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

Date of Decision: 18th November, 2021

\+ **ARB. A. (COMM.) 66/2021 & I.A. 15029/2021**

NATIONAL HIGHWAYS AUTHORITY OF INDIA ..... Appellant

Through: Mr. Parag P. Tripathi, Senior Advocate with Ms. Madhu Sweta, Advocate.

versus

PANIPAT JALANDHAR NH-1 TOLLWAY PVT. LTD. ..... Respondent

Through: Mr. Arvind Nigam, Senior Advocate with Mr. Vaibhav Gaggar, Mr. Aaditya Vijakumar, Ms. Sumedha Dang, Mr. Akshita Katoch and Mr. Prerak Khurana, Advocates.

\+ **ARB. A. (COMM.) 67/2021 & I.A. 15077-78/2021**

PANIPAT JALANDHAR NH1 TOLLWAY PVT. LTD. THROUGH: ITS DIRECTOR PATRI RAMCHANDRA RAO ..... Appellant

Through: Mr. Arvind Nigam, Senior Advocate with Mr. Vaibhav Gaggar, Mr. Aaditya Vijakumar, Ms. Sumedha Dang, Mr. Akshita Katoch and Mr. Prerak Khurana, Advocates.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA ..... Respondent

Through: Mr. Parag P. Tripathi, Senior Advocate with Ms. Madhu Sweta, Shivangi Khanna, Srinivasan Ramaswamy, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA HYBRID MODE]

SANJEEV NARULA, J. (Oral):

1. The present appeals under Section 37 of the Arbitration and Conciliation Act, 1996 [*hereinafter referred to as the* '***Act***'] impugn the order of Arbitral Tribunal dated 24th August, 2021, whereby: *(i)* an application filed under Section 17 of the Act by the Claimant – i.e., Panipat Jalandhar NHAI Tollway Pvt. Ltd. [*hereinafter referred to as* '***PJNTPL***'] has been dismissed; and *(ii)* a modification application filed by National Highways Authority of India [*hereinafter referred to as* '***NHAI***'] has been disposed of with certain directions merging into the order of interim measures, pending arbitration.

2. The facts of the case have been noted extensively by the Arbitral Tribunal. Therefore, recounting the same all over again is neither necessary or useful for deciding the present appeals. It would suffice to summarize the controversy between the parties succinctly. The same is as follows:

2.1. Parties executed Concession Agreement dated 9th May, 2008 [*hereinafter referred to as the '**C.A.**'*] in respect of '*Six-Laning of Panipat-Jalandhar Section of NH-1 From Km 96.00 to Km 387.10 (length of 291.10 Km) in the State of Haryana and Punjab to be executed as BOT (Toll) on DBFO Pattern under NHDC Phase-V*', granted to PJNTPL by NHAI for a period of fifteen years.

2.2. Later, NHAI issued Notice to Cure on 13th October, 2020, followed by a Notice of Suspension dated 14th December, 2020 and finally by a

Termination Notice dated 5th March, 2020, invoking the provisions and rights vested under Article 37 of the C.A. on the ground of non-curing of the defects as mentioned therein.

2.3. The aforesaid notices were impugned in a petition under Section 9 of the Act, which this very Court also had the occasion to deal with at the pre-reference stage. [1] In the said proceedings, initially, certain interim orders were passed.[2] Subsequently, in a challenge to an interim order, the Division bench dismissed the petition.[3] However, in an appeal before the Supreme Court, the petition was restored to the file of the court for fresh adjudication.[4] At that stage when this matter was heard by this Court,[5] taking note of the fact that an Arbitral Tribunal had been constituted, the petition under Section 9 was converted into one under Section 17 which was then directed to be considered by the Arbitral Tribunal.

