⁸. This lends credence to Mr. Tripathi's submission that the grant of PCOD was not contingent merely upon 75% completion of the work but upon satisfaction of various other conditions as stipulated in Clause 14.3 of the CA. The Tribunal's *prima facie* findings with regard to testing, non-availability of streetlights and the condition of the road support its conclusion that the appellant has not been able to make out a *prima facie* case of entitlement to PCOD.

37. It is also important to point out that Mr. Gupta's arguments regarding the sequence of events leading to termination of the CA on 17.11.2021 focus on the fact that cure notices were sent by the respondent to the appellant in 2017, following which the NITT was issued only on 16.10.2020 and the termination letter was issued 13 months thereafter on 17.11.2021. While these are certainly matters to be considered by the Tribunal at the final hearing, I am unable to find a strong *prima facie* case in favor of the appellant on this count. Clause 47.6 of the CA specifically supports Mr. Tripathi's stand that mere forbearance with continued nonperformance, would not disentitle the respondent from terminating the CA. What does, however, appear quite incongruous is that the respondent filed an affidavit before the Bombay High Court only on 15.11.2021 in which the imminent termination was not dealt with. Mr. Tripathi has sought to offer some explanation for this situation, but it is a matter which

⁵⁸ Independent engineer's report at page 1223 of appellant's list of documents (It may be noted that, at least for the present purposes, the factual context of the said report was not disputed by the appellant.)

will ultimately fall for the decision of the Tribunal, if raised by the parties before it.

38. In the light of the specific findings returned by the Tribunal, I am also unable to accept Mr. Gupta's submission relying upon the judgment in *EFS Facilities*⁵⁹. The analysis of the Tribunal with regard to the *prima facie* case made out by the Appellant is sufficiently detailed and reasoned, on the basis of the material before it. Keeping in mind the level of scrutiny required at the stage of consideration of interlocutory relief, the decision cannot be characterised as perverse or arbitrary on the ground urged.

39. On the question of balance of convenience and irreparable injury also, I do not find the Tribunal's findings to be vulnerable to interference. Mr. Gupta emphasised that the SRA, after its amendment in 2018, does not provide for adequacy of damages as a bar to specific performance. While that is undoubtedly so, a consideration of balance of convenience and irreparable injury remain part of the trinity of tests that the Court must apply before granting an interim injunction. In consideration of these questions, the adequacy of monetary compensation may, in given circumstances, inform the Court's assessment. The Tribunal has expressly held that if the appellant is ultimately found, on evidence, to have established its case that the termination was illegal, consequential relief as available to it in law would follow. Mr. Tripathi did not, in the course of arguments in this appeal, suggest that the appellant would be disentitled to

⁵⁹ Supra (note 16).

compensatory damages, although the extent of such compensation would naturally depend upon the contractual provisions and the evidence placed before the Tribunal.

40. With regard to the judgment of this Court in *West Haryana Highways*⁶⁰, I notice that factually, in that case, the PCOD certificate was already granted in favour of the concessionaire and the highway was operational when the impugned suspension order was passed by the NHAI.⁶¹ There was also an arbitral award dated 29.08.2019, whereby NHAI was found responsible for the delay in execution of the project.⁶² It is in the context of these facts that the Court found the suspension of the concessionaire's right to collect toll to be unjustified, pending arbitration. The Court noted that the project was executed at the cost of the concessionaire.⁶³ Even in such circumstances, while staying the suspension letters issued by the NHAI, the Court in fact reserved the NHAI's right to terminate the contract in accordance with the CA.⁶⁴ The Court also declined the concessionaire's request to stay notices inviting tender for repair and maintenance work on a part of the concerned highway.

41. In the aforesaid important aspects, the facts before the Court in *West Haryana Highways*⁶⁵ were quite different from those subsisting in the present case, where the highway is not operational and the PCOD has not been issued. The undisputed facts are also, as noted by

⁶⁰ Supra (note 17).

⁶¹ Paragraph 8 of the judgment.

⁶² Paragraph 9 of the judgment.

⁶³ Paragraph 58 of the judgment.

⁶⁴ Paragraph 57 of the judgment.

⁶⁵ Supra (note 17).

the Tribunal, that the highway has in fact been taken over by the respondent pursuant to the termination notice and grant of the relief sought in the application under Section 17 of the Act would in fact require the appellant to be put back in possession thereof. Significantly, in the present case, the respondent's infusion of significant funds is also a distinguishing factor from the case in *West Haryana Highways*⁶⁶.

42. Mr. Gupta also submitted that an assessment of balance of convenience must take into account the fact that the appellant is a special purpose vehicle constituted only for the purpose of the subject project. He submitted that a deprivation of the right to collect toll would potentially lead to a complete collapse of the appellant's business, perhaps even disabling it from taking the ongoing litigation to its logical conclusion. In the context of the present case, I am unable to accept this submission. In the face of the Tribunal's findings on the questions of *prima facie* case and the public interest in the project being completed, as well as the bar incorporated in Section 20A and Section 41(ha) of the SRA, this is not a sufficient ground to reverse the Tribunal's finding on balance of convenience.

43. On the question of determinability of the contract, which concededly remains a ground to deny specific performance, the Tribunal relied upon the decisions of the Supreme Court in *Indian Oil Corpn. Ltd. vs. Amritsar Gas Service & Ors.*⁶⁷ and of this Court in

⁶⁶ Ibid.

⁶⁷ (1991) 1 SCC 533.

*Inter Ads Exhibition Pvt. Ltd. vs. Busworld International*⁶⁸ and *Bharat Catering Corporation vs. Indian Railway Catering and Tourism Corporation Ltd.*⁶⁹ To the extent that the judgment of the Division Bench in *Bharat Catering Corporation*⁷⁰ specifically holds that a contract which has already been terminated ought not to be restored pending arbitral proceedings, the said decision militates against the grant of injunction to the appellant.

44. Mr. Gupta's attempt to meet the requirements of Section 20A and 41(ha) of the SRA by proposing a workable solution for the continued implementation of the project also does not persuade me to a contrary conclusion. As noted above, both the Tribunal in the concluding paragraphs of its judgment, and this Court in the initial proceedings in this appeal, considered it appropriate to require the parties to attempt a mutually acceptable resolution in the interest of the project. It appears that there remains a significant variance in their respective understanding regarding the quantum of funds required to avoid impediment or delay in the progress or completion of the project. In such circumstances, for the Court to stay the termination requires a substantive review of the requirements and a satisfaction that the appellant's proposal is sufficient to overcome the bar of Section 20A of the SRA. The appellant has not been able to satisfy the Court on this count, to an extent which would persuade the Court to

⁶⁸ 2020 SCC OnLine Del 351.

⁶⁹ 2009 SCC OnLine Del 3434.

⁷⁰ Ibid.

override the assessment of the respondent and compel it to permit the appellant to undertake the remaining work.

VII. Conclusion

45. For the aforesaid reasons, I am of the view that the impugned order is not liable to interference by this Court in the exercise of jurisdiction under Section 37(2)(b) of the Act. The appeal, alongwith pending applications are, therefore, dismissed. There will be no orders as to costs.

46. It is made clear that the observations in this judgment are only for the purposes of disposal of this interlocutory appeal and will not prejudice the parties in the final adjudication of their respective contentions before the Tribunal.

PRATEEK JALAN, J

December 20, 2022

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