2.4. Pursuant thereto, the Arbitral Tribunal passed an interim order on 1st June, 2021, making *inter alia* the following interim arrangement:

> *"3. It is ordered that so far as the order passed terminating the contract is concerned, the same would be subject to the final order passed on the Section 17 application. However, in the interregnum, and till the application under Section 17 is heard and disposed of, the collection of toll fee at the three toll plazas would be carried out by the Respondent by engaging M/s. Eagle Infra India Ltd. as an interim arrangement, which upon collection shall be deposited in the connected Escrow Account on actual collection basis. The representative of the Claimant would also be present in each of the toll plazas so as to ascertain the total collection made on each day in each of the toll plazas.*
>
> *4. As the Respondent has been carrying out the operation and maintenance of the highway at present, which is required to be carried out*

[1] OMP (I) (COMM) 421/2020.
[2] Order dated 12th March 2021 in OMP (I) (COMM) 421/2020.
[3] Judgment dated 13th April 2021 in FAO(OS)(COMM) 55/2021.
[4] Order dated 27th April 2021 in Civil Appeal No. 1691 of 2021.
[5] Order dated 28th May, 2021 in OMP (I) (COMM) 421/2020.

under the Concession Agreement, a onetime withdrawal for meeting such expenses on maintenance will be permitted from the Escrow account which could be made by the Respondent but only upon certification of the the IC / Independent Engineer. The accounts thereof regarding the nature and amount of withdrawal shall be placed before this Tribunal for information and necessary action if any within a week from the date of such withdrawal with copy to the Claimant. It is also ordered that the Respondent shall not enter into a fresh concession agreement with any party till final order is passed in this application filed under Section 17 of the Act.

5. The counsel for the respondent agrees to file an affidavit informing the tribunal about the present position and status of collection of tolls at the three toll plazas which according to the counsel are not functional due to the farmers' agitation where the protesting farmers have prevented the authority from collecting tolls. The affidavit must contain all the relevant facts which are stated during the discussion today which is to be filed in 10 days with a copy to the counsel for the claimant whereupon the claimant would be entitled to file reply, if any, within a week thereafter. This affidavit and reply thereto would also be considered on 26.06.2021 and 27.06.2021 while considering the application under Section 17 of the Act."

2.5. Parties filed their statement of claims and counter claims and pleadings were completed. Thereafter, PJNTPL's application under Section 17 of the Act was rejected by way of the impugned order. This is the subject matter of challenge by PJNTPL's appeal *vis*. ARB. A. (COMM.) 66/2021.

2.6. By way of the same impugned order, NHAI's application seeking modification of an earlier order of the Tribunal dated 1st June, 2021 was also decided, and directions were issued for arrangements *qua* operation and maintenance of the highway. The same form the subject matter of NHAI's appeal *vis*. ARB. A. (COMM.) 67/2021. NHAI's challenge is confined to the findings returned by the Arbitral Tribunal in para 112(e) of the impugned order whereby certain directions have been given for deposit of the earnings from the toll gates and other facilities for maintenance and operation of the toll, pending final decision.

CONTENTIONS:

3. Mr. Arvind Nigam, senior counsel, has made the following submissions on behalf of PJNTPL:

3.1. Non-consideration of amended provisions of Specific Relief Act, 1963.

3.1.1. The impugned order is liable to be set aside as the 2018 amendment to Section 14 of the Specific Relief Act, 1963 has not been correctly appreciated.

3.1.2. The effect of the impugned order is that it has laid down a proposition of law that: (a) termination notice can never be stayed by an Arbitral Tribunal under Section 17 of the Act, and (b) that even post the amendment to the Specific Relief Act, specific performance cannot be granted under any circumstance in a commercial contract, especially in relation to NHAI related matters.

3.1.3. The legal interpretation of the amended provisions of the Specific Relief Act needs to be settled as a question of law, by considering the amendments made to Specific Relief Act, whereunder, specific enforcement has now become a rule, rather than exception.

3.1.4. The Arbitral Tribunal has proceeded on the premise that every commercial contract is determinable, while disagreeing with the judgments cited by PJNTPL. Mere presence of a termination clause is not sufficient to determine whether a contract is terminable or not. A clear distinction has to be drawn by the Courts in respect of contracts like the present one.

3.1.5. Additionally, a contract which is terminable only on certain

grounds, is not a contract which in its nature is determinable and therefore such contracts can be specifically enforced.

3.2. Judgments relied upon by NHAI are not applicable.

He submits that the judgments relied upon by NHAI, which have been taken note of by the Arbitral Tribunal are not applicable as the same are predicated on the principles set out in Section 14(1)(a) of the Specific Relief Act, prior to amendment, which stands omitted after the 2018 amendment.[6]

3.3. Reliance placed on Section 20A(1) & 41(ha) of the Specific Relief Act is not applicable.

3.3.1. Under Section 20A(1), injunctive relief could be passed at the post-completion stage, whereas in the instant case, work stood completed way back in 2015 at the time of grant of provisional completion certificate. That apart, vehicles are plying on the road, and hence, it cannot be stated that the work on the infrastructure project is still ongoing and/or incomplete.

3.3.2. Under this section, the term "*progress and completion*" take colour from each other and have to be read '*ejusdum generis*'.

3.3.3. Bar is only if such an injunction would cause "*impediment or delay*' in the progress or completion which is not the case at hand, hence not applicable.

3.3.4. In Section 41(ha), the term "*interfere with the continued provision of relevant facility related thereto or services being the subject*

[6] NHAI had relied upon the following judgments: (i) ***Turnaround Logistics Ltd. v. Jet Airways India Ltd.*** MANU/DE/8741/2006, (ii) ***Interads Exhibitions v. Busworld***, 2020 SCC OnLine Del 351, (iii) ***Adhunik Steels Ltd. v. Orissa Manganese and Minerals Ltd.***, (2007) 7 SCC 125, (iv) ***Harpal Singh v. Union of India,*** 2009 SCC Online Del 757, and (v) ***Bharat Catering v. IRCTC***, MANU/DE/2927/2009.

matter of such project" applies to a situation where a person or entity is claiming that toll collection should be stopped or that the amount of toll should be reduced or the relevant facility. This does not apply to the situation at hand. It thus cannot be stated that there is no impediment in granting injunctive relief.

3.3.5. Reliance on ***Hari Ram Nagar v. DDA***,[7] and ***Ravi Gupta v. Government of NCT***,[8] was misplaced as the judgments were with respect to "*impediment or delay*" and where the construction of the projects was still on going, which is not the case.

3.4. *Duty of NHAI to act fairly.*

NHAI had to follow the concept of *parens patriae* and thus act in in fairness while dealing with the private contractors or players.[9] Admittedly, NHAI was permitted to collect toll and deposit it in an escrow account *vide* orders of this court dated 15th December 2020, 22nd December 2020 and 05th February 2020. It never stated before court that it was unable to collect toll, nor did it trigger the force majeure mechanism under the C.A. NHAI even filed a sworn affidavit dated 13th May 2021 before this court stating that it was collecting toll. However, *vide* affidavit dated 10th June 2021 before the Tribunal, it stated, for the first time, that it had not collected toll since December 2020, in violation of court orders. Yet, the Tribunal recorded in para 102 of the impugned order that there's nothing on record to show that the state has acted arbitrarily, in contravention to the principles of violation

[7] CS(OS) 423/2019.
[8] CS(OS) No.500/2019.
[9] As per: ***Recommendation 7.1.6 of SRA Expert Committee Report, State of Karnataka v. Ranganath Reddy***, 1978 (1) SCR 641; ***Jacob v. Kerala Water Authority***, (1991) 1 SCC 28; ***Madan Mohan Pathak v. Union of India***, (1978) 2 SCC 50.

of an order, as laid down in various judgments.[10]

3.5. *The Tribunal applied the Trinity tests incorrectly.*

The threshold for grant of interim relief is the existence of a *prima facie* case, which the Ld. Arbitral Tribunal acknowledges that PJNTPL did have in its favour, although not a strong prima facie case (since it is not a case of staying the encashment of a bank guarantee). Similarly, the Ld. Arbitral Tribunal held that PJNTPL would not suffer irreparable loss despite being cognisant of the fact that the C.A. was a bankable agreement and PJNTPL had made huge investments. Tribunal was aware that non-deposit of monies in the Escrow Account, whether through toll collection or through termination payment, would lead to initiation of proceedings by the Lenders against PJNTPL, including insolvency. No reasons have been ascribed as to why balance of convenience does not lie in favour of PJNTPL. Effectively, this test has not been considered in the background of the totality of the facts and circumstances. Consequently, the observations by the Ld. Arbitral Tribunal are completely facetious and the impugned order ought to be set aside.

3.6. *Termination Payment.*

3.6.1. If the termination is not stayed, it shall be treated that the termination has taken effect and is sustaining. Then as a necessary sequitur, NHAI must be directed to deposit at least 90% of the debt due as per Article 33.3.3 of the C.A., as, there can no contemplation of there

[10] ***Municipal Council, Shirdi v. Soniya Devidas Patil & Ors.*** [para 12], ***Somasundara Mudali & Ors. v. Thiruppathuran***, and ***Delhi Development Authority v. Skipper Construction Co. Pvt. Ltd. & Anr.*** [para 17, 19 & 21].

being a termination without there being a deposit for termination payment.

3.6.2. This Court, in the case of ***Jetpur Somnath Tollways Ltd v. NHAI***,[11] has directed that in an event of termination, NHAI was contractually obligated to deposit termination payment, later upheld by the Division Bench,[12] and also by the Supreme Court.[13]

3.6.3. Further, the claim filed by PJNTPL before the Tribunal itself serves as a notice to NHAI to deposit termination payment in case termination is not stayed. This was specifically prayed by PJNTPL as its alternate prayer (Para 223 of SOC). Further vide order dated 27th June 2021, the parties were restrained from communicating *inter-se* and therefore PJNTPL could not have sent a demand notice for the said deposit. Irrespective, PJNTPL has reiterated the demand on 29th October 2021 which has also not be replied to or acted upon by NHAI. It would be important to highlight that this Court in the case of ***West Haryana Highways Projects Pvt. Ltd. v. NHAI***,[14] had granted stay of the operation of notice at an interim stage.

3.7. <u>On finality of relief.</u>

The opinion of the Tribunal, at para 85 of the impugned order, that the stay of the operation of the termination notice would amount to giving a final relief, is in teeth of the of the decision of this court in ***National Highways Authority of India v. VIL Rohtak Jind Highway Private Ltd.***,[15] wherein it

[11] 2017 SCC OnLine Del 9453.
[12] In FAO(OS) Comm 165/2017.
[13] In SLP No 35087/2017.
[14] In O.M.P.(I) (COMM.) 263/2020.
[15] 2019 SCC OnLine Del 6545.

has been held that in cases where there is no uncertainty qua the legal rights of the party claiming the relief, injunction should be granted even if it amounts to giving final relief. Thus, even if PJNTPL succeeds, in effect, it would only be compensated and would never be able to take over the tolling. The final relief, in a sense, would be been rendered superfluous.

CONTENTIONS BY MR. TRIPATHI:

4. Mr. Tripathi has vehemently opposed the above stance, by making the following submissions:

4.1. No perversity in the impugned order has been demonstrated by PJNTPL, which would merit interference by this Hon'ble Court.

4.2. The argument that the NHAI having exercised its right of Suspension under Article 36 could not have exercised the right of Termination under Article 37 is grossly misplaced and was thus rejected by the Tribunal.

4.3. Articles 36 and 37 provide for a composite scheme.

4.4. The contract in the instant case is by its very nature determinable. It is a commercial contract specifically providing for a termination clause in terms of Article 37 of the CA. It is not even pleaded by PJNTPL that the contract in question is not one which by its very nature is determinable. Thus, under the provisions of Section 14(1)(c) of the Specific Relief Act, 1963, no injunction could be granted.

4.5. The law is well settled that the provisions of the Special Relief Act, 1963 have to be kept in consideration while exercising jurisdiction under Section 9 of the Act. In this regard, ***Adhunik Steels Ltd. v.***

Orissa Manganese and Minerals Ltd.,[16] was relied upon.

4.6. In that view of the matter, Section 41 (1)(e) of the Specific Relief Act, 1963 clearly applies, meaning thereby that there can be no injunction which can be granted to prevent the breach of the contract, the performance of which cannot be specifically enforced. It is a settled position of law that no order of injunction can be made staying the termination of a contract which is determinable in nature. Reliance was placed upon: ***Indian Oil Corporation v. Amritsar Gas Service & Ors***.,[17] and ***Rajasthan Breweries Limited v. The Stroh Brewery Company***.[18]

4.7. The instant case is squarely covered by a judgment of this Court in ***Inter Ads Exhibition Pvt. Limited v. Busworld International***,[19] whereby, in a contract involving a similar termination clause, this Court held the contract to be determinable in nature and declined to grant of relief under Section 9. The appeal against this judgment was upheld by the Division Bench in FAO(OS)(Comm) No. 23/2020 *vide* judgment dated 01st May 2020.

4.8. The law is also well settled that the scope and ambit of Section 9 is not to restore a contract which has already been terminated. Reliance placed upon ***Bharat Catering Corporation v. IRCTC & Anr***.[20]

4.9. There is a bar to the grant of injunctions u/s 20A read with Section 41(ha) of the Specific Relief Act, 1963, volving a contract relating to an infrastructure project specified in the Schedule, where granting of

[16] (2007) 7 SCC 125.
[17] (1991) 1 SCC 533 [Paras 14-16/Page 543].
[18] 2000 (55) DRJ.
[19] 2020 SCC Online Del 351, at Paras 27, 29, 32, 40 and 44.

injunction would cause impediment or delay in progress or completion of such project. This Court in ***Ravi Gupta v. GNCTD***,[21] interpreting the scope of the Section 20A, has proceeded to hold that the intent behind Section 20A was to ensure that the infrastructure projects are not delayed on account of pendency of court proceedings or orders passed therein.

ANALYSIS:

5. The Court has extensively heard Mr. Arvind Nigam and Mr. Parag P. Tripathi, Senior Advocates.

6. The Court is not impressed with the arguments addressed by Mr. Nigam. To consider whether a stay of termination is warranted and in order to form its *prima facie* opinion, the Tribunal has carefully examined the entire conspectus of the case. For this purpose, the Tribunal has also examined the contractual provisions, the grounds for issuance of Notice of Suspension under Article 36.1 and the termination notice under Article 37. The Tribunal was of the view that by way of a composite scheme under Articles 36 (Suspension) and 37 (Termination), the suspension under Article 36, if invoked, leads to termination under Article 37. The said termination, depending upon the nature of default, can lead to '*deemed termination*' under Article 36.5.2 if the default is such that the authority may choose to wait for 180 days. However, if the nature of default is such that non-curing of delay for 180 days cannot be tolerated, the Authority can, after 90 days of

[20] 164 (2009) DLT 530 (DB) at Para 17/Page 537.

suspension, exercise its right to terminate under Article 37.1. In so far as Article 36 is concerned, it operates in its own field, i.e., when an order of suspension is issued, the commercial relationship between the parties does not get severed. The said relationship would only get suspended and only after expiry of 180 days, as provided in the agreement the provision of deemed suspension would apply and get attracted. However, so far as Article 37 is concerned, the same operates as and when conditions mentioned therein for applying the provisions become applicable and get satisfied and therefore even if an action is initiated under Article 36 which could result in a deemed termination, the same could not, in any manner, prevent or foreclose the right of the respondent from proceeding under Article 37, if such a case is made out in the facts and circumstances of the case. In the present case, the Respondent issued a notice intimating intention to terminate and thereafter issued a suspension, notice and finally issued the termination order. While issuing the said order, the Respondent satisfied the preconditions and parameters of issuing a notice intimating the intention to terminate the contract due to the defaults committed by the Claimant. For such reasons, the tribunal took the *prima facie* view that NHAI's exercise of power under Article 37 was found to be legal, and not arbitrary. It was not required to wait for 180 days after initiation of an action under Article 36 in order to apply the provisions of deemed termination, as the power available to NHAI under Article 37 was separate and exclusive.

7. Next, the Tribunal examined if an interim measure under Section 17 of the Act, seeking stay of operation of the termination notice was

[21] CS (OS) 500/2019 dated 15.01.2020 at para 16(G).

warranted. On this aspect, the Tribunal observed that such a relief could not be granted for two reasons. First, allowing this relief would amount to grant of a final relief at an interim stage. Second, the relief would not be covered under Section 17 of the Act. On the first aspect, the Tribunal relied upon the decision rendered by this Court in ***NHAI v. Bhubaneshwar Expressway Pvt. Ltd***.[22] On the second aspect, the Tribunal relied upon the judgment of this Court in ***Bharat Catering Corporation v. Indian Railway Catering and Tourism Corporation***,[23] and also took note of the intervening facts and circumstances and observed that by way of interim order, PJNTPL was requesting for restoration of possession and control of the toll plazas and highway. For this reason, the Tribunal formed an opinion that it would not be proper to stay the operation of the order of termination, which had otherwise been effective and functional for the last four months.

8. The above reasoning is not the only opinion expressed by the Tribunal for rejecting the application. The Tribunal then also dealt with the contention which has been urged by Mr. Nigam *qua* the amended provisions of the Specific Relief Act. On this plea, the Tribunal analysed the relevant clauses of the CA and held that the contract in question is in the nature of a commercial contract, and as such contracts are determinable in nature, they cannot be enforced specifically. This opinion has been rendered on a *prima facie* basis for the purpose of determining and deciding the application under Section 17 of the Act. The court does not find that the Tribunal has proceeded on a wrong premise or that by making such observations

[22] 2021 SCC OnLine Del 2421.
[23] 2009 164 DLP 530.

effectively no commercial contract can ever be enforced. The tribunal has formed the opinion by noticing Article 37 which undoubtedly laid down that the contract can be terminated by either of parties on happening of the conditions mentioned therein. The Tribunal has also meticulously examined the reasons for termination and concluded that the power exercised under the aforenoted provision is not, in any manner, arbitrary or illegal. Thus, finding the contract to be *prima facie* determinable and the conditions for such termination having been met and followed, the Tribunal did not find a *prima facie* case for granting the relief of stay of termination. Besides, the deletion of section 14(1) (a) of the Specific Relief Act - which provided for a bar to specific enforcement on the ground of compensation in money being an adequate relief - cannot be construed to mean that in every case of termination, specific enforcement has to necessarily follow.

9. The amended Section 14 still bars against enforcement in cases where the contract is in its nature determinable. Whether the bar under Section 14(1)(d) of the Specific Relief Act would not apply on the ground that the contract is not 'inherently determinable' is a matter of construction and/or interpretation of the contract, and is further also intertwined with the determination of the question of legality of termination, analysis of reasons and sufficiency of grounds for termination. The contract in question is a commercial contract. It specifically provides for termination in terms of Article 37. The Tribunal had only to take a *prima facie* view on the issue of illegality of termination, as final determination has to be done at later stage and could certainly not have been done while deciding an application under section 17 of the Act. With that *prima facie* view, the bar under Section 41

(1)(e) of the Specific Relief Act would also get attracted, meaning thereby that there can be no injunction which can be granted to prevent the breach of contract, the performance of which cannot be specifically enforced. Therefore, the view taken by the Tribunal on the basis of the judgments relied upon by PJNTPL, cannot be held to be perverse, thus not warranting this Court to set aside the impugn order. The tribunal has noted that if termination is found to be illegal, PJNTPL can be compensated by giving extension of the period of contract, if any, or by way of payment of damages. Thus, there is no merit in PJNTPL's contention that it would never be able to take over the tolling or that the final relief has been rendered superfluous. The reasoning given, in the facts of the case, does not invite admission of the present appeal.

10. It must also be noted that the Arbitral Tribunal has observed that PJNTPL has an arguable case, but it could not establish the Trinity test of *prima facie* case, balance of convenience and irreparable loss. These findings arrived at by the Tribunal on the basis of analysis of the contractual terms and the facts referred-above, not being arbitrary or perverse, cannot be set aside. The grant/relief sought, amounts to restoration of the contract which is evidently beyond the scope and ambit of Section 9 of the Act. There is no doubt about the proposition that in cases where there is no uncertainty *qua* the legal rights of the party claiming relief, injunction can be granted even if it amounts to giving the final relief. However, this cannot be applied in the instant case, where the survival of PJNTPL's rights under the contract, in light of termination is in serious jeopardy.

11. This brings us to Mr Nigam's arguments that if the termination is not stayed, the Court must direct NHAI to deposit at least 90% of the debt due in terms of Article 33.3.3 of the C.A. Here it must be observed that substantive relief claimed in the section 17 application filed by PJNTPL was for seeking stay of termination notice. No argument or relief qua deposit of dues by NHAI was sought by PJNTPL before the Arbitral Tribunal. Before this court, for the first time, it is now argued that if the termination is not stayed, should be construed that the termination has taken effect and is sustaining. On this basis it is claimed that as a necessary sequitur, the Ld. Tribunal, and this court at this stage, must direct NHAI to deposit at least 90% of the debt due as per Article 33.3.3 of the CA. The court does not find merit in the contention that the claim of PJNTPL before the Tribunal serves as a notice to NHAI to deposit the termination payment. The application under Section 17 sought no such relief and PJNTPL all throughout has argued that it is entitled to a stay of the termination notice. This substantive relief, contrary to what was prayed for before the Tribunal, cannot be entertained in an application under section 37 of the Act. If PJNTPL believes that it was necessary for NHAI to deposit the 90% debt due immediately upon termination, they ought to have prayed for the same.

12. PJNTPL has also argued that they could not send a demand notice for the said deposit in view of order dated 27th June 2021 restraining the parties from communicating *inter-se*. Yet, they had somehow reiterated the demand on 29th October 2021, which was also not replied to or acted upon by NHAI. Regardless, these communications were exchanged after the impugned order was passed, and thus cannot be examined in the present proceedings. In the

event NHAI wants to insist for payments under the contractual scheme, as provided under Article 33.3.3, which according to them is a mandatory requirement, it is open to them to apply to the Tribunal for suitable directions in accordance with law. This, however, cannot be pressed as a ground to impugn the order, particularly when no such submissions have been advanced and the Tribunal has not considered this aspect.

13. Mr. Nigam has also stressed that since there is no authoritative decision on the impact of the amended Specific Relief Act on commercial contracts, this Court should entertain the present petition on this ground alone. The court finds no merit in this submission. The impugned decision rendered under Section 17 of the Act, as discussed above, is on the basis of the factual circumstances and the terms and several reasons which did not make out a case for grant of stay of the termination notice. Irrespective of the impact of the amended Specific Relief Act, PJNTPL has not been held to entitled to a stay of the termination notice. Therefore, pure question of law of impact of SRA on commercial contracts, cannot be the ground to admit the petition.

14. Lastly, the court also finds no ground to accept the contention that NHAI has not acted fairly. The observations recorded in para 102 of the impugned order, that there's nothing on record to show that the state has acted arbitrarily have been rendered on prima facie basis after examining the grounds of termination. This plausible tentative view cannot be upset in the present proceedings.

15. For these reasons, PJNTPL's challenge to the impugned order fails.

ARB. A. (COMM.) 67/2021

CHALLENGE TO THE IMPUGN AWARD AT THE INSTANCE OF NHAI

16. Next, we shall proceed to address the grievances raised by NHAI against the impugned order. NHAI is primarily aggrieved by the findings returned by the Arbitral Tribunal at paragraphs 112(e) of the impugned order, whereby the Tribunal held as under:

> "*(e) The Concession Agreement which is the subject matter of dispute in the present case envisaged opening of an Escrow Account which was so opened, and the lenders bank have been appointed as an operating agent. So all the earnings from the toll gates and other facilities shall be deposited in the Escrow Account and that no money shall be withdrawn by any one including the banks without specific permission from IE in that regard. Intimation shall also be given to the tribunal regarding such withdrawal as and when made.*"

17. This, along with other sub-paras of para 112, is in partial modification of an earlier order of the Tribunal dated 1st June 2021, relevant portion whereof has already been extracted in para 2.4 of this judgment.

18. In this regard, Mr. Tripathi has made the following submissions:

18.1. *Interim orders dated 15th December 2020, 22nd December 2020 and 05th February 2021 were passed when the C.A. was alive.*

18.1.1. The said orders were passed in the context of a period in the interregnum where there was an order of suspension dated 04th December 2020 which was challenged, but there was no order of termination.

18.1.2. The C.A. was terminated on 05th March 2021. Though an order granting interim stay on termination was passed by this Court on 12th March 2021, it was vacated by the Division Bench on 13th April 2021 and no stay on termination was granted thereafter.

18.2. *Prejudice caused to NHAI*

18.2.1. Article 31.1.1 of the C.A. stipulates that PJNTPL shall open an Escrow Account with a Bank in accordance with the C.A. read with the Escrow Agreement. Clearly therefore, if the Escrow Agreement has been executed under the C.A., there can be no deposit into the Escrow Account, once the C.A. itself has been terminated.

18.2.2. Article 31.2 deals with 'Deposits into Escrow Account' and Article 31.3 deals with 'Withdrawals during Concession Period'. Likewise, Article 31.4 deals with Withdrawals upon Termination'. There is no provision in the C.A. which deals with deposit upon termination. All that the C.A. provides is how the money will be dealt with. Similarly, Clause 3.6 of the Escrow Agreement deals with 'Deposits during Concession Period'. Clause 4 contemplates 'Withdrawals during concession period'. There is also a Clause 4.3 in the Escrow Agreement which deals with 'Withdrawals upon Termination'. There is however no clause which contemplates deposit upon termination.

18.2.3. The impugned order has been passed without considering the waterfall mechanism incorporated in Article 31.4 of the C.A., whereunder, payments and damages which are due and payable to the NHAI, have lower precedence to other withdrawals, especially

90% debt due, and outstanding Concession Fee. Consequently, no money will be available for withdrawal by NHAI from the Escrow Account to meet the expenses incurred by it towards O&M of the Project Highway and to rectify the deficiencies of the project highway. If the toll money is deposited in Escrow Account, then the same will unjustly enrich PJNTPL, which can then use the funds from the Escrow account to discharge its liability, whereas no money will be available to be withdrawn by the NHAI from the Escrow account to meet the expenses incurred for O&M of the Project Highway.

18.3. *Impugned Order is contrary to the National Highways Fee Rules, 2008.*

The direction to deposit toll money in the Escrow Account is not tenable post the termination of the C.A., as Rule 7 National Highways Fee Rules, 2008 [*hereinafter referred to as* '***Rules***'] contemplates that in case of public funded projects (which are defined under Rule 2(n)), the fee collected by every executing authority shall be remitted to the Central Government, i.e., Consolidated Fund of India. NHAI's argument on the statutory scheme has neither been noted nor been dealt with by the Tribunal.

ANALYSIS:

19. The Tribunal, faced with a situation where it has to take a final view on the claims and counter claims, felt that the appropriate course of action for an interim measure would be to modify the interim order dated 1st June, 2021. It would, therefore, be apposite to first take note of the order that has

been modified. The relevant portion thereof has already been reproduced in para 2.4 of this judgment, and is not being reproduced for brevity's sake. The modification in para 112(e), which aggrieves NHAI, too, been extracted above.

20. The grievance of NHAI is that the Tribunal has not taken note of the statutory scheme as provided under the Rules. It would be apposite to take note that the said statutory scheme came into force on 5th December 2008. The C.A. between the parties was executed on 9th May, 2008, prior to the enforcement of the aforesaid Rules. Rule 1(3) provides that the Rules shall not apply to agreements and contracts executed and bids invited prior to the publication of these Rules. Thus, *prima facie,* the Rules would not have any application in the instant case, and the argument of NHAI that the project is not a private investment but a public funded project, as defined under Rule 2(n), does not appear to be tenable.

21. Besides, the Tribunal has exercised its power under Section 17 of the Act to make an interim measure, pending the final adjudication of the disputes between the parties. Therefore, NHAI's insistence that since the C.A. has been terminated, Article 31.1.1 thereof ceases to operate, is an aspect which is yet to be determined finally.

22. Mr. Tripathi has argued that no money will be available for withdrawal by NHAI from the escrow account to meet the expenses incurred by it towards O&M of the project highways and to rectify the deficiencies of the project highways. The Tribunal, being conscious of this fact, has in the

impugned order made an arrangement for the pay out towards expenses as provided under para 112(c), which reads as under:

> *"(c) expenses incurred for both the aforesaid work could be so done on certification by the Independent Engineer and as and when such certification is given by the IE, the bank would release the amount to the Respondent."*

23. Besides, the interim order dated 1st June, 2021 also made a similar provision for a one-time expense. Therefore, the Court does not find this to be a valid ground meriting interference with the impugned order. Needless to say, NHAI would always be at liberty to approach the Tribunal for any further interim orders in accordance with law, in case the situation so warrants.

24. For the aforesaid reasons, there is no merit in the present petition, as well.

25. Accordingly, both the petitions are dismissed along with all pending applications.

SANJEEV NARULA, J

NOVEMBER 18, 2021
